UNIVERSITY OF LJUBLJANA

LAW SCHOOL

CHAIR OF INTERNATIONAL LAW

Ph.D. Dissertation:

MILITARY AID AS COMPLICITY IN INTERNATIONAL CRIMES:

INDIVIDUAL OR STATE RESPONSIBILITY?

Candidate: Tina Drolec Sladojević, LL.M.

Supervisor: prof. dr. Vasilka Sancin

Ljubljana, February 2017
To my mother...
## List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AC</td>
<td>Appeals Chamber</td>
</tr>
<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
</tr>
<tr>
<td>AJPIL</td>
<td>Austrian Journal of Public International Law</td>
</tr>
<tr>
<td>ARSIWA</td>
<td>Articles on State Responsibility</td>
</tr>
<tr>
<td>BYIL</td>
<td>British Yearbook of International Law</td>
</tr>
<tr>
<td>BiH</td>
<td>Bosnia and Herzegovina</td>
</tr>
<tr>
<td>EJIL</td>
<td>European Journal of International Law</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>FRY</td>
<td>Federal Republic of Yugoslavia</td>
</tr>
<tr>
<td>GA</td>
<td>General Assembly of the United Nations</td>
</tr>
<tr>
<td>GAOR</td>
<td>The General Assembly Official Records</td>
</tr>
<tr>
<td>GYIL</td>
<td>German Yearbook of International Law</td>
</tr>
<tr>
<td>HRLJ</td>
<td>Human Rights Law Journal</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
</tr>
<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
</tr>
<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for Former Yugoslavia</td>
</tr>
<tr>
<td>IHL</td>
<td>International Humanitarian Law</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>IMT</td>
<td>International Military Tribunal (Nuremberg)</td>
</tr>
<tr>
<td>JCE</td>
<td>Joint Criminal Enterprise</td>
</tr>
<tr>
<td>JICJ</td>
<td>Journal of International Criminal Justice</td>
</tr>
<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
</tr>
<tr>
<td>SC</td>
<td>Security Council</td>
</tr>
<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
</tr>
<tr>
<td>SWGCA ICC</td>
<td>Special Working Group on the Crime of Aggression</td>
</tr>
<tr>
<td>TC</td>
<td>Trial Chamber</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>YILC</td>
<td>Yearbook of the International Law Commission</td>
</tr>
</tbody>
</table>

e.g. for example  
ed., eds. editor(s)  
et al. et aliae  
et seq. et sequentes or et sequentia; and the following  
i.e. that is (to say)  
p., pp. page(s)  
para(s). paragraph(s)  
v. versus  
Vol. Volume
TABLE OF CONTENTS

TABLE OF CONTENTS ................................................................................................................................................. 4

EXECUTIVE SUMMARY IN SLOVENIAN LANGUAGE - POVZETEK ............................................................................. 9

INTRODUCTION ............................................................................................................................................................. 16

PART I - THEORETICAL FRAMEWORK CONCERNING THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL CRIMINAL RESPONSIBILITY FOR INTERNATIONAL CRIMES ...... 27

1. Introduction ............................................................................................................................................................... 27
   1.1. Definition of Basic Notions .................................................................................................................................. 28
   1.2. The Concepts of State Responsibility and Individual Criminal Responsibility .................................................. 31
      1.2.1. The Evolution of State Responsibility .......................................................................................................... 31
      1.2.2. The Doctrine of International Crimes of States ............................................................................................ 37
      1.2.3. The Evolution of a Doctrine of Individual Criminal Responsibility .............................................................. 41
      1.2.4. Separate Evolution of the Two Regimes of International Responsibility ...................................................... 47
      2.1. The Initial Approach: Monistic Model or Mutual Exclusiveness ........................................................................ 52
      2.1.1. State Responsibility as a Substitute to Individual Criminal Responsibility .................................................... 54
      2.1.2. Individual Criminal Responsibility as a Substitute to State Responsibility .................................................... 55
      2.2. Alternative Approaches in the Context of Complementarity: Subordination and Interdependence .................. 57
         2.2.1. Individual Criminal Responsibility as a Form of Reparation ........................................................................... 57
         2.2.2. The Accessory Model - State Responsibility as a Prerequisite to Individual Criminal Responsibility ............ 59
         2.2.3. Individual Criminal Responsibility as a Prerequisite to State Responsibility ................................................ 59
      2.3. The Unitary Model - A Merging of Primary Norms ......................................................................................... 61
      2.4. The Dualistic Model as Prevailing Approach .................................................................................................... 70
         2.4.1. Dual attribution .................................................................................................................................................. 71
         2.4.2. Complementarity (and coexistence) between State Responsibility and Individual Criminal Responsibility .... 75
   3. Conclusion ................................................................................................................................................................. 80

PART II – THE PROVISION OF MILITARY AID AS COMPLICITY IN INTERNATIONAL CRIMINAL LAW ................................................................................................................................. 86

4. Introduction ................................................................................................................................................................. 86
4.1. Determination of the Appropriate Mode of Responsibility ............................................. 91
5. The Law on Complicity in International Criminal Law ......................................................... 99
5.1. The Authorities ................................................................................................................... 99
5.2. Aiding and Abetting in the Ambit of the ad hoc Tribunals ............................................. 101
5.2.1. The actus reus Elements (The Conduct Elements/ The Objective Elements) ....... 102
5.2.1.1. The Substantial Effect Requirement (the Nexus Requirement) ......................... 103
5.2.1.2. The Direct Effect Requirement .............................................................................. 112
5.2.1.3. The Specific Direction Requirement ....................................................................... 117
5.2.2. The mens rea Elements – The Fault Element .............................................................. 133
5.2.2.1. A Knowledge-based mens rea Threshold ................................................................. 134
5.2.2.2. A Double Knowledge Standard ............................................................................... 135
5.2.2.3. A Purpose-based mens rea Standard ........................................................................ 136
5.3. Aiding and Abetting under the Rome Statute .................................................................... 137
5.3.1. The Actus Reus Standard ............................................................................................... 137
5.3.2. A Substantial Effect Requirement in Article 25(3)(c) of the Rome Statute ............. 138
5.3.3. Specific Direction Under the Rome Statute .................................................................. 139
5.3.4. Subjective Element Under Article 25(3)(c) - An Elevated mens rea Standard ........ 140
5.4. The Appropriate mens rea Standard .................................................................................... 142
5.4.1. Is the ad hoc Tribunal’s Jurisprudence Concerning mens rea Standard under Customary International Law Flawed? ............................................................... 142
5.4.2. Post-World Warr II Jurisprudence on mens rea Standard ....................................... 144
5.4.3. Mens rea in The Rome Statute ....................................................................................... 145
5.4.4. Mens rea Under U.S. Courts of Appeals ...................................................................... 146
5.4.5. Conclusion on the Appropriate mens rea Standard ..................................................... 147
6. Application of the Law on Complicity by Way of Provision of Military Aid: ................. 149
6.1. Case Study – The Case of Prosecutor v. Momčilo Perišić ............................................. 149
6.2. Application of actus reus Element of Aiding and Abetting in Perišić Case ................. 151
6.2.1. Perišić’s Role in the Provision of Military Aid ............................................................. 151
6.2.2. Provision of Personnel Assistance to the VRS .......................................................... 152
6.2.2.1. The Personnel Centre .............................................................................................. 153
6.2.2.2. The importance of the Personnel Centre according to the Trial Chamber .......... 157
6.2.2.3. Provision of Officers and its Substantial Effect on the Commission of Crimes .... 158
6.2.2.4. Substantial Effect of Salaries on the Commission of Crimes ................................ 160
6.2.2.5. Decision to Pay Salaries taken at the Political Level ............................................. 162
6.2.2.6. Federal Control over the Defence Budget and the Salaries .................................. 165
6.2.2.7. Payment of Salaries does not Equate to Control ................................................................. 167
6.2.3. Perišić’s Role in the Logistical Assistance Process ................................................................. 169
6.2.3.1. Logistical and Technical Assistance to the VRS ............................................................... 169
6.2.3.2. Final Decisions on Logistical Assistance Taken by the SDC .............................................. 169
6.2.3.3. SDC Granted Perišić Authority Over the Logistical Assistance Process ...................... 171
6.2.3.4. Perišić Advocated for the Continued Provision of Logistical Assistance to the VRS ...... 173
6.3. Military Aid Provided for Furtherance of Specific Criminal Activities .................................. 176
6.3.1. Perišić Merely Implemented the FRY State policy Adopted Prior to his Tenure ................. 177
6.3.2. Provision of Logistical Support Constituted a State Secret ..................................................... 178
6.4. Substantial Effect Applied in Perišić ............................................................................................ 181
6.4.1. The Lack of Nexus Between the Acts of the Accused and the Crimes Committed .............. 181
6.4.2. The Effect of Reliance on the VRS’s Dependence on the VJ – Strict Liability .................. 184
6.4.3. The Trial Chamber’s Dependence Analysis Undermined by the Lack of Evidence ........... 187
6.5. Aid Specifically Directed Towards the Commission of Crimes .............................................. 189
6.5.1. Specific Direction in the Perišić Case ...................................................................................... 189
6.5.1.1. Specific Direction as a mens rea element of aiding and abetting .................................. 193
6.5.1.2. Conflating aiding and abetting with the JCE .................................................................... 194
6.5.2. Can the Requisite Link be Satisfied by the Substantial Effect Requirement? .................. 197
6.6. Application of mens rea of Aiding and Abetting in the Perišić Case .......................................... 200
6.6.1. Perišić Purposefully Assisted in the Commission of Crimes .............................................. 203
6.6.2. Determination by the Trial Chamber Concerning Perišić’s mens rea ................................. 203
6.6.3. Perišić’s Knowledge that his Conduct Assisted the Crimes Committed in Sarajevo ......... 206
6.6.4. Perišić’s Knowledge that his Conduct Assisted the Crimes Committed in Srebrenica ....... 207
6.7. Charles Taylor’s Case of Aiding and Abetting by Way of Provision of Military Aid ............ 207
6.7.1. Specific Direction Disregarded in the Charles Taylor Case .................................................... 211
7. Conclusion ...................................................................................................................................... 213

PART III: STATE COMPLICITY IN INTERNATIONAL LAW ................................................................. 221
8. Introduction ....................................................................................................................................... 221
8.1. The Notion of State Complicity .................................................................................................... 223
8.2. Interaction Between Primary and Secondary Rules in Prohibiting State Complicity ............ 225
9. State Complicity in State Wrongdoing ........................................................................................... 234
9.1. ILC’s Definition of State Complicity .......................................................................................... 234
9.2. The Evolution of the Article on Complicity in the ILC ............................................................. 235
9.3. The Elements of State Complicity .............................................................................................. 239
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.3.1</td>
<td>The Objective Element (The Conduct Element): The Scope of Aid and Assistance</td>
<td>239</td>
</tr>
<tr>
<td>9.3.2</td>
<td>The Nexus Element</td>
<td>243</td>
</tr>
<tr>
<td>9.3.3</td>
<td>The Subjective Element</td>
<td>246</td>
</tr>
<tr>
<td>9.3.4</td>
<td>A Double Obligation Requirement</td>
<td>255</td>
</tr>
<tr>
<td>10.</td>
<td>State Complicity in Customary International Law</td>
<td>255</td>
</tr>
<tr>
<td>10.1</td>
<td>Status of Complicity as a Customary Norm</td>
<td>257</td>
</tr>
<tr>
<td>10.1.1</td>
<td>Complicity by Way of Provision of Military Aid in State Practice</td>
<td>257</td>
</tr>
<tr>
<td>10.1.1.1</td>
<td>Military Aid Used for Aggression</td>
<td>259</td>
</tr>
<tr>
<td>10.1.1.2</td>
<td>Military Aid Used to Violate Rules of Warfare</td>
<td>261</td>
</tr>
<tr>
<td>10.1.1.3</td>
<td>Military Aid Used to Violate Human Rights</td>
<td>263</td>
</tr>
<tr>
<td>10.1.2</td>
<td>Opinio Juris</td>
<td>272</td>
</tr>
<tr>
<td>11.</td>
<td>Special Rules on Complicity</td>
<td>274</td>
</tr>
<tr>
<td>11.1</td>
<td>The Use of Force and Collective Security</td>
<td>274</td>
</tr>
<tr>
<td>11.2</td>
<td>International Humanitarian Law</td>
<td>276</td>
</tr>
<tr>
<td>11.3</td>
<td>Human Rights Law</td>
<td>278</td>
</tr>
<tr>
<td>12.</td>
<td>Complicity and Peremptory Norms of International Law</td>
<td>281</td>
</tr>
<tr>
<td>13.1</td>
<td>State Complicity, Non-State Actors and Attribution</td>
<td>289</td>
</tr>
<tr>
<td>13.2</td>
<td>Attribution of Conduct of Non-State Actors to a State</td>
<td>291</td>
</tr>
<tr>
<td>14.</td>
<td>State Complicity by way of Provision of Military Aid in the Genocide case</td>
<td>293</td>
</tr>
<tr>
<td>14.1</td>
<td>Provision of Military aid and Attribution in the Genocide case</td>
<td>297</td>
</tr>
<tr>
<td>14.1.1</td>
<td>Attribution on the Basis of the Conduct of Its Organs</td>
<td>298</td>
</tr>
<tr>
<td>14.1.2</td>
<td>Attribution on the Basis of Complete Dependence Test – (i.e. “strict control test” or “agency test”)</td>
<td>299</td>
</tr>
<tr>
<td>14.1.2.1</td>
<td>Provision of Military Aid and Complete Dependence test in the Nicaragua Case</td>
<td>300</td>
</tr>
<tr>
<td>14.1.2.2</td>
<td>Provision of Military Aid and Complete Dependence test in the Genocide Case</td>
<td>303</td>
</tr>
<tr>
<td>14.1.2.3</td>
<td>Provision of Military Aid in the Armed Activities Case</td>
<td>304</td>
</tr>
<tr>
<td>14.1.3</td>
<td>Attribution on the Basis of Instructions, Direction or Control – a Subsidiary Test (the Effective Control Test)</td>
<td>304</td>
</tr>
<tr>
<td>14.1.3.1</td>
<td>The Effective Control Test in the Nicaragua Case</td>
<td>304</td>
</tr>
<tr>
<td>14.1.3.2</td>
<td>The Effective Control Test in the Genocide Case</td>
<td>305</td>
</tr>
<tr>
<td>14.1.4</td>
<td>Complicit Relationship does not Suffice for Attribution</td>
<td>307</td>
</tr>
<tr>
<td>14.2</td>
<td>Substantial Contribution Applied in the Genocide Case</td>
<td>310</td>
</tr>
<tr>
<td>14.3</td>
<td>Subjective Element of Complicity Applied in the Genocide Case</td>
<td>310</td>
</tr>
<tr>
<td>15.</td>
<td>Provision of Military Aid as Violation of Principles of Non-Use of Force and Non-Intervention</td>
<td>313</td>
</tr>
</tbody>
</table>
16. Enforcement Mechanisms of State and Individual Criminal Responsibility for Complicity ... 314
16.1. The International Court of Justice ................................................................. 314
16.2. The International Criminal Court ............................................................... 321
17. Conclusion........................................................................................................... 324

PART IV – FINAL CONCLUSIONS ...................................................................... 331

BIBLIOGRAPHY ............................................................................................................. 344

TABLE OF UN SC RESOLUTIONS ................................................................... 368
TABLE OF INTERNATIONAL TREATIES ...................................................... 369
TABLE OF CASES ................................................................................................. 371
POVZETEK

Doktorska disertacija obravnava vprašanje, kdaj nudenje državne pomoči tujim oboroženim silam ali drugim oboroženim skupinam v situacijah oboroženega spopada, ki vključuje izvršitev mednarodnih hudodelstev, prekorači mejo med pravno dopustno zunanj politiko in kaznivim nudenjem pomoči ter podpore storilcem mednarodnih hudodelstev (tj. kaznivo udeležbo). Določitev te meje predstavlja eno najtežjih aktualnih vprašanj v mednarodnem kazenskem pravu in ima daljnosežne normativne posledice, v praksi mednarodnih kazenskih sodnikov pa ostaja predmet ostrih razhajanj.

V tem okviru je temeljna premisa disertacije, da sodobno mednarodna kazensko pravo in sodna praksa puščata odprto vprašanje, ali lahko zgolj nudenje vojaške pomoči tuji državi ali nedržavnemu akterju v oboroženem spopadu šteje za pomoč (tj. udeležbo v ožjem pomenu) pri izvršitvi mednarodnih hudodelstev v takšnem oboroženem spopadu. Eden od ciljev disertacije je zato pojasniti mednarodno pravo de lege lata glede individualne kazenske odgovornosti vojaških ali političnih voditeljev, ki uveljavljajo državno politiko nudenja vojaške pomoči, kot tudi odgovornost države v tem kontekstu.

Ob preučevanju dokumentov, sodb različnih mednarodnih sodnikov, dejstev in doktrine, disertacija predstavi izvirna, kritična in na mestih inovativna stališča in sklepe glede vprašanja mednarodnopravne ureitve udeležbe države in posameznika pri izvršitvi mednarodnega hudodelstva v obliki čezmejnega nudenja vojaške pomoči (situacije, za katere je v disertaciji uporabljen izraz “primeri tuje pomoči”). Pri preučevanju omenjenega vprašanja se ugotavljanje, kaj je že obstoječe mednarodno pravo (de lege lata) in kaj naj bi mednarodno pravo postalo (de lega ferenda) prepeta.

Namen disertacije je med drugim izpostaviti in razjasniti očitno napetost med obstoječimi normami, ki se nanašajo na nudenje vojaške pomoči, kot izhajajo iz mednarodnega kazenskega prava, na eni strani, in iz prava odgovornosti držav za mednarodno protipravna dejanja na drugi strani. Sodobna mednarodna praksa je osredotočena na individualno kazensko odgovornost posameznega vojaškega ali političnega voditelja, medtem ko odgovornost držav ostaja nejasna. Omenjeno napetost disertacije preučuje zlasti v luči sodobnih normativnih sprememb na področju mednarodnega kazenskega prava.
Normativni okvir državne odgovornosti in individualne kazenske odgovornosti za pomoč pri izvršitvi mednarodnega hudodelstva disertacija proučuje tudi s ciljem opredelitve ustreznega odnosa med dvema ločenima režimoma mednarodne odgovornosti v obravnavanem kontekstu. Analiza obstoječih modelov odnosa med odgovornostjo države in individualno kazensko odgovornostjo kaže, da (pravna) doktrina kot dominantno izhodišče opredeli tradicionalni dualistični model obravnavanega odnosa. Ta pristop upošteva, da med obravnavanima dvema režima odgovornosti obstaja določena povezava, hkrati pa izključi možnost njune formalne soodvisnosti. Medtem ko dualistični pristop priznava dvojno pripisovanje odgovornosti in medsebojno dopolnjevanje kot poglaviti dve oznaki obravnavanega odnosa, analiza kaže, da ne ponuja ustreznega odgovora pri opredelitvi odnosa med odgovornostjo države in individualno kazensko odgovornostjo za mednarodna hudodelstva v t.i. “primerih tuje pomoči”. Dualistični pristop namreč izpostavlja, da bi morale vse razprave o odnosu med državno odgovornostjo in individualno kazensko odgovornostjo izhajati iz predpostavke, da sta obravnavana režima medsebojno neodvisna, ločena sistema, odločitve, sprejete znotraj enega, pa nimajo nikakršnega vpliva na sprejemanje odločitev znotraj drugega režima odgovornosti.

Upoštevajoč, da ugotovitev individualne kazenske odgovornosti pred mednarodnim kazenskim sodiščem ni pravno prepričljiv argument pri ugotavljanju odgovornosti države pred pristojnim mednarodnim sodiščem, pravna, politična in moralna povezanost obeh oblik odgovornosti vendarle kliče k bolj celovitemu pristopu k uveljavljanju mednarodne odgovornosti v tem kontekstu. Ena od temeljnih premis disertacije je ta, da bi morali biti odgovornost držav in individualna kazenska odgovornost vojaških ali političnih voditeljev v t.i. “primerih tuje pomoči” obravnavani kot medsebojno soodvisni, da bi se izognili neskladnim ali nasprotujočim si izidom, ki bi postavili pod vprašaj legitimnost različnih mednarodnih sodišč, ki ugotavljajo odgovornost različnih akterjev. V tem kontekstu disertacija ugotavlja, da trenutna mednarodnopravna ureditev ne zagotavlja primernega normativnega okvira za uveljavljanje odgovornosti zaradi udeležbe pri mednarodnih hudodelstvih. Disertacija razkriva tudi pomanjkanje koordinacije med obema normativnima okviroma, ki vodi v neskladnost pri uveljavljanje mednarodne odgovornosti za udeležbo pri mednarodnih hudodelstvih. Zato je ključnega pomena uskladiti normativne okvire individualne kazenske odgovornosti in odgovornosti držav, tako da bi omogočali uveljavljanje odgovornosti države kot tudi
uveljavljanje individualne kazenske odgovornost vojaških in/ali političnih voditeljev za isto ravnanje.


Disertacija ugotavlja, da je večinsko stališče sodne prakse ad hoc mednarodnih kazenskih sodišč neustrezno, saj ne upošteva razlike med nudenjem vojaške pomoči pri izvrševanju specifičnih mednarodnih hudodelstev in splošnim nudenjem pomoči in podpore v oboroženih spopadih, ki samo po sebi ni nujno kaznive narave z vidika statutov različnih ad hoc mednarodnih kazenskih sodišč in Rimskega statuta stalnega mednarodnega kazenskega sodišča, zlasti kadar je nudena pomoč splošnega značaja.

Smiselno bi bilo spremeniti uveljavljeni pravni standard, v skladu s katerim kakršnokoli nudenje vojaške pomoči stranki v oboroženem spopadu, ob hkratnem zavedanju obdolženca, da obstaja verjetnost, da bo prejemnik pomoči udeležen pri izvrševanju mednarodnih hudodelstev, vzpostavi individualno kazensko odgovornost ne glede na humanitarni namen, specifičnost in
pomen, usmerjenost ali dejanski učinek dane vojaške pomoči. Disertacija namreč opozarja, da neupoštevanje pravnega standarda ‘specifične usmerjenosti’ ali vsaj standarda ‘z namenom olajšanja izvršitve’ (angl. for the purpose of facilitating the commission), ki ga predpisuje Rimski Statut stalnega mednarodnega kazenskega sodišča, vzpostavi prag individualne kazenske odgovornosti za pomoč, ki omogoča nevarnost za vdor objektivne odgovornosti v področje mednarodnega kazenskega prava.

Upoštevajoč omenjeni primer Perišić in vzporedni primer Uporabe Konvencije o preprečevanju in kaznovovanju zločina genocida (Bosna in Hercegovina v. Zvezna republika Jugoslavija) pred Meddržavnim sodiščem, disertacija na praktičnem primeru raziskuje povezave med mednarodnim kazenskim pregonom najvišjih vojaških in/ali političnih voditeljev in sodnim postopkom ugotavljanja odgovornosti države za identično dejansko stanje in v kontekstu primerljivih pravnih okvirov. Disertacija ugotavlja, da bi morala mednarodna sodišča, ki ugotavljajo individualno kazensko odgovornost, in sodni primerek kazenske odgovornosti države, ki ugotavljajo odgovornost držav, zavzeti celovitejši pristop pri presoji pravnih posledic dejstev, ki potencialno lahko vzpostavljajo tako individualno kazensko odgovornost kot odgovornost države.

Upoštevaje nejasno opredelitev odnosa med državno odgovornostjo in individualno kazensko odgovornostjo na področju mednarodnih hudodelstev, se disertacija osredotoča na argument, da so v kontekstu t.i. “primerov tuje pomoči” mednarodna hudodelstva praviloma izvršena v okviru državne politike in s sodelovanjem državnega aparata. Preučevanje primera Perišić namreč obravnava predpostavko, da posameznik mimo obstoja državne politike nudenja vojaške pomoči ni zmožen nuditi takšne vojaške pomoči drugi državi ali nedržavnemu akterju v oboroženem spopadu, ki bistveno pripomore oziroma znatno prispeva k izvršitvi mednarodnega hudodelstva. Analiza elementov kazenske odgovornosti za pomoč pri izvršitvi mednarodnih hudodelstev kaže, da objektivni element (actus reus), in znotraj tega zlasti standard ‘znatnega prispevka’ (angl. substantial contribution) k izvršitvi mednarodnega hudodelstva, kot pogoj za vzpostavitev individualne kazenske odgovornosti postavlja (kvantitativno in kvalitativno) določen prag nudene pomoči. Namreč, kaznivo je nudenje zlasti tiste vojaške pomoči, ki znatno prispeva k izvršitvi mednarodnih hudodelstev. Analiza prakse ad hoc mednarodnih kazenskih sodišč pa kaže, da je tovrstna vojaška pomoč predvsem sistemsko (in politično) vprašanje in vselej zahteva aktivno podporo državnega aparata. Analiza primera Perišić jasno pokaže, da je pri ugotavljanju
objektivnega elementa individualne kazenske odgovornosti vojaškega voditelja presoja obstoja državne politike nudenja vojaške pomoči s strani sodnega senata v pretežni meri nadomestila presojo ravnanja posameznika (obdolženca), s tem pa zameglila meje med dvema ločenima režimoma mednarodne odgovornosti v t.i. “primerih tuje pomoči”. Disertacija tako med drugim izpostavlja, da v t.i. “primerih tuje pomoči” odločitev o obstoju individualne kazenske odgovornosti vojaškega ali/in političnega voditelja temelji, vsaj posredno, na predhodni presoji identičnega dejanskega stanja, ki je predmet presoje pri ugotavljanju državne odgovornosti zaradi nudenja vojaške pomoči.

To ne pomeni, da je individualna kazenska odgovornost odvisna od predhodne ugotovitve odgovornosti države, temveč da bi moralo ugotavljanje individualne kazenske odgovornosti vključevati predpostavko odgovornosti države za isto ravnanje. Veljalo bi poenotiti pravne standarde obeh režimov mednarodne odgovornosti za nudenje vojaške pomoči drugi državi ali nedržavnemu akterju. Ob individualni kazenski odgovornosti vojaškega ali političnega voditelja za uveljavljanje državne politike glede nudenja vojaške pomoči tuji državi ali nedržavnemu akterju v oboroženem spopadu, bi morala biti za isto ravnanje odgovorna tudi država.

vojaška pomoč eni od strani v oboroženem spopadu ob zavedanju, da bo ta stran v spopadu verjetno izvršila mednarodno hudodelstvo, podlago za ugotovitev kazenske odgovornosti glede na morebitni humanitarni namen, težo, specifičnost, usmeritev ali vpliv takšne vojaške pomoči. Upoštevajoč te pomisleke je v disertaciji zavzeto stališče, da vodizavnitev standarda ‘specifične usmerjenosti’, ali celo nižjega standarda ‘z namenom olajšanja izvršitve’ (kot ga zahteva Rimski Statut Mednarodnega kazenskega sodišča), v prag odgovornosti, ki je povsem drugačen od tistega za odgovornost države.

Disertacija izpostavlja pomen uskladitve mednarodnoprivravnih okvirov individualne kazenske odgovornosti in odgovornosti držav za udeležbo pri izvršitvi mednarodnega hudodelstva v obliki nuženja vojaške pomoči. Ločenost in zaprtost obeh režimov odgovornosti, oziroma vzdrževanje vtisa nepovezanosti in medsebojne neodvisnosti teh dveh režimov, najverjetneje vodi do nepotrebnih omejitev razvoja pravil odgovornosti v mednarodnem pravu ter zavira progresivni razvoj načel, pravil in postopkov, namenjenih čim večji zaščiti človekovih pravic.

Vloge Meddržavnega sodišča in mednarodnih kazenskih sodišč so avtonomne, pa vendarle medsebojno dopolnjujoče in njihov učinek bi bilo mogoče izboljšati, če bi imele te različne institucije bolj kompatibilna pravila glede ugotavljanja odgovornosti držav in ugotavljanja individualne kazenske odgovornosti. Če so standardi ugotavljanja slednje znatno nižji od tistih v pravu mednarodne odgovornosti držav, obstaja tveganje, da je posameznik spoznan za kazensko odgovornega za ravnanje, ki je za državo dopustno. Z namenom izogniti se takšnim neskladjem in s ciljem vzpostaviti bolj usklajeno uveljavljanje mednarodne odgovornosti, disertacija predlaga razrešitev dileme ad hoc mednarodnih kazenskih sodišč glede mej individualne kazenske odgovornosti za sodelovanje pri mednarodnih hudodelstvih v obliki nuženja pomoči in podpore z upoštevanjem standardov, uveljavljenih v Rimskem Statutu Mednarodnega kazenskega sodišča, ter standardov mednarodnega prava odgovornosti držav, kot so zapisana v Osnutku členov o odgovornosti držav za mednarodnoprivro nedopustna dejanja.
Ključne besede: mednarodno kazensko pravo, mednarodna hudodelstva, mednarodno pravo odgovornosti držav, individualna kazenska odgovornost, vojaška pomoč, udeležba pri mednarodnih hudodelstvih.
INTRODUCTION

The magnitude of the catastrophes often coincides with the grandeur of the legal concepts in which refuge is sought: humanitarian intervention, the responsibility to protect or countermeasures in the collective interest. In this perspective, the issue of complicity is frequently overlooked. The extent of such crises may, however, be reduced if more emphasis is put on the concept of complicity. If States scrutinize their connections with wrongful conduct at an early stage, the need for recourse to more intrusive mechanisms may be reduced. One could also argue that, before States take any action, they should have scrutinized possible complicity with the situation they wish to affect. When they are not complicit themselves, they may remind other States of their obligation not to assist the wrongful acts of the State or non-state actor engaged in the commission of international crimes. This would require a greater awareness and clarity of the issue of complicity among international lawyers and, more importantly, decision-makers. This dissertation contributes to that end.

This dissertation examines the question under what conditions does provision of material aid to another State or a non-state actor in an armed conflict situations involving the commission of international crimes give rise to individual criminal responsibility and/or state responsibility for complicity in these crimes. Moreover, this work explores whether political decisions of States to provide such military aid qualify as acts of States and are to be addressed within the framework of the international law of state responsibility, or whether they are to be dealt with as acts entailing individual criminal responsibility within the framework of international criminal law. Accordingly, the analysis is methodically limited to the provision of military aid by one State to another, or by one State to the non-state groups operating in another State in an armed conflict situation. The scope of this dissertation therefore does not include other aspects of the topic at issue, such as the regulation of international trade in conventional arms, international cooperation and legitimate trade in materiel, equipment and technology for peaceful purposes, and illicit arms trade. Moreover, analysis will not focus on situations in which military aid consists of items

---

1 Obligations set out in the Arms Trade Treaty, regulating international trade in conventional arms are not the focus of this dissertation, as they give rise to direct responsibility of the State Parties for violation of obligations prohibiting States to transfer, for example, conventional arms if such transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the UN Charter, in particular
whose use is wrongful. Rather, it will focus on assistance consisting either of weapons (including ammunition), military equipment, monetary grants or other items whose use could be lawful. Additionally, for reasons of scope, this study does not address a number of emerging issues and areas in international law related to, or even falling within, the notion of complicity. Firstly, it does not address corporate complicity. Secondly, it does not deal with the responsibility of international organizations that allegedly aided and abetted international crimes committed by States or non-state actors. Thirdly, it does not address the ways in which international law holds States or individuals jointly responsible (i.e., shared international responsibility). Fourthly, this work does not deal with situations where a State directs and controls the commission of an internationally wrongful act by another State or coerces such an act. Moreover, it does not provide a comprehensive overview of state practice relating to state complicity or of the modes

arms embargoes or if the State has knowledge at the time of authorization of the transfer that the arms would be used in the commission of core international crimes.

The concept of shared responsibility refers to the responsibility of multiple actors. These actors include States and international organizations, but may also include other actors such as multinational corporations and individuals. The term refers to the responsibility of multiple actors for their contribution to a single harmful outcome. Such an outcome may take a variety of forms, including material or nonmaterial damage to third parties. The issue of shared responsibility is related to the question of how to apportion responsibility among these actors. Particularly, it addresses plurality of wrongdoing actors and the question of how to distribute responsibility among two or more States, international organizations, and individual perpetrators when these States or organizations conduct joint military operations in which some soldiers violate international humanitarian law. The term shared responsibility examines the problem of allocation of responsibilities among multiple states and other actors. The ILC, in its work on state responsibility and the responsibility of international organizations, recognized that attribution of acts to one State or organization does not exclude possible attribution of the same act to another state or organization, but has provided limited guidance on allocation or reparation. Furthermore, the term shared responsibility strictu sensu refers to situations where the contributions of each individual cannot be attributed to them based on causation. If individual causal contributions could be determined, the allocation of responsibility could fully be based on principles of individual criminal responsibility, rather than shared responsibility. In this sense, shared responsibility is an antidote for situations where causation does not provide an adequate basis for responsibility. Another defining feature of shared responsibility in this broad sense is that the responsibility of two or more actors for their contribution to a particular outcome is distributed to them separately, rather than resting on them collectively. If the responsibility rested on a collectivity, it would no longer be shared, but rather would be the responsibility of the collectivity as such. To refer to situations of shared responsibility, the term joint responsibility is also used. This is a different question from the relationship between state complicity and individual criminal responsibility for complicity by way of the provision of military aid conducted in pursuit of a state policy of provision of military aid to another State or a non-state actor. For the phenomenon of shared international responsibility among multiple actors that contribute to harmful outcomes that international law seeks to prevent, see e.g., Nollkaemper, A., and Jacobs, D., Shared Responsibility in International Law: A Conceptual Framework, 34 Michigan Journal of International Law 359, 2013; Zyberi, G., The Practice of Shared Responsibility in relation to Responsibility of States and Individuals for Mass Atrocity Crimes, in Nollkaemper A. and Plakokefalos, I. (eds.), The Practice of Shared Responsibility in International Law, Cambridge University Press (SHARES Research Project on Shared Responsibility in International Law), 2016; Nollkaemper, A., Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art, Cambridge University Press, 2014, pp. 6-7: The concept of shared responsibility for mass atrocities is based on the premise that international crimes are caused by joint or concerted action. This can involve concerted action of two or more States; of a State and political or military leaders of armed groups in another State; or of a plurality of individuals.
of responsibility in international criminal law.

Instead, this study seeks to understand how international law regulates state and individual complicity by way of extraterritorial provision of military aid (situations referred to in this dissertation as “foreign assistance cases”). It places the rules into analytical framework based on the particular type of complicit conduct prohibited, the nexus between the accomplice’s acts and the principal’s wrong, and the fault required of the accomplice. While the analysis is focused on primary norms, it includes its impact on rules of State attribution, which form part of secondary norms of international law. Responsibility for complicity in international crimes is taken as the basis for the concept of state and individual criminal responsibility. Within this framework, the goal of the dissertation is to expose and clarify the apparent tension between the existing rules relating to the provision of military aid as they derive from international criminal law, on the one hand, and the law of state responsibility, on the other. In contemporary international law practice, the focus seems to be on the individual criminal responsibility of (an) individual (military or political) leader(s) while the responsibility of a State remains unclear.

In addition to the normative analysis, the dissertation includes an empirical study of the landmark “foreign assistance case” arising out of the contemporary armed conflict (i.e., the Perišić case\(^3\)) and the role of a third State and its military leader as potential accomplice in the international crimes committed in that conflict. The selected case marked a milestone in the development of accomplice liability in international criminal law: for the first time in history a military leader of one State had been found individually criminally responsible as accomplice for the crimes committed by members of the armed forces of another State or entity. Accordingly, prior to Perišić, no political or military leader had been charged before the international tribunal(s) with aiding and abetting international crimes of another State or armed groups operating in another State merely for the reason that he supplied them with arms or personnel.

Moreover, this particular case has been chosen for this study as it represents the only “foreign assistance case” whereby both regimes of international responsibility had been invoked. Namely, the provision of military aid by the Federal Republic of Yugoslavia (hereinafter: FRY) to the Republic of Srpska (hereinafter: RS) and its army during the armed conflict in BiH between

\(^3\) ICTY, Prosecutor v. Momčilo Perišić, Case No. IT-04-81-T (hereinafter: Perišić case).
1991-1995 led to the only instance, thus far, of concurrent adjudication of individual criminal responsibility (for complicity) by an international criminal tribunal and adjudication of state responsibility (for complicity) by the ICJ. Particularly, the Perišić case and the Genocide case\(^4\) offer an unparalleled example of exercise of parallel jurisdiction over the same set of facts. In the Genocide case the ICJ resorted to the criminal law notion of ‘aiding and abetting’ when determining under what conditions provision of military aid by a State to a non-state actor invokes state responsibility. This decision serves as an important ground to initiate a discussion on the comparison between these two different regimes of international responsibility in cases of complicity.

Using the Perišić proceedings before the ICTY and the parallel Genocide inter-state proceedings before the ICJ as a case study, this dissertation examines the links between international criminal prosecutions implicating top military leaders and judicial proceedings addressing state responsibility that involve similar facts and legal norms. In the Genocide case, state responsibility claims were accompanied by prosecutions of individuals whose acts led to the responsibility of the State. Not only are the Perišić/Genocide cases a good example of such parallelism; they offer, in fact, the only example of a military leader being actually convicted before an international criminal court while parallel legal proceedings were pending against his State before another international court. The lessons that can be drawn from these parallel proceedings may help us better understand the practical and theoretical issues raised by the simultaneous pursuit of individual and state responsibility over the same set of acts (or omission) before different adjudicative mechanisms. At a minimum, the Perišić/Genocide proceedings clearly demonstrate that international courts concerned with individual and state responsibility over the same facts should adopt a more comprehensive approach when adjudging legal consequences of acts capable of triggering individual and state responsibility.

This thesis attempts to explore the consequences of the expansion of the domain of individual criminal responsibility in cases of complicity for the law of state responsibility. A State’s possible involvement in a number of core international crimes is generally recognized.\(^5\) The


criminal character of an act remains constant regardless of whether the State or an individual is the main actor. This creates a presumption that if an act is recognized as entailing individual criminal responsibility, the same act, in the right context, might also entail state responsibility. Establishment of individual criminal responsibility (for complicity) does not necessarily mean that the State is atomised and that the State could negate its own responsibility by having responsibility shifted towards individual State organs – state responsibility can exist next to individual criminal responsibility. Accordingly, if certain acts that essentially boil down to implementation of state policy entail criminal responsibility when committed by an individual, the same acts should also entail responsibility when committed by a State. To conclude otherwise would allow States to shield themselves behind an individual. Thus, the work proposes that, in the “foreign assistance cases”, the whole of the international law norms concerning the prohibition of complicity in international crimes should operate at both, inter-state and individual level. As a result, there would be no legal loopholes given that State and individual criminal responsibility operate as complementary instruments aimed at suppressing complicity in international crimes.

The thesis aims to show that in addressing accomplice liability when dealing with provision of military aid, there is a direct connection between state responsibility and individual criminal responsibility. The question to be examined is whether the mere provision of military assistance to another State or a non-state actor (e.g., rebel forces) engaged in an armed conflict can be equated with aiding and abetting the crimes committed during such a conflict. The subsequent analysis is based on the premise that the provision of military aid by a State in contemporary armed conflicts, which involve the commission of international crimes may, under certain circumstances, be characterized as complicity in those crimes. As regards the rules concerning individual criminal responsibility of political and military leaders in this context, some guidance can be found in the jurisprudence of international courts and tribunals. In particular, the recent judgment of the ICTY in the Perišić case ambitiously drew new boundaries and set stricter standards in terms of accomplice liability of military and political leaders when providing military aid to another State or non-state actors operating in another State. This dissertation aims to show that new developments of international criminal law should affect the rules governing the responsibility of States in this regard: if military or political leaders are to be responsible for

---

6 Ibidem.
implementing the state policy concerning the provision of military aid to another State/non-state actor in an armed conflict situation, then the State should equally be held responsible for that conduct. In other words, the determination of individual criminal responsibility for complicity in the commission of international crimes by way of provision of military aid should entail the presumption of state responsibility for the same act.

While perfect alignment is neither desirable nor feasible given the fundamentally different underpinnings of state and individual criminal responsibility, recent international case law has rejected an attempt to raise the aiding and abetting standard that insisted on a purposive element for complicity. Such rejection exposed the disconnection of individual criminal responsibility from state responsibility in this context. The premise of this dissertation is that the element of specific direction advocated in Perišić requires that the assistance be directed/aimed towards the crimes, thereby establishing the requisite nexus between the acts of the accused and the crime(s) committed. Moreover, it is argued that by adopting specific direction standard in Perišić, the ICTY Appeals Chamber adequately brought individual criminal responsibility for complicity closer to that of state responsibility. This dissertation will show that it is conceptually problematic to disconnect the responsibility of a military or a political leader, whose acts can only be explained by the fact that he acted for the State, entirely from the responsibility of the State itself.

This dissertation explores the proposition that extraterritorial provision of military aid qualifying as complicity in international crimes necessarily entails the implementation of a state policy, and should therefore be considered as an act of a State rather than (or in addition to) an act of an individual. The premise of this analysis is that provision of (substantial) military aid to another State or non-state actors operating in another State is not an act which can be perpetrated by a single individual in isolation from the State apparatus. It is submitted that the case of individual complicity by way of provision of military aid by definition requires the substantial involvement of the State (military apparatus) in its perpetration. This is not to claim that individual criminal responsibility is dependent upon the previous establishment of state responsibility, but rather that individual complicity entails a clear overlap between state responsibility and individual criminal responsibility, since the same conduct triggers both kinds of international responsibility.
The aim of this dissertation is to show that in cases of complicity by way of provision of military aid international crimes are generally perpetrated at the State level or in the framework of a state policy or with the involvement of the State apparatus. As a rule, international criminal courts have no jurisdiction to adjudicate on issues of state responsibility and are very rigorous in applying the principle of individual criminal responsibility. However, when they establish facts pertaining to the general criminal context, and in particular facts in which a State is involved, this can have a deep impact on the parallel establishment of state responsibility for international crimes. Accordingly, in such cases both regimes should be examined and viewed concurrently when addressing accomplice liability for provision of military aid. Throughout Part II and Part III the dissertation argues for the need to better align the normative frameworks of individual and state responsibility for complicity. Confinement of distinct and separate sets of responsibility rules for different types of international actors – or maintenance of a perception that these regimes are unrelated and not co-dependent – is likely to impose unnecessary restrictions on the development of theories of responsibility in international law, impeding the progressive development of principles, rules, and procedures that extend the fullest protection possible to human rights and impose the greatest cost on those actors that violate the most fundamental norms of international law.⁷

From a methodological point of view, the inquiry into the relationship between state and individual criminal responsibility for complicity in international crimes will be carried out on the basis of a three-step analysis.

Part I examines theoretical framework of the relationship between these two regimes of international responsibility. First, a definition of basic notions is set forth, illustrating the legal framework in which the inquiry will be developed. Second, the concepts and (separate) evolution of respective doctrine of state responsibility and individual criminal responsibility are introduced. Third, various doctrinal approaches⁸ to this relationship will be examined and

⁸ The kind of legal research prominent in professional legal writings, such as handbooks, monographs, commentaries, and textbooks of law that implements a specific legal method consisting in the systematic, analytically evaluative exposition of the substance of public international law and international criminal law, is called »legal doctrine«. Although an exposition of this kind may contain historical, sociological, philosophical, and other considerations, its core consists in the interpretation and systematization of valid law. More precisely, it consists in a description of the literal sense of statutes, precedents, etc., intertwined with many moral and other
evaluated. Accordingly, the works of international law scholars will be taken into account, expressing different views on specific issues raised by this relationship. Neither a systematic analysis of the relationship between these two responsibility regimes entailed by the commission of international crimes nor a general theory of this relationship is to be found in the international law literature.\textsuperscript{9} Thus, Part I attempts to provide such a systematic analysis by examining the applicable works of different international law scholars in order to identify the conceptual schemes aiming to explain the relationship between state and individual criminal responsibility and to evaluate which of these conceptual schemes best corresponds to cases of individual and state complicity by way of provision of military aid. While different questions concerning the relationship between state and individual criminal responsibility for international crimes have been addressed by various international law scholars\textsuperscript{10}, this dissertation contributes to the existing research and debate by examining this relationship in cases of individual and state complicity by way of provision of military aid (i.e., in the “foreign assistance cases”). Particularly, the contribution of this dissertation should be seen in its examination of the possible application of the adequate doctrinal model of this relationship, in cases of individual and state complicity by way of provision of military aid.

\textsuperscript{9} To this day the only coherent treatise, the author was able to identify, on mutual relationship between state and individual responsibility is work by Bonafè, B. I., \textit{The Relationship Between State and Individual Responsibility for International Crimes}, Martinus Nijhoff Publishers, 2009.

Part II examines individual criminal responsibility for international crimes, focusing in particular on the treatment of aiding and abetting as a mode of criminal responsibility by the ad hoc tribunals and the ICC. Primarily, by a systematic analysis of international jurisprudence and some particularly problematic aspects of the individual complicity by way of provision of military aid, Part II seeks to identify a general legal framework of individual criminal responsibility for complicity. The results emerging from the analysis of jurisprudence of international criminal tribunals will be examined by application of the normative framework on the landmark case of individual complicity by way of provision of military aid. Accordingly, the second part of Part II engages these normative dimensions of the “foreign assistance cases” through an appraisal of the legal elements that have played a central role in judicial and scholarly efforts to set the boundaries of complicity. By illustrating the competing approaches to aiding and abetting it is suggested that the most adequate resolution of the “foreign assistance cases” inevitably resists easy encapsulation and requires proof beyond the mere provision of military aid. Thus, Part II turns to the much-debated specific direction standard applied in Perišić that plays a particularly important role in the “foreign assistance cases” and considers it in the light of proper and adequate application of the actus reus requirement of substantial assistance.

Part III explains a general legal framework of state complicity in international law. State responsibility for complicity is addressed specifically for violations of international law committed by States and individuals or groups that have received some form of aid or assistance from a State. The normative structure of state complicity will be looked at from the practical perspective, namely from its application in the context of provision of military aid by the ICJ in the Nicaragua case, the Armed Activities case and the Genocide case.

Finally, Concluding remarks address the basic question of the existence of a relationship between state and individual criminal responsibility for complicity. The results of the inquiry into the existing doctrinal models identified in Part I will be evaluated in light of the results of the analysis of normative framework and international practice of complicity conducted in Part II and Part III. By examining the landmark case of complicity by way of provision of military aid

---

in international practice, the dissertation explores the overlap and interaction between these forms of responsibility, and considers whether the attempted narrowing of individual criminal responsibility under aiding and abetting through the insistence on a “specific direction” element can be seen as an attempt to bring these two regimes of international responsibility closer. Inevitably, this final part presents a selection of the most significant problems entailed by the relationship between these regimes in the “foreign assistance cases.” In particular, these regard the diverging standards of state and individual criminal responsibility for complicity in international crimes, and the potential for parallel establishment of state and individual criminal responsibility for complicity by way of provision of military aid. Since the various connections between state and individual criminal responsibility for complicity in international crimes revealed by the case study and the study of international practice show a certain complementarity between these regimes, concluding remarks argue for establishment of a comprehensive framework capable of securing a more effective co-ordination between them.

A central question of this dissertation concerns the structure of complicity rules in international law. As a normative matter, complicity rules ought to hold accomplices responsible for their own contribution to the principal’s wrong, rather than for the wrong committed by the principal. This normative claim is married to an analytical assessment of complicity rules structured around a particular form of complicity (i.e., complicity by way of provision of military aid), the nexus between the accomplice’s acts and the principal's wrong, and the fault of the accomplice. The normative claim of this dissertation is that doctrines of complicity ought to give rise to individual as well as state responsibility and sanction for the accomplice’s contribution to the principal’s wrong. Furthermore, if doctrines of complicity in international crimes by way of provision of military aid give rise to individual criminal responsibility, than the same act should give rise to state responsibility.

The analysis will also be conducted from the historical perspective. It will chart the evolution and development of complicity norms in the field of individual criminal responsibility and state responsibility, respectively. The legacy of the international military tribunal (hereinafter: IMT) and jurisprudence of international criminal tribunals will assist in outlining the concept of individual criminal responsibility for complicity, whereas travaux preparatoires and the ILC Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts
(hereinafter: the “Articles on State Responsibility” or the “Articles” or “ARSIWA”)\(^{13}\), the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: Genocide Convention)\(^{14}\), Geneva Conventions\(^{15}\), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: Torture Convention)\(^{16}\), General Assembly resolutions and Security Council resolutions concerning provision of aid and assistance\(^{17}\), and the ICJ rulings adjudicating cases of state responsibility for provision of military aid\(^{18}\) will assist in outlining the concept of state responsibility for complicity. The research material is also extended to books, law reviews, articles and relevant international and national jurisprudence on complicity.

---


\(^{15}\) ICRC, Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949), 75 UNTS 31; ICRY, Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea (adopted 12 August 1949), 75 UNTS 85; ICRC, Geneva Convention (III) on Prisoners of War (adopted 12 August 1949), 75 UNTS 135; ICRC, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, (adopted 12 August 1949), 75 UNTS 287.


PART I - THEORETHICAL FRAMEWORK CONCERNING THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL CRIMINAL RESPONSIBILITY FOR INTERNATIONAL CRIMES

1. Introduction

The relationship between state responsibility and individual criminal responsibility for acts or omissions that constitute at the same time internationally wrongful acts as well as crimes under international criminal law forms one of the most fascinating, yet underdeveloped, questions of international law. While both state responsibility and individual criminal responsibility have generated considerable debate in literature, the articulation of these two forms of responsibility in the realm of international crimes remains, for the most part, unclear.\(^1\)

The thesis will focus on a particular mode of responsibility, namely complicity by way of provision of military aid. For a more coherent analysis only core international crimes (i.e. crimes against humanity, war crimes and the crime of genocide) will be taken into account. The mutual relationship between state and individual criminal responsibility for international crimes has been subject of attention of international doctrine for various reasons over time. The early era, confronted with the establishment of the first international criminal tribunals, had to substantiate the very existence of an individual as a separate legal person in international law.\(^2\) The next period, marked by the introduction of international crimes of States\(^3\), had to evaluate their link to the well established categories of crimes under international law. Finally, the current increased doctrinal interest in the field can be reasoned by parallel legal proceedings before various international courts concerning state and individual criminal responsibility for international crimes.

---

\(^1\) Bonafè, B. I., *supra* note 9, p. 56.
\(^3\) The controversial notion of “international crimes of state” was introduced to indicate the category of crimes for which state involvement is a constitutive element of their definition, in the sense that they cannot be established factually without the implication of the state. In those cases, state involvement is a necessary precondition of the establishment of individual criminal responsibility. The use of the term is not intended to make any reference to the now obsolete concept of state international crimes reflected in Draft Article 19 of the ILC Articles on State Responsibility (that was partly substituted by the notion of “aggravated” state responsibility), nor to the concept of criminal responsibility of the state, which has as of today no basis in international law.
Following an examination of international practice in Part II and Part III of the thesis, the various points of contact between state and individual criminal responsibility for complicity in international crimes revealed a certain degree of co-dependence and complementarity between these regimes. This dissertation argues for a need of a full appreciation of the mutual relationship and coexistence of the two regimes of responsibility.

1.1. Definition of Basic Notions

The dissertation has the limited purpose of examining the relationship between state responsibility and individual criminal responsibility for complicity in international crimes, focusing on the particular form of complicity by way of provision of military aid to another State or a non-state actor operating in another State. Thus, Definition of basic concepts used in this dissertation is necessary in order to enhance its consistency and prevent potential misunderstandings.

The notion of ‘complicity’ comprises a range of terms used to describe an actor’s participation in a wrongdoing committed by another actor (e.g., aiding, abetting, assisting, advising, persuading, counselling, inducing, instigating, soliciting, helping, giving comfort, procuring the commission of an offence). These may be termed modes or forms of complicity.\textsuperscript{22} Together these terms prohibit complicity as a particular way of contributing to a wrongdoing. As the concern of this work is primarily responsibility for provision of military aid and assistance, this dissertation limits the usage of complicity to a particular mode of participation in a wrongdoing committed by another actor, namely (i) aiding and assisting by a State to another State or a non-state actor operating in another State and (ii) aiding and abetting by an individual to another State or a non-state actor operating in another State. In the law of individual criminal responsibility, there is no uniform use of the terms mentioned. Whether understood as complicity, accessory or secondary liability, this dissertation is ultimately focused on individual complicity not for the direct perpetration or commission of crimes under international law, but for aiding and abetting international crimes committed in another State by way of provision of military aid.

A broad understanding of the principle of complicity is adopted so as to conduct a proper comparison of how States and individuals, respectively, incur responsibility for their complicit

conduct. Complicity in wrongdoing thus occurs when an actor violates a rule that was designed to prevent it from influencing that wrong. Out of three modes of aiding and abetting under the law of *ad hoc* tribunals, individual complicity in this work studies practical assistance, but not encouragement and moral support.

Second, the notion of ‘*international crimes*’, referring to both state and individual criminal responsibility, may need some preliminary clarification. For the sake of simplicity, international crimes is a very short and clear expression that will be employed herein to refer to those very serious breaches of customary international law rules entailing both state responsibility and individual criminal responsibility. In no way is this intended to suggest that, when referring to breaches entailing state responsibility, international law provides for a criminal regime of state responsibility. It therefore encompasses crimes under international law committed by individuals and international crimes *stricto sensu* contained in former Article 19 of the Articles on Responsibility of States for Internationally Wrongful Acts. This solution is practical since it escapes usage of current terminology under Articles on State Responsibility, namely Article 40 (*serious breaches of obligations arising under peremptory norms of general

---

23 The International Law Commission (hereinafter: ILC) has used this expression for years in connection with state responsibility, and in particular in the attempt to codify special consequences to attach to very serious breaches of international obligations. From the very beginning, the ILC has made it plain that referring to international crimes did not imply the establishment of a criminal regime of state responsibility under international law (see the ILC Commentary on Article 19, ILC, *Report of the ILC on the Work of its 28th Session*, YILC (1976), vol. II(2), pp. 104, 119) (hereinafter: ILC Report on the Work of its 28th Session). Nonetheless, the use of this expression raised some concern, because it could suggest the development of such a regime (see the general commentary on Articles 40 and 41, p. 111, paras. 5–6). Thus, the ILC decided to abandon this terminology in favour of a more neutral one. See Crawford, J., *First Report on State Responsibility*, UN Doc. A/CN.4/490/Add.1, para. 60, and UN Doc. A/CN.4/490/Add.2, paras. 68–71; Crawford, J., *Third Report on State Responsibility*, UN Doc. A/CN.4/507, para. 9, and A/CN.4/507/Add.4, para. 407; Crawford, J., *Fourth Report on State Responsibility*, UN Doc. A/CN.4/517, paras. 48–9. See infra Section 1.2.2.


international law), traditionally described as the “twin brother” of previous concept under former Article 19. The term ‘serious breaches of obligations arising under peremptory norms of general international law’ is used only to remove repetition of wording ‘international crimes’ and refers strictly to the branch of state responsibility.

Third, state responsibility and individual criminal responsibility for complicity will be taken into account only for acts that constitute at the same time internationally wrongful acts as well as crimes under international criminal law: aggression, war crimes, crimes against humanity, genocide and torture. Only international crimes prohibited under customary international law will be examined, focusing on the “core international crimes” in order to limit the analysis to a small number of well-established rules establishing binding obligations on all the members of the international community.

Additionally, the analysis concentrates on particular elements developed under international law for the complicity rules in the regimes of state and individual criminal responsibility, respectively. Accordingly, it essentially focuses on the relationship between state responsibility and individual criminal responsibility for complicity by way of provision of military aid under international law. As will be discussed below, these regimes both originate from the breach of primary norms aimed at safeguarding the same collective interests of the international community and can thus be compared.

In accordance with international theory and practice, state responsibility is envisaged here as a legal institute, which is “neither civil, nor penal, but simply international”. State responsibility is connected only with the reparation of damages and in no way implies punishment of the State. On the other hand, responsibility of an individual is defined in a strictly criminal sense, without any reference to its potential civil character which may be found in some domestic legal

28 The ILC had always referred to obligations owed to the international community as a whole until the provisional Draft adopted in 2000 (see Article 41 of the Articles on State Responsibility provisionally adopted by the Drafting Committee on second reading, UN Doc. A/CN.4/L 600). All of a sudden a year later, the final version of Article 40 emerged, referring to “serious breaches of peremptory norms of general international law” (ILC Report on the Work of its 53rd Session, p. 112). According to Wyler, E., Ibidem, p. 1159, the substitution of ‘crimes’ with ‘serious breaches’ “has been nothing more than a ‘cosmetic’ change in the law of responsibility”.
orders.\textsuperscript{31} A unified term ‘responsibility’ shall be used throughout this dissertation when referring to either responsibility within the law of state responsibility as well as individual criminal responsibility under international criminal law. The concepts of state responsibility and individual criminal responsibility are briefly described here in order to set out the general framework in which the following analysis will be structured.

1.2. The Concepts of State Responsibility and Individual Criminal Responsibility

1.2.1. The Evolution of State Responsibility

State responsibility assigns responsibility to a State that breaches its international obligations.\textsuperscript{32} In its traditional sense, it provided remedies to a State for internationally wrongful act committed by another State. Thus, state responsibility has long encapsulated the simple but vital principle of attaching legal responsibility to every legal wrong.\textsuperscript{33} Judge Huber in the \textit{Spanish Zone of Morocco Claims (Spain v. United Kingdom)} stated: ‘Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation.’\textsuperscript{34} State responsibility is therefore essential to the authority and effectiveness of international law.

As the principal institution of international law, state responsibility results from the general legal personality of every State under international law, and from the fact that States are the principal bearers of international obligations. One of its early predecessors is the concept of just war and reprisals developed in the 14\textsuperscript{th} and 15\textsuperscript{th} centuries, which posited that a State was entitled to wage war, as a matter of last resort, to enforce its rights against another State and, that a State which waged an unjust war had the obligation to pay damages to the injured State.\textsuperscript{35} The principle of state responsibility originates from the nature of the international legal system, which relies on

\textsuperscript{31} Murphy, J., \textit{Civil liability for the commission of international crimes as an alternative to criminal prosecution}, in: 12 Harvard Human Rights Journal, 1999, p. 28.
\textsuperscript{34} 1923, 2 RIAA 615, 641.
States as means of formulating and implementing its rules, and arises out of the twin doctrines of state sovereignty and equality of States.

Historically, state responsibility was developed with the aim of protecting the rights of aliens. Before the Universal Declaration of Human Rights was adopted in 1948, the incursion by one State into the sovereignty of another State was permissible only where that State sought to protect the rights of its nationals threatened or violated in that other State. The doctrine of state responsibility was thus developed as a device aimed principally at protecting the rights of aliens in a foreign State. Foreign nationals were entitled to be treated equally with nationals or at least in accordance with minimum international standards of justice. The doctrine was enforced by States through diplomatic means and at times through international arbitration, adjudication or force. The consequence of the doctrine of state responsibility for injury to aliens was also to deny any other State but the national State of the alien a right to act for the rights of that alien.

These traditional conceptions of state responsibility have altered in two fundamental ways. The first concerns the status of the individual in international law and the second relates to the range of States, which can enforce rights in international law. When individual criminal responsibility emerged after the end of World War II as part of a process of transformation of international law, individuals eventually came to the fore as subjects of the international legal order with their own set of rights and responsibilities. The idea that individuals have duties that transcend national

---

36 The doctrine of state sovereignty requires that States refrain from issuing binding orders towards other States. The purpose of this immunity is to protect state actors while they perform their duties without foreign interference, as well as protect their State's dignity. See Wirth, S., *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, 13 EJIL 877, 882 (2002). Because heads of state or foreign ministers carry out much of international relations, protection of state functions requires that sovereign immunity be extended to these officials. (See Vienna Convention on Diplomatic Relations, 18 April 1961) Before the adoption of the Universal Declaration of Human Rights in 1948, the doctrine of state sovereignty served as a shield to protect States from international scrutiny in matters concerning the domestic protection of human rights. Issues of human rights within the domestic sphere fell within the boundaries of state sovereignty, and, by operation of its sister doctrine of the equality of all States, no state had a right to question the status of human rights in another State.


38 GA Res. 217A (III), UN Doc. A/810 at 71 (1948).


40 *Ibidem*, p. 201.

41 Brownlie, I., *supra* note 35, p. 3.

42 Ever since the 1966 edition of *Principles of International Law* Brownlie has asserted, 'There is no general rule that the individual cannot be a “subject of international law”, and in particular contexts he appears as a legal person on the international plane (See 7th Edition, Oxford University Press, 2008 p. 65); For the doctrinal debate on the question whether individuals are to be considered 'subjects' of internaitonal law, see e.g. Clapham, A., *The Role of
boundaries, set forth in the Nüremberg judgment, paved the way for the consolidation of their autonomous status under international law. Furthermore, in 1970 the existence of obligations towards the international community as a whole was affirmed by the ICJ in the *Case concerning the Barcelona Traction, Light and Power Co Ltd* in a generally accepted *dictum*:

“[a]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”

Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character.” Accordingly, not only an injured State, but all States may evoke state responsibility for a breach of obligations *erga omnes*.

The progressive development of international law and its codification have been one of the major aspects in the evolution of international law since the Second World War, one in which the ILC has played a central role. In 1962, it was recommended that the ILC identifies the general rules governing state responsibility for breaches of international law. Thus, in the early sixties, the ILC changed its approach to the question of state responsibility. The emphasis was no longer on the international responsibility of States for violations of obligations concerning the treatment of

---

the *Individual in International Law*, Eur J Int Law, 2010, 21; Assenza, C.M., *Individual as Subject of international law in the International Court of Justice Jurisprudence*, University of Heidelberg, 2010 (pointing out the doctrinal discrepancy regarding the concept of international subjectivity and identifying four possible criteria for its attribution to a person; this study asserts how it is possible that in a gradual way, over time, due to the existence of new conditions in the international arena, the individual evolved from being considered a mere object of law into a subject of international law, endowed with rights and duties under international law.); Trindade, A.A.C., *The Emancipation of the individual from his own State: The Historical Recovery of the Human Person as Subject of the Law of Nations*, Human rights, democracy and the rule of law, 2007, p. 156.

44 *Barcelona Traction Case*, para. 33.
45 *Barcelona Traction Case*, paras. 33, 34.
47 *Barcelona Traction Case*, paras. 33, 34.
aliens. The approach became to define the rules of international responsibility of the State in general, namely the rules defining the conditions for the existence of internationally wrongful acts and its consequences.\textsuperscript{49} In 1973, the ILC began its consideration of the Draft Articles submitted by its Special Rapporteur, Roberto Ago, dealing with the rules. The basic assumption of the Articles was a distinction based on the importance to the international community of the obligations involved, and accordingly on the acknowledgement of a distinct and more serious category of internationally wrongful acts, which could be described as international crimes. For over more than four decades, the ILC has been examining the underlying concepts of state responsibility: attribution, breach, excuses, and consequences.\textsuperscript{50} While the rules on state responsibility started its development in customary international law, in 2001, the ILC adopted the Articles on state responsibility, which seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the state responsibility for internationally wrongful acts. Accordingly, under customary international law as codified by the ILC Articles, state responsibility is invoked whenever the breach of an international obligation is attributable to a State; that is, liability and the obligation to make reparations to other States are triggered by an internationally wrongful act by a State.\textsuperscript{51}

State responsibility originally dealt with international wrongful acts in general, without distinguishing between different classes of wrongs. However, there have been efforts to introduce the idea of “international crimes of States” into this notion.\textsuperscript{52} In the early attempts of


\textsuperscript{50} The law of international state responsibility addresses the consequences arising from the breach of international obligations. Primary obligations trigger the law of state responsibility, i.e. obligations owed among States under international law, whereas secondary obligations deal with the consequences arising from the breach of primary obligations. The law of international state responsibility is exclusively concerned with secondary obligations. It does not attempt to codify the entirety of international obligations owed among states. Thus, only the consequences arising out of the breach of a primary obligation belong to the law of state responsibility. See, e.g., Joyner, D. H. and Roscini, M., \textit{The law of state responsibility}, in Joyner, D. H. and Roscini, M. (eds.), \textit{Non-Proliferation Law as a Special Regime: A Contribution to Fragmentation Theory in International Law}, Cambridge University Press, 2012, pp. 173–174.

\textsuperscript{51} See Article 1 and 2 ARSIWA.

the ILC to codify general rules governing state responsibility, one of the more controversial elements proved to be Article 19 which appeared in the 1980 Draft Articles on State Responsibility, introducing the concept of “international crimes of States”.53 These were defined as breaches of an international obligation ‘so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole.’54 The approach of defining “state crimes” objectively as breaches of obligations that are essential for the protection of interest of the international community was a step forward from the definition given to the character of jus cogens norms, which the Vienna Convention on the Law of Treaties determined not by their content but by their effect: namely, the impossibility to derogate from them by special agreement.55 However, when the Articles were adopted in 2001, the concept of “international crimes of States” was abandoned.56

The ILC Articles represent a major step towards the codification of international rules on state responsibility and have contributed to the development of certain basic concepts of international law, in particular the concepts of peremptory norms of international law (jus cogens)57 and obligations owed to the international community as a whole (obligations erga omnes).58 Despite

---


54 Article 19 (2) of the 1996 Draft Articles.


56 See infra Chapter 1.2.2 for further details on the doctrine of international crimes of States.

57 Laid down by the 1969 Vienna Convention on the Law of Treaties, Article 53 and 64.

58 Crawford, J., The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentary, Cambridge University Press, 2002. It must be pointed out that the ILC tends to blur the distinction between peremptory norms and obligations owed to the entire international community, and conceives of these two categories of international obligations as substantially overlapping. In the general commentary on Articles 40 and 41 the ILC explains that: “Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the Court has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise, the examples of peremptory norms given by the ILC in its commentary to what became article 53 of the Vienna Convention involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance – i.e., in terms of the present Articles, in being entitled to invoke the responsibility of any State in breach” (ILC Report on the Work of its 53rd Session, pp. 111–112, para. 7).
the traditional aspects of the Articles, however, this area of progressive development in their text is particularly important for the task of establishing a link between state responsibility and individual criminal responsibility. Some of these *jus cogens* norms (or peremptory norms) of international law pertain to classic inter-state rules, such as the prohibition on the use of force codified in Article 2(4) of the UN Charter, while others involve obligations imposed on States to refrain from, prevent, and punish certain grievous harms to individuals. These latter include the prohibition against genocide, slavery, torture, and crimes against humanity, namely the human rights-related peremptory norms. This area of state responsibility concerns the set of obligations imposed on States by rules of customary international law relating, *inter alia*, to the physical integrity and dignity of the human person, albeit within the territorial jurisdiction of the State. This category of duties was denominated as obligations *erga omnes*.59 These rules, because of their substantive content and their recognition of the individual as the subject of international law, demonstrate an obvious potential for overlap with the rules of primary obligations of individuals under international criminal law.

When the wrongful state act amounts to a serious breach of obligations owed to the international community as a whole, customary international law provides for a particular regime of *aggravated state responsibility*.60 Interestingly, the term aggravated state responsibility is given the same meaning as state responsibility for international crimes, which distinguishes it from ordinary state responsibility connected with less serious violations of international law. The main characteristic of aggravated state responsibility is that it has developed around the concept of obligations *erga omnes*.61

---

59 *Barcelona Traction Case*, paras. 33, 34.
60 See *infra* Section 1.2.4.
61 *Ibidem*. See, e.g., De Hoogh, A., *supra* note 52, Dominice, C., *supra* note 52, Crawford, J., *supra* note 58, Bonafè, B. I., *supra* note 9, p. 19: For years, the ILC has strived to find an agreement on both the definition of the most important obligations whose breach would amount to an international crime, and the definition of the most serious consequences that would attach to the commission of international crimes by States. In the end, the ILC realized that it had to adopt a different approach more in line with international practice. Leaving aside those controversial ‘substantive’ aspects, it focused instead on ‘procedural’ aspects, that is, explaining which subjects are entitled to react against serious breaches of obligations owed to the entire international community. Thus, it concentrated on a particular category of international norms, *i.e.*, obligations owed to the international community as a whole. Accordingly, *aggravated state responsibility* originates from the breach of obligations characterized by a particular structure. Contrary to most international norms, which establish bilateral relations between States, the legal relation underlying such obligations is between a State and the entire international community. Therefore, when such obligations are violated, the injured party is the international community, which is also the party entitled to react against such breaches.
While the ILC recommended the General Assembly of the United Nations to convert the Articles into a convention, no convention has been adopted to date. Therefore, the ILC Articles are not binding law as such but, despite their nature, they are an essential codification in the area of state responsibility for internationally wrongful acts and to a large extent they codify international law.\textsuperscript{62} Reflecting the existing case law and state practice in this area, the Articles have been described by some legal scholars as generally providing evidence of established and evolving customary international law,\textsuperscript{63} while others have even suggested that they could be said to have authoritative force since they represent the views of highly recognized publicists in international law.\textsuperscript{64}

### 1.2.2. The Doctrine of International Crimes of States

The idea of criminal jurisdiction over States for the "international crimes of States" reaches far back in history and initially enjoyed great popularity.\textsuperscript{65} The basis was that the original concept of international law started to regulate exclusively the relations among States. Correspondingly, the laws and customs of war at the beginning emphasized the obligations of States. The law aimed at preventing and provided States with all legal means to prevent violations of the international humanitarian law through their military forces. The main aim of those regulations at that time was not to create an individual obligation under international law for each member of the armed forces. In the beginning, violations of these laws resulted only in a responsibility of the States allowing for sanctions (e.g., reprisals).\textsuperscript{66} The UN Charter is still based on this conception, since the articles in Chapter VII do not mention any responsibility of natural persons.\textsuperscript{67} However, the growing importance of international humanitarian law developed the notion that humanity on the battlefield was a question of individual criminal responsibility as well. Since World War I, the idea of holding individuals directly responsible for violations of international law, especially

\textsuperscript{62} Talmon, S., \textit{The Responsibility of Outside Powers for Acts of Secessionist Entities}, 58 ICLQ, 2009, pp. 493-517, at p. 495: claims that the ILC Articles “are widely considered to reflect customary international law”.

\textsuperscript{63} \textit{Ibidem}.

\textsuperscript{64} For a brief survey of the views of prominent scholars on the Articles, see Caron, D., \textit{The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority}, 96 American Journal of International Law, 2002.

\textsuperscript{65} For a historical survey, see Carjeu, P.M., \textit{Projet d'une juridiction penale internationale}, 1953.


\textsuperscript{67} \textit{Ibidem}.
those who acted as heads or organs of States or as commanding military officers, has continuously gained support. This was able to develop, as more rights and duties were assigned to individuals by international law. Consistent with this principle, the Nuremberg and Tokyo practice of exercising for the first time international military jurisdiction over individuals, seemed to be the most effective way to enforce international criminal law and to prevent the core international crimes. This preference continued for decades after Nuremberg.

Even during all those decades when individual criminal responsibility for crimes under international law was favoured, the idea of holding the State responsible as well as the individual, was continuously kept alive. Developments of international criminal law continued when great parts of the laws and customs of war were formulated in the Four Geneva Conventions of 1949. Individual criminal responsibility was promoted, but responsibility of States to fulfil the duties of the conventions and to prevent and punish grave breaches was equally developed. States violating their duties can be held responsible in addition to the individual perpetrator. The drafting commission for the Genocide Convention openly discussed the possibility of exercising jurisdiction over States. It rejected the embodiment of the principle in the proposed Convention only for pragmatic reasons, the inappropriateness of articulated conventional criminal sanctions, and the lack of an international criminal court with an enforcement power over States. The same reservations arose during the discussions with the ILC on the Draft Code of Crimes against the Peace and Security of Mankind (hereinafter: Draft Code of Crimes or Draft Code) up until 1954. Once more, for pragmatic reasons, the ILC favoured the principle of individual criminal responsibility, omitting state responsibility in the Draft Code. However, the inclusion of the concept of “international crimes of States” in Article 19 of the 1976 Draft Articles reopened the debate as to whether the exclusion of state responsibility from the Draft Code in particular could still be maintained. Article 19 referred to “international crimes of States”, describing them as a breach by a State of an international

68 Triffterer, O., supra note 52, p. 354.
70 Ibidem.
obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime.\textsuperscript{74} Thus, Article 19 proposed a distinction between ‘normal’ internationally wrongful acts, called “delicts” and exceptionally grave breaches of international law, termed “international crimes”.\textsuperscript{75} Despite strong and passionate opposition,\textsuperscript{76} the ILC maintained this distinction when it completed the first reading of its Draft Articles in 1996.\textsuperscript{77}

Strong reservations as to the terminology of ‘crimes’ were expressed within the ILC and in the comments of many governments. Yet, there was no particular difficulty in terms of the current state of international affairs in accepting the idea that some obligations are held to the international community as a whole and not only to individual States, as that grave breaches of those obligations should attract special consequences. The problem was merely how to translate that idea into the text of the Articles in a generally acceptable way. Thus, the doctrine on "international crimes of States" introduced by Article 19, in addition to causing controversy and raising a number of problems\textsuperscript{78}, has been abandoned in the final version of the Articles, adopted in 2001, to be replaced by the notions of ‘serious breaches of obligations under peremptory norms of general international law’\textsuperscript{79} and of breach of obligations ‘owed to the international community as a whole.’\textsuperscript{80} Crawford and Bodeau specify that the chapter on serious breaches is ‘aimed at reflecting the values inspiring Article 19 without going into the issues of “crime”’.\textsuperscript{81}

Articles 40 and 41 do not raise the difficulties inherent to the possible confusion between two kinds of ‘crimes’ committed by States and individuals, respectively. This terminological differentiation aims to clarify the respective legal regime of the international responsibility of an individual for crimes and the corresponding state responsibility for the violation of peremptory norms. While one of the main reasons for the removal of “international crimes of States” was the

\textsuperscript{74} ILC Draft Articles on State Responsibility, UN Doc A/51/10, 125, GAOR 51st Session Supp 10, 125, Part 1, Origin of international responsibility, Chapter III Breach of an International Obligation, Art.19(2).
\textsuperscript{75} ILC Report on the Work of its 28th Session, pp. 95-112.
\textsuperscript{76} See, e.g. Rosenstock, R., supra note 52, p. 265; Bowett, D. W., supra note 52, p. 163; Rosenne, S., supra note 52, pp. 145–166, at p. 145.
\textsuperscript{79} Part II, Chapter III, Articles 40 and 41 ARSIWA.
\textsuperscript{80} Article 48(1)(b) ARSIWA.
\textsuperscript{81} Crawford, J. and Badeau, A., La seconde lecture de project d’articles sur la responsabilite des Etats de la Commission du droit international, 104 RGDIP, 2000, p. 931.
desire to have a unique objective regime of state responsibility, the 2001 Articles nevertheless create an aggravated regime for ‘serious breaches of obligations under peremptory norms of general international law’. Whereas Article 19 sought to establish an aggravated regime of state responsibility for the violation of *jus cogens* norms, Articles 40 and 41 reintroduce a second category of responsibility with special legal effects.\(^\text{82}\)

The major objective in deleting “crime” and replacing it with the concept of “serious breach” was to free the Draft Articles of a concept of criminal responsibility inspired by domestic law. According to many commentators, the distinction introduced in Article 19 between “crimes” and “delicts” led to a criminalization of state responsibility.\(^\text{83}\) Decriminalizing state responsibility was the option finally adopted, on the grounds of embryonic state practice in the area and the inconsistency of the Articles, which, while maintaining the distinction between crimes and delicts, had failed in its task of establishing a legal system specifically tailored to international crimes.\(^\text{84}\) Accordingly, the law of state responsibility does not recognize the ‘crime of State’ as part of its regime. States cannot be held criminally responsible under international law, as the law of state responsibility has remained essentially reparational and not punitive in its scope.

Thus, classical international state responsibility remains conceived in terms of an essentially reparational view, as well as a sort of civil liability in the international order. It does not have the object of punishing the State. It is, however, doubtful whether the earlier reference to *international crimes of States* could be seen as an indication of the theoretical view that a State can be held criminally accountable for a crime. The Articles did not envisage any criminal sanctions. Rather, the basic idea was to distinguish between different kinds of internationally wrongful acts, and the duty of the State to make reparations for its consequences.\(^\text{85}\) The reference to *international crimes of States* was meant to reflect that the violation of a substantive norm of a fundamental character weighted more heavily.\(^\text{86}\) It related to the international community as a


\(^{83}\) See, e.g. the observations by governments, particularly from Western countries like France, Germany or the UK (see UN Doc. A/CN.4/488 and Crawford, *First Report on State Responsibility*, supra note 23, paras. 52-59).

\(^{84}\) First Report on State Responsibility, UN Doc. A/CN.4/490/Add. 3, para. 91.

\(^{85}\) See Pellet, A., *supra* note 52, p. 433; who argues that international responsibility is neither civil not penal.

whole, and compensation could thus be claimed by all States. Nevertheless, although an aggravated form of state responsibility, it still indicated the civil liability of States, rather than a penal form of responsibility.\textsuperscript{87} This view was affirmed by a final set of Articles\textsuperscript{88}, which, referring to serious breaches, emphasize its nature as a tort. According to Pellet, the original use of the terms “crime” and “delict” has been misleading.\textsuperscript{89}

1.2.3. The Evolution of a Doctrine of Individual Criminal Responsibility

Whereas the notion of state responsibility has a long pedigree under international law,\textsuperscript{90} the concept of individual criminal responsibility is more recent. The concept of individual criminal responsibility and the designation of certain individuals as \textit{hostis humani generis} already existed in Grotius’ time.\textsuperscript{91} However, this concept was applied almost by definition, to individuals operating outside the purview of the State apparatus, such as pirates, slave traders, and subsequently, terrorists and drug traffickers.\textsuperscript{92} International criminal law initially focused on crimes of an intrinsically international concern, which were perpetrated by individuals or groups operating independently of States, typically in areas beyond the latter’s reach (such as the open sea or the African \textit{terra nullius}).\textsuperscript{93}

Historically, international law was concerned only with actions of States, while the individuals through whom States acted remained almost entirely outside its purview. However, the traditional state of affairs has undergone a dramatic change in the 20\textsuperscript{th} century. In the aftermath of the two World Wars, attempts were made to put on trial those leaders most responsible for breaching the peace (\textit{jus ad bellum}) and violating the laws of war (\textit{jus in bello}). While efforts to try the German Kaiser and senior Turkish leaders implicated in the Armenian massacres failed for a variety of legal and political reasons in the aftermath of World War I,\textsuperscript{94} the Nürnberg and

\begin{footnotesize}
\begin{itemize}
    \item\textsuperscript{87} Pellet, A., \textit{supra} note 52, p. 433.
    \item\textsuperscript{88} Articles 40, 41 ARSIWA.
    \item\textsuperscript{89} Pellet, A., \textit{supra} note 52, p. 433.
    \item\textsuperscript{90} See generally, Brownlie, I., \textit{State Responsibility}, Clarendon Press, 1983, 1 \textit{et seq}.
\end{itemize}
\end{footnotesize}
Tokyo trials addressed the criminal responsibility of the Nazi and Japanese leadership and removed any immunity that may have resided with their office.95

According to the classical rules of the law on international responsibility of States, imputing to a State an internationally wrongful act committed by one of its organs amounted in principle to concentrating responsibility on the public person, thereby ignoring that of the individual(s) who actually acted on its behalf. The individual, as in general terms in the whole of classical voluntarist international law before the international affirmation of rights of the human person (1945), does not exist independently of the State to which he is attached by the bond of nationality. This is all the more so where he is perceived not just as a national of the State but as one of its organs, de jure or de facto, acting not on his own personal behalf but for the State apparatus he serves.96 What has sometimes been called the ‘Nüremberg Revolution’ reverses this logic, even if war crimes had already been considered in terms of their individualized authors.97 Moreover, the individual criminal responsibility of a Head of State had already been contemplated in Article 227 of the Peace Treaty of Versailles, which provided for Wilhelm II to be accused and judged: ‘The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.’ It is still the case that the Nazi leaders were judged as individuals, for the crimes they had themselves decided, commanded, or organized, even if the position each of them occupied within the State apparatus was carefully analysed by the Nüremberg Tribunal. At Nüremberg the German State criminals were not judged in the place of a State. While it is true that the Third Reich had disappeared after the defeat, Germany itself was declared liable for war damages. In the same way, the Japanese State, which nobody claimed to have been legally eclipsed in the slightest after the war, was also declared liable as such under international law. Personal condemnation by the Tokyo Tribunal98 of the Japanese military, therefore, clearly

95 The International Military Tribunal at Nüremberg, created by the Agreement for Prosecution and Punishment of Major War Criminals of the European Axis, August 8, 1945 (hereinafter: Nüremberg Tribunal), Charter of the International Military Tribunal, Aug. 8, 1945, art. 7, 82 UNTS 279; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. 1589, reprinted in 1 Ferencz 523, 1 Friedman 895 (hereinafter: Tokyo Charter), art. 6. It is interesting to note that Hitler’s successor as Head of the German State, Admiral Doenitz, was among the defendants in Nüremberg.
96 Dupuy, P. M., supra note 10, p. 1086.
97 Ibidem.
98 International Military Tribunals for the Far East; Trial of the Major War Criminals, Proceedings of the International Military Tribunal for the Far East at Tokyo; reprinted (excerpts) in 4 Bevans 20; 2 Ferencz 522, 1975;
shows that their responsibility was not conceived of as a substitute for that of the State they had served; if the Japanese military leaders were judged, it was indeed for acts for which they were held individually responsible. Their responsibility was distinct from that of the State whose agents they were. Accordingly, the Nüremberg and Tokyo Tribunals laid the groundwork for modern international criminal law. They were the first tribunals where individual violators of international law were held responsible for their crimes. They also recognized individual criminal responsibility and rejected historically used defences based on state sovereignty.99

The aspirations of the Nüremberg and Tokyo Tribunals to achieve future peace and security, however, have only had limited success.100 The first forty years after Nüremberg was a period of slow progress in developing international criminal law. There is no doubt that international criminal law has developed in the last two decades. Indeed, if international criminal law is defined as the prosecution of individuals for ‘international crimes’ then there was no such law for most of the twentieth century. On the eve of the twentieth century attempts to regulate warfare in The Hague Conference of 1899, and again in 1907, were constrained by notions of state sovereignty. As the Nüremberg judges pointed out in 1946, ‘The Hague Convention nowhere designates such practices [methods of waging war] as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders.’101 While the Genocide Convention and the Four Geneva Conventions were adopted in 1948 and 1949 respectively, almost all other efforts to codify international criminal law have been rather slow and unsuccessful. However, since the end of the Cold War, the driving ideas behind the Nüremberg and Tokyo trials were restored.102 In 1991, the ILC passed the First Reading of the Draft Code of Crimes, which was finally discussed in 1996. The Draft Statute for an International Criminal Court was completed in 1994, to be approved in 1998. The establishment of the ad hoc international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) by the UN Security Council in 1993 and the development of hybrid, internationalized criminal tribunals

100 Triffterer, O., supra note 52, p. 344.
such as the one for Sierra Leone finally culminated in the creation of a new, permanent International Criminal Court (ICC) in 2001.\textsuperscript{103}

With respect to individual criminal responsibility, it is beyond question that today serious breaches of certain obligations owed to the international community as a whole entail individual criminal responsibility.\textsuperscript{104} Customary international law provides for a regime of criminal responsibility with respect to individuals who commit certain international offences considered by the international community to be serious violations of its most important rules.\textsuperscript{105} As for the offences entailing individual criminal responsibility, there is general agreement over the recognition of the existence of at least three categories of customary international crimes


committed during armed conflict, namely, the so-called Nüremberg crimes: crimes of aggression, war crimes, and crimes against humanity. International individual criminal responsibility is a traditional regime of criminal responsibility providing for the punishment of individuals who have perpetrated international crimes.

Indeed, since the creation of the ICTY in 1993, followed by a line of newly created ad hoc international criminal tribunals, international law has made strides in establishing individual criminal responsibility for crimes against international law as one of its most fundamental principles. These developments towards individual criminal responsibility for international crimes provide the greatest success since Nüremberg and Tokyo for the enforcement of international criminal law. In international law the actions of criminal individuals are most often considered in relation to the nature of the links these individuals had to the State apparatus or to conflicts in which the State is implicated. Accordingly, the new designation of the individual as a person responsible in public international law, by the ad hoc Tribunals or the ICC, has ended by designating the individual as a full subject of public international law, eligible to defend his rights, but also to be responsible for the breach of obligations incumbent on him vis-à-vis other individuals. The dependency of an individual to a State apparatus may be exercised by the maintenance of links that the individual criminal responsibility has with the State concerned. The relevant facts may in particular concern the individual’s statutory position vis-à-vis the State at the time of the commission of the crime. It must however generally be noted that the case law of the ad hoc Tribunals, still more than that of the Nüremberg and Tokyo Tribunals, does not necessarily require the individual’s strict membership in the State apparatus. More broadly, it requires a link of sufficient connection between the action of the individual accused and the collective action attributable to the State he referred to in so acting. The Statutes of the Nüremberg and Tokyo Tribunals authorized them to consider only cases of individuals who acted ‘on behalf’ of the Axis countries. This formula, contained in Article 6 of the Statute of the Nüremberg Tribunal, covers both individual State agents and those who, while not its de jure

---

agents, *de facto* acted for the Nazi State. The London Agreement setting up the Nuremberg Tribunal was aimed in its preamble only at the ‘major criminals’.\textsuperscript{107} The declarations of criminality were to be understood as excluding members of organizations who were unaware of their criminal goals or acts, as well as non-voluntary members. In the new generation of international criminal courts, the ICTR has been prosecuting the main members of the Hutu government in power at the time of the genocide in 1994 according to the political responsibilities they exercised.\textsuperscript{108} The ICTY, for its part, has ‘the power to prosecute persons responsible for serious violations of international humanitarian law’\textsuperscript{109} without restriction to persons occupying a high post in the hierarchy of organs of the State concerned. Accordingly, in the case of the ICTY it is the nature and legal description of the crimes that count, more than the position of an accused. Similarly, with regard to the jurisdictional basis *ratione personae*, Article 1 of the Rome Statute declares that the Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions." However, all these developments of the past two decades dealt with *individual* and not *state* responsibility for international crimes. Indeed, it was precisely the need to remove from culpable individuals the protective shield of the State, which caused the development of individual criminal responsibility in international law.\textsuperscript{110}

While the promoters of the various international criminal courts undoubtedly intended, by punishing individuals, also to punish the actions of the State to which the acts may be attributed, there is also the individual as such who is persecuted and condemned when committing criminal acts under contemporary public international law. Individual criminal responsibility is not solely linked to that of the State he served, but also frees itself therefrom to become autonomous, completing the constitution of the individual as a subject of international law. Now, when


\textsuperscript{109} Article 1 of the ICTY Statute annexed to UN Security Council Resolution 827, supra note 104.

\textsuperscript{110} See, e.g., Ratner, S.R. and Abrams, J.S., supra note 103, pp. 3–14; Dupuy, P.M., supra note 10, pp. 1085 et seq.
individual criminal responsibility is enforced by *ad hoc* international tribunals and the ICC, the consideration of state responsibility and the creation of a jurisdictional authority over States for crimes of States should not be neglected. As long as States are supporting such crimes, their prosecution is an indispensable part of measures to effectively prevent such crimes.\(^{111}\)

1.2.4. Separate Evolution of the Two Regimes of International Responsibility

Identifying the individual criminal responsibility of natural persons who have committed crimes under international law leads to a system of international responsibility, evolving in the direction of increasingly disassociating the respective responsibility regimes for the individual and the State.\(^{112}\) The position defended even recently in legal scholarship\(^{113}\), that the growing affirmation of the individual criminal responsibility is only a way of implementing that of the State on whose behalf they act, displays the difficulty these authors have in detaching themselves from the classical conception (pre-1945) that there are no legal persons in international law apart from the State. This conception reduces the individual to an organic dependency on the State, independently of which the individual cannot exist. According to Dupuy, this sort of view, plainly marked by the ideology intrinsic in classical legal positivism, seems increasingly out of step with the actual evolution of law.\(^{114}\)

There is a radical difference in foundation between individual criminal responsibility, founded on fault and intention, and state responsibility, founded on the internationally wrongful act. The development of international criminal law has enabled cases in which intention constitutes a constitutive element in the State’s international responsibility. Thus, when a State was accused of genocide before the ICJ, it was incumbent to show the genocidal intent of the State that ordered actions falling within the framework of those listed in Article 2 of the Genocide Convention. The fact remains that intention is essentially individual and is only in a sense communicated to the State because the origin of the latter is, as the Nuremberg Tribunal said, ‘men and not abstract entities’. Moreover, intention is the primary foundation of the individual criminal responsibility,

\(^{111}\) See *infra* Chapter 16 on enforcement mechanisms of state and individual criminal responsibility.

\(^{112}\) Dupuy, P. M., *supra* note 10, p. 1091.

\(^{113}\) See Maison, R., *La Responsabilité individuelle pour crime d’État en droit international public*, Bruxelles, (Ed. de l’Université de Bruxelles), 2004, 69 et seq.

\(^{114}\) Dupuy, P. M., *supra* note 10, p. 1091.
whereas it is a mere subsidiary element in state responsibility, to be found only in a limited number of international wrongful acts.

Furthermore, while the individual criminal responsibility is fundamentally criminal, that of the State remains, at least in the present stage of development of the international law, linked to the classical foundation of responsibility for an internationally wrongful act.\textsuperscript{115} This explains why it remains distinct from that of the individuals who are at the origin of the wrongful acts. It is this latter aspect that the ICJ had occasion to highlight in the \textit{Genocide} case.\textsuperscript{116} Rejecting the argument that the Genocide Convention established only individual criminal responsibility for genocide, the Court observed the responsibility of a State for acts of its organs is not excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by “rulers” or “public officials.”\textsuperscript{117}

The affirmation of the individual criminal responsibility completes the evolution begun after 1945 by introducing international human rights protection into the international order. The quality of being a subject of a legal order depends on the possibility to defend the rights of which one is the bearer. But simultaneously, it is based on legal capacity to be a bearer of associated obligations as they result from norms established in that legal order. The most contemporary developments in international criminal law verify this evolution. They equally show that the same type of wrongful acts, like aggression or genocide, can give rise to two distinct types of responsibility coming under mutually autonomous legal regimes, the first constituting the individual criminal responsibility of individuals, the second that of the State in the name of which these same acts were committed. The further evolution of the two types of responsibilities is preserved by Article 58 ARSIWA, stating that the provisions of the Articles on state responsibility ‘are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State’. Indeed, according to the ILC, state responsibility and individual criminal responsibility are considered as distinct in international

\begin{footnotesize}
\begin{enumerate}
\item[115] See \textit{supra} Section 1.2.2.
\item[116] Genocide case, Preliminary Objections, Judgment, ICJ Reports 1996, p. 595: the Court dismissed the preliminary objections and found that it had jurisdiction to adjudicate on the dispute on the basis of Article IX of the Genocide Convention and that the Application was admissible.
\item[117] Genocide case, para. 151.
\end{enumerate}
\end{footnotesize}
Similarly, the Rome Statute provides that ‘[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.’ Similar language was used in Article 4 of the Draft Code of Crimes, adopted by the ILC in 1996. Such clauses are illustrative of the way in which the two forms of responsibility have evolved.

The long codification process of state responsibility attests to the difficulties of adjusting the old fashioned and rather rudimentary responsibility schemes (as they have emerged particularly as regards the treatment of aliens) to the evolving realities of international law. The ILC has always been very careful in indicating the difference between the individual criminal responsibility of organs of a State and the international responsibility of the State for the same acts. They have given priority to elaborating the individual criminal responsibility by completing first the Draft Code and the Statute for the ICC. The ILC had indicated that the punishment of individuals in charge of the State machinery, which committed international crimes, does not relieve the State itself from its responsibility. Nor does any act committed by an organ of the State for which the perpetrator is held individually responsible automatically entail an international responsibility of a State. The attribution of a wrongful act to a State is quite different from the incrimination of certain individual organs for committed crimes.

While the exact standards of the regime of aggravated state responsibility remained largely unsettled, a suggestion to separate between different classes of wrongful acts and the ensuing modes of reparation, depending on the gravity of the acts, made a development in the field of state responsibility. As argued in Section 1.2.2, the idea should not be misunderstood as a mode

---

118 The ICJ has observed that the duality of state and individual criminal responsibility 'continues to be a constant feature in international law.' See Genocide case, para. 173.
121 Crawford, J., supra note 58.
122 As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. Nevertheless, there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct. See Report of the ILC to the General Assembly, GAOR, 33rd Session, Supplement 10, p. 243, UN Doc. A/33/10 (1978), reprinted in Yearbook of the ILC, 1978, vol. 2, p. 99, UN Doc. A/CN.4/SER.A/1978/Add. I (pt. 2) (hereinafter: ILC Report on State Responsibility).
of criminal responsibility. The ILC's discussion and its codification efforts show that the concept of state criminal responsibility was overwhelmingly rejected. Moreover, international courts have repeatedly rejected the idea of criminal state responsibility. They do not try or penalize States for their breaches of *jus cogens* norms of international law. As the ICTY Appeals Chamber in *Blaškić* explained “under international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems.” Finally, the jurisdiction of the ICC is limited to natural persons.

Concerning the procedural differences between the two regimes of international responsibility, prosecution of international crimes committed by individuals depends on universal competence. In connection with the competence of the ICTY and ICTR, their great originality lies in the fact that the prosecutions may be totally unilateral and not subordinate to prior assent by the State of nationality of the accused. This position, however, remains exceptional. For in the absence of legal action brought by a State, the ICC is in principle competent only within the framework defined *vis-à-vis* the States Parties, and under the rather restrictive conditions set out in Article 12 of the Rome Statute. This brings us close to the conditions for legal action within the framework of state responsibility, premised upon the state consent to jurisdiction.

Accordingly, the individual criminal responsibility, confirming the innovation brought by the international military tribunals of Nüremberg and Tokyo, is separated from the state responsibility. We are thus seeing an evolution towards the individualization of criminal responsibility in the international legal order that closely parallels the one municipal legal systems underwent long ago. It would be misleading, however, to conclude that the two separate regimes of responsibility never intersect or overlap. Nevertheless, since the individual criminal responsibility...
responsibility system has expanded faster than the law of state responsibility, the gap between the two inevitably increases.

2. **Doctrinal Approaches – Different Theoretical Models of the Relationship between State and Individual Criminal Responsibility for International Crimes**

This Chapter analyses doctrinal approaches toward the relationship between state responsibility and individual criminal responsibility for international crimes. Compared to state responsibility, individual criminal responsibility is a recent development. Nevertheless, the relationship between the two regimes of responsibility has already undergone various stages of definition. As no explicit theory on the relationship between state and individual criminal responsibility for international crimes has been put forward, identifying the general approaches to the relationship between state and individual criminal responsibility is a challenging task. While various international law scholars have addressed isolated questions concerning the relationship between state and individual criminal responsibility, no comprehensive theoretical framework, explaining the various connections between the two responsibility regimes, exists. Essentially, the literature on this issue is fragmented and the tendency is to emphasize the

---

129 The term »legal doctrine« needs to be distinguished from the term legal theory. Legal doctrine in Continental European Law consists of professional legal writings, e.g. handbooks, monographs, etc., whose task is to systematize and interpret valid law (Peczenik, A., A Theory of Legal Doctrine, Ratio Juris, Vol. 14, No. 1, March 2001 (75-105). The theoretical framework of Part I refers to doctrinal approaches to the relationship between state and individual criminal responsibility. It is the results of the works of various legal scholars that this inquiry pertains. Different models of the examined relationship are the results of an activity of scholars as well as to the products of this activity, that is, to the content of books and research. Legal doctrine picks up questions from legal practice and discusses them in a more general and profound manner. But the perspective of the legal scholar differs in some respects form the perspective of a judge. A legal scholar has no power to make binding decisions and may freely make recommendations de lege ferenda and even boldly propose new juristic methods, whereas the judge must make correct decisions in the light of prevailing legal method. The work of legal doctrine is usually value-laden. Jurists draw a distinction between conducting a cognitive inquiry into the law as it is (de lege lata) and making justified recommendations fort he lawgiver (de lege ferenda). But the distinction between de lege lata and de lege ferenda is not clear-cut. Legal doctrine pursues a knowledge of existing law, yet in many cases it leads to a change of the law (Peczenik 1995). Legal doctrine aims to attain a knowledge of the law. At the same time, it is a part of the law in the broadest sense, for it participates in developing the norms of society.

130 See supra note 10.

difference between state and individual criminal responsibility for international crimes and, in this regard, to highlight the peculiarities of international criminal law. At the same time, more traditional views insist on the primary role of States in international law and seek to bring individual criminal responsibility back into the framework of state responsibility as a particular consequence of the commission of international crimes by State organs.\(^{132}\)

Existing doctrinal approaches represent various models as well as opposite perspectives on the relationship between state and individual criminal responsibility for international crimes. As such, they can hardly be sustained in their theoretical comprehensiveness. Rather, more nuanced views better reflect international practice. Nevertheless it is important to conceptualize these opposite perspectives of the relationship between state and individual criminal responsibility in order to identify their basic assumptions and their limitations. The following Section articulates various doctrinal approaches that have historically been elaborated, with a view to examine the possibility of identifying a general rule concerning the relationship between state and individual criminal responsibility.

### 2.1. The Initial Approach: Monistic Model or Mutual Exclusiveness

Classical theories took as a starting point a monistic conception, which called for the mutual exclusiveness of state and individual criminal responsibility. The monistic approach is built on the basis of traditional international law with States as the only legal persons on the international scene and thus the only legal entity facing responsibility in international law.\(^{133}\) According to the classical perception of international law, individuals do not exist independently of their State of nationality, especially when they act on behalf of the State. Traditionally, international law attributes acts of individuals who act as State organs exclusively to the State. While in factual terms States act through individuals (the Permanent Court of International Justice stated: ‘States can act only by and through their agents and representatives\(^{134}\)), in legal terms state responsibility is born not out of an act of an individual, but out of an act of the State.\(^{135}\)

---


\(^{133}\) Maison, R., *supra* note 113.

\(^{134}\) *Case of Certain Questions relating to settlers of German origin in the territory ceded by Germany to Poland*, Advisory opinion, PCIJ Series B, No 6, 22.

The monistic approach is based on the assumption that individual criminal responsibility constitutes the mere form of state responsibility; individual criminal responsibility is thus absorbed into state responsibility. Nollkaemper talks about the “invisibility of individual in the traditional law of state responsibility”, which means that an unlawful act of an individual in a position of State organ was attributed only to his nation State. Penal action against an individual performed at the domestic level was considered as satisfaction by which a nation State realized its own obligation of reparation. The sanction against an individual was a prerogative of a nation State. Thus, all other members of the international community were excluded from sanctioning by reference to a traditional international legal axiom *pars in parem non habet iurisdictionem*. Protagonists of the monistic approach postulated a rule, according to which a serious violation of international law implicated a breach of otherwise inviolable principle of sovereign equality of States; the lack of a nation State’s action activated a right (not a duty) of all other States to initiate penal proceedings against the organs of a third State.

While the monistic approach is connected mostly with works from the mid 20th century, references to monism can nevertheless be traced in the 21st century as well. Maison in her work from 2004 advocates the monistic approach, even in the light of an unprecedented evolution in the field of international criminal law. In her opinion international criminal tribunals, which act in the name of the international community as a whole, constitute tools of centralized repression, which only replaced a duty of a nation State and the right of all other States to initiate penal action against an individual. The monistic approach can be detected both in primary norms (the obligation to criminalize certain unlawful conduct) and in secondary norms (punishment of an individual as a form of satisfaction) addressed to and adherent with the State.

---

138 Bonafé, B. I., *supra* note 9, pp. 52-53.
140 Bonafé, B. I., *supra* note 9, pp. 54-57.
142 Ibidem, pp. 10-11.
143 Genocide Convention, Article I, Article V.
2.1.1. *State Responsibility as a Substitute to Individual Criminal Responsibility*

In classical international law, the State was the only subject recognized as possessing rights and obligations on the international sphere. The individual had neither legal personality nor *locus standi* outside the domain of domestic jurisdiction. Thus, initially state responsibility was considered to absorb individual criminal responsibility for conduct that constituted an international crime and could be attributed to the State. The positivist doctrine that prevailed especially during the nineteenth century recognized the State as the central (and exclusive) actor on the international scene.\textsuperscript{144} Individuals were viewed solely as the object of legal regulation, whose rights and obligations were realized only through the spectrum of the State.\textsuperscript{145} As a result, state responsibility was the only form of responsibility recognized under international law, and individual criminal responsibility was a matter of exclusively domestic concern. In this context, the “act of State” doctrine\textsuperscript{146} functioned as a substantive defence, relieving the individual perpetrator from responsibility, because the criminal acts were considered as acts of the State, and not as their own. According to this approach, “the State is the only entity internationally accountable for an internationally wrongful act of one of its agents acting on its instructions, the issue of the responsibility of the individual agent being irrelevant under international law”.\textsuperscript{147} Individual criminal responsibility is thus excluded.\textsuperscript{148}


\footnote{145} Shaw, M., *supra* note 32, p. 258.

\footnote{146} The "act of State" doctrine has been described variously as a doctrine of judicial prudence or deference, judicial restraint, judicial abstention, issue preclusion, conflict of laws, and choice of law. The roots of the doctrine can be traced back to seventeenth-century England and to a common origin with the doctrine of sovereign immunity. During the heyday of European monarchies, the crown enjoyed complete immunity from suit. As monarchies declined, the state replaced the king as the sovereign entity, and state sovereignty came to be personified not by kings, but by state officials. While the state was still protected from suit by the doctrine of sovereign immunity, these state officials were personally exposed to suit for their official acts. The act of state doctrine developed in part to provide similar protection from suit for individual government officials. Act of state immunity therefore arose as nothing more than a corollary to sovereign immunity. Sovereign immunity protected the sovereign government against a lawsuit, while the act of state doctrine extended the same immunity to individual officials acting on behalf of their government.


\footnote{148} Dupuy, P. M., *supra* note 10, pp. 1085-1099.
2.1.2. Individual Criminal Responsibility as a Substitute to State Responsibility

The previous approach was abandoned in the aftermath of World War II, along with the emergence of human rights and international criminal justice, which caused a breach in the traditional doctrine of international law by bringing the individual to the fore and gradually granting them with legal personality, recognizing the individual as a bearer of both rights and obligations. Accordingly, individual criminal responsibility was considered as the most appropriate means of punishing violations of international law that constitute crimes of concern to the international community as a whole. For a while, individual criminal responsibility overshadowed state responsibility, a concept principally objective and prima facie incompatible with the criminal nature of the imputed conduct.

The theory underlying the Nüremberg proceedings, which still serves as the foundation of modern international criminal law, is that the traditional focus on state responsibility failed to deal directly with those State agents whose acts, omissions and decisions actually shape unlawful State policies.\(^{149}\) The attempt to generate a better fit between moral agency and legal responsibility\(^{150}\) may be supported by considerations of morality and efficiency: piercing the veil of state responsibility renders it more difficult for individuals in positions of authority to act with a sense of impunity and lack of moral blameworthiness.\(^{151}\) Moreover, shielding the individual from responsibility undermined the efficacy of international law. Ever since the development of international criminal courts, international law leaves it no longer to the national legal order to determine which individuals are subjected to obligations and responsibilities and confronts individuals directly with the legal consequences of their acts. This is also true if the individuals act as State agents.\(^{152}\)

---

\(^{149}\) Nüremberg Judgment, p. 41.


\(^{152}\) Although the fact that an individual acted as organ of the state may shield that individual from prosecution, it does not take away the responsibility the immunity from jurisdiction does not mean that an individuals acting as state organs enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility. See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, ICJ Reports 2002, p. 3, para. 60.
According to this initial approach, individual criminal responsibility works as a substitute for state responsibility; in the case of international crimes, responsibility of the individual perpetrator is the only form of responsibility that is relevant. Individual criminal responsibility was meant to replace state responsibility which, being conceived as collective as well as objective, could neither respond to the criminal nature of the atrocities committed by fulfilling the functions of criminal justice, nor comply with the principle of justice, which is contrary to the imposition on an entire nation of the guilt of individual leaders.\textsuperscript{153} In the Nüremberg Judgment emphasis was placed on individual criminal responsibility, as

\begin{quote}

...crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced [...] Individuals have international duties which transcend the national obligations of obedience imposed by the individual State.\textsuperscript{154}
\end{quote}

Under this approach, the “act of State” doctrine is no longer accepted as a defence precluding individual criminal responsibility of State officials for acts committed in official capacity and which constitute international crimes. This provision is reproduced in the Statutes of all subsequent international criminal courts and tribunals.\textsuperscript{155} Similarly in the Genocide case, on the issue whether the fact that the Genocide Convention envisages individual criminal responsibility implies there is no room for state responsibility, Judges Shi and Vereshchetin declared:

\begin{quote}
The determination of the international community to bring individual perpetrators of genocidal acts to justice, irrespective of their ethnicity or the position they occupy, points to the most appropriate course of action. We share the view expressed by Britain’s Chief Prosecutor at Nüremberg, Hartley Shawcross, in a recent article in which he declared that ‘There can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs’ (International Herald Tribune, 23 May 1996, 8). Therefore, in our view, it might be argued that this Court is perhaps not the proper venue for the adjudication of the complaints which the Applicant has raised in the current proceedings.\textsuperscript{156}
\end{quote}


\textsuperscript{154} Nüremberg IMT: Judgment and Sentence, reprinted in (1947) 41 \textit{AJIL} 172, p. 217.

\textsuperscript{155} Gattini, A., \textit{supra} note 144, pp. 101-126.

\textsuperscript{156} Genocide case, Joint declaration of Judges Shi and Judge Vereshchetin, ICJ Rep 1996, para. 631-632.
According to Nollkaemper, the argument need not be rejected offhand. If a breach of fundamental rules of international law is brought about by a small group of leaders of a State, against the apparent wishes of the population, and these leaders have been taken from behind the veil of the State and held individually responsible, the question can be asked whether it is still useful to strive for separate responsibility of the State.\textsuperscript{157} Removal of the leadership of a State may be sufficient, would spare the innocent parts of the population and prevent primitive collective responsibility.\textsuperscript{158}

\textbf{2.2. Alternative Approaches in the Context of Complementarity: Subordination and Interdependence}

The theories of mutual exclusiveness were soon surpassed and the duality of the two forms of responsibility became evident.\textsuperscript{159} Thus, it is maintained that state and individual criminal responsibility often coexist and complement each other, by obeying to different rules and pursuing different goals. In the context of the duality, various theories have been elaborated, specifying the concept of complementarity and parallel existence of the two forms of responsibility. Such theories for the most part refer to the relationship between state and individual criminal responsibility in terms of subordination and/or interdependence, either by viewing the latter as a specific consequence of the former, in terms of reparation, or by considering state responsibility to be a precondition of individual criminal responsibility in the case of international crimes; as a result, the individual criminal responsibility is said to depend on the state responsibility.

\textbf{2.2.1. Individual Criminal Responsibility as a Form of Reparation}

Based on the conceptual and practical role of the State in the majority of core international crimes, a doctrine has developed according to which individual criminal responsibility for international crimes is a consequence of an exceptional regime of state responsibility for crimes of States (i.e., aggravated responsibility).\textsuperscript{160} This doctrine starts from the assumption that individual criminal responsibility is internationally recognized only for State crimes, and views

\textsuperscript{157} Nollkaemper, A., \textit{supra} note 5, p. 622.
\textsuperscript{158} Cassese, A., \textit{supra} note 30, pp. 6-8.
\textsuperscript{159} Duality is meant in a sense of distinguishing the individual criminal responsibility from the responsibility of the State for which or under the control of which the individual acted.
\textsuperscript{160} For a critique of this approach, albeit in the context of Draft Article 19, see Jørgensen, N. H. B., \textit{supra} note 20, p. 154-157.
the latter as a form of reparation, more specifically as an aggravated form of satisfaction, as a guarantee of non-repetition, or even as a restitution. According to this approach, an individual committing crimes in a context of State criminality may be considered as de facto State organ. This theory considers individual criminal responsibility as a centralised sanction by the international community as a whole, as a reaction to the breach of erga omnes obligations.

The limitation of this theory is its erroneous assumption that international criminal law is only concerned with the punishment of State organs. While the jurisdiction of the ad hoc tribunals is limited to those who bear major responsibility for international crimes, such does not form a prerequisite for establishment of individual criminal responsibility under international criminal law. Individuals may commit international crimes irrespective of their status as State organs, and State involvement in the commission of such crimes does not per se fulfil the criteria of attribution required under international law, so as to automatically generate state responsibility.

The Commentary of the ILC Report on State Responsibility (hereinafter: Commentary or ILC Commentary) to Article 37 ARSIWA states that penal action against the individuals whose conduct caused the internationally wrongful act is an example of a form of satisfaction. However, neither the text of the Article nor the Commentary view penal action as a special consequence of the regime of aggravated responsibility pursuant to Article 41 ARSIWA. Rather, the obligation to punish the individual perpetrator(s) is stipulated as a separate obligation in most relevant treaties, including the Genocide Convention and the Torture Convention, in the form of a primary norm establishing state responsibility. As such, it does not form part of a specific regime of state responsibility. On the other hand, the obligation to punish the individual perpetrator(s) applies to all breaches of international obligations by States; its

---

161 Maison, R., supra note 113.
162 Ibidem, p. 326.
163 Ibidem.
164 See Chapter II ARSIWA. The general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State. The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality.
application is not limited to the serious breaches regime (pursuant to Article 40 ARSIWA).\footnote{Zimmermann, A. and Teichmann, M., \textit{supra} note 165, pp. 305-306.} Moreover, the ILC rejected any connection between state responsibility and punishment of individuals.\footnote{Some ILC members spoke about humiliation of state. YILC 2000, Vol. 1, p. 213, para. 33.} Therefore, this approach has been rejected as manifestly inconsistent with contemporary international practice.\footnote{Bianchi, A., \textit{supra} note 147, p. 17.}

2.2.2. \textit{The Accessory Model - State Responsibility as a Prerequisite to Individual Criminal Responsibility}

Under the accessory model individual criminal responsibility is perceived as a separate regime which is nevertheless dependent on a previous conclusion about state responsibility.\footnote{This approach is applicable in relation to the crime of aggression and in certain circumstances to the war crimes – compare Wilmshurst, E., \textit{Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility}, in The International Criminal Court and the Crime of Aggression, 2004, p. 93 and Zimmermann, A., \textit{supra} note 165, p. 219.} Namely, the accessory model treats individual criminal responsibility as a category flowing directly from rules of international law (i.e. not resulting only from State obligations, as monism contends), but at the same time makes its realization dependant on a previous conclusion about state responsibility. Applicability of this model is nevertheless limited to war crimes\footnote{Zimmermann, A. and Teichmann, M, \textit{supra} note 165, p. 308 – Zimmermann points to the importance of reprisals in international criminal law. Compare Cassese, A., \textit{supra} note 30, p. 255.} and a crime of aggression, which is based on the axiom “no State responsibility for an act of aggression, no crime of aggression by an individual.”\footnote{Wilmshurst, E., \textit{supra} note 170, p. 93} The theory of state and individual criminal responsibility does not apply this approach to other core international crimes.

2.2.3. \textit{Individual Criminal Responsibility as a Prerequisite to State Responsibility}

Another model abstracted from international theory and practice is a reflection of the previous accessory approach. According to this approach, individual criminal responsibility is perceived as a separate regime (i.e. not as a monistic form of state responsibility), highlighted by the assumption that state responsibility for international crimes is formally dependant on a previous conclusion about individual criminal responsibility.\footnote{Gaeta, P., \textit{On What Conditions Can a State be Held Responsible for Genocide?}, 18 European Journal of International Law, 2007, pp. 645-46.}
The arguments of this school of thoughts were echoed in the declaration of Judge Skotnikov annexed to the judgment in the *Genocide* case. Namely, the formal interdependence of state responsibility and individual criminal responsibility was pointed out in the *Genocide* case by the FRY, whereby it presented the argument that in order for the Court to uphold a claim of the responsibility of a State for an act of genocide it is necessary, as a matter of law, a finding of genocide by a court or tribunal exercising criminal jurisdiction is necessary. The FRY argued that “the condition *sine qua non* for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State’s responsibility.”

The Court promptly rejected this line of argumentation, reasoning that:

“If the different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity.”

Furthermore, the Court underlined such an interpretation would enable situations, where hiding of responsible individuals before criminal justice spills over to the other branch of international law, namely to the law of state responsibility. However, according to Judge Skotnikov, the ICJ as the inter-state court has exceeded its powers, when admitting that “it can itself make a determination as to whether or not genocide was committed without a distinct decision by a court or tribunal exercising criminal jurisdiction.”

Similarly, Groome argues, that “the ICJ should and must wait until such final [criminal] judgments are rendered [by the court competent to exercise jurisdiction over the alleged crimes] before it commences its work on the merits.”

Groome contends that the ICJ has no competence in criminal matters and by reserving it, the ICJ points to *in absentia* trial without adequate guarantees provided in criminal proceedings.

---

174 *Genocide* case, para. 180.
175 *Ibidem*, para. 181.
176 *Ibidem*, paras. 181, 182.
179 *Genocide* case, para. 181.
2.3. The Unitary Model - A Merging of Primary Norms

The unitary approach to the relationship between state and individual criminal responsibility has been put forward by Bonafè.\textsuperscript{181} According to this approach, state responsibility and individual criminal responsibility for international crimes both derive from the same primary norm. Therein lies a theoretical basis for the bridge between responsibility regimes. It is indisputable that the parallel developments of state responsibility and individual criminal responsibility have occurred in relative isolation from each other, with little substantive overlap and few theoretical links. Nevertheless, a basic foundation for the establishment of a link between state and individual criminal responsibility is apparent: both types of responsibility seek to ensure the observance of international law by identifying and assigning liability to those actors responsible for its violation. Both regimes deal with the evaluation and imposition of responsibility for international legal wrongs.

When the focus on state responsibility is narrowed to responsibility for violations of obligations \textit{erga omnes}, the parallels between the two regimes of responsibility are even stronger, as both responsibility regimes share substantive origins in the primary obligations that they seek to endorse. In \textit{Barcelona Traction}, the Court described the criteria for obligations \textit{erga omnes}\textsuperscript{182} as obligations deriving from the outlawing of acts of aggression, genocide, and from the principles concerning the basic rights of the human person.\textsuperscript{183} Aggression, genocide, and slavery have been criminalized by international law.\textsuperscript{184} Crimes against humanity and torture, moreover, unquestionably fall within the description of ‘principles and rules concerning the basic rights of the human person’. Additionally, the rules relating to almost all these norms have been codified in conventions ‘of a universal or quasi-universal character’\textsuperscript{185}, and all are generally accepted as part of customary international law.\textsuperscript{186} Customary international law therefore imposes the same obligations on both States and individuals, prohibiting both from committing the violations listed

\begin{itemize}
\item \textsuperscript{181} Bonafè, B. I., \textit{supra} note 9.
\item \textsuperscript{182} See \textit{supra} Section 1.2.1.
\item \textsuperscript{183} \textit{Barcelona Traction} case, para. 34.
\item \textsuperscript{184} See, e.g., Article 5 of the Rome Statute.
\item \textsuperscript{185} UN Charter, Article 2(4) (aggression, 191 parties); 1948 Genocide Convention (137 parties); 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (119 parties); 1984 Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (Torture Convention) (139 parties).
\item \textsuperscript{186} \textit{Akayesu Trial Judgment}, para. 495 (genocide is customary international law); Furundija Trial Judgment, paras. 138-139 (torture is customary international law); Prosecutor v. Musema, Trial Judgment, para. 214 (crimes against humanity are customary international law).
\end{itemize}
above. It is from this shared source of primary obligations that the concept of double responsibility is born: for example, violations of the prohibition against genocide or torture, if conducted by agents of the State or otherwise attributable to the State,\textsuperscript{187} might give rise to both individual criminal responsibility and state responsibility for a violation of an obligation \textit{erga omnes}.\textsuperscript{188} While state responsibility for violations of obligations \textit{erga omnes} has only been imposed once (i.e. by the ICJ in the \textit{Genocide} case, whereby Serbia was responsible for having breached the obligation to prevent genocide), the principle has gained acceptance by both commentators and international jurists\textsuperscript{189}, and has been repeatedly recognized by the ICJ since its dictum in \textit{Barcelona Traction}.\textsuperscript{190}

While aggravated state responsibility and individual criminal responsibility both stem from the serious breach of obligations owed to the international community as a whole (obligations \textit{erga omnes}) and thus share a common origin,\textsuperscript{191} a breach of the same type of international obligations by a State or individual nevertheless triggers different sets of consequences.\textsuperscript{192} This unity of state and individual criminal responsibility at the level of primary norms\textsuperscript{193} does not necessarily mean that primary norms entailing aggravated state responsibility are identical to primary norms entailing individual criminal responsibility under international law. Rather, it means that both these regimes originate from the breach of primary norms aiming at the protection of the same collective interests of the entire international community, and having the same structure, that is,

\begin{flushright}
\footnotesize
\textsuperscript{187} ILC Articles, Arts. 4 – 11 for the rules governing attribution of conduct to a state.
\textsuperscript{188} \textit{Furundžija} Trial Judgment, para 142.
\textsuperscript{189} ILC Articles and accompanying text; ILC Report on State Responsibility, Commentary on Article 48; \textit{Furundžija} Trial Judgment, para. 151.
\textsuperscript{191} In the framework of state responsibility, different expressions have also been used to refer to more or less the same phenomenon. Cassese refers to ‘community obligations’ (Cassese, A., \textit{supra} note 30, p. 15), while Dupuy speaks of ‘\textit{normes communautaires}’ (Dupuy, P. M., \textit{Droit international public} (7th edn, Paris, Dalloz, 2004), pp. 536–9). However, there are two ways in which \textit{erga omnes} obligations have been conceived of, namely, either as obligations towards all States or as obligations towards the international community as a whole. From the viewpoint of state responsibility, this distinction implies that the holder of the corresponding right of reaction is either any State or the international community as a whole.
\textsuperscript{192} Nollkaemper, A., \textit{supra} note 5, p. 627 (“Both individual and State responsibility are consequences of breaches of fundamental norms of concern to the international community”).
\textsuperscript{193} The distinction between primary and secondary norms was proposed as a general criterion to codify the law of state responsibility by Special Rapporteur Ago in his ‘Second Report on State Responsibility’, \textit{YILC} (1970), vol. II, p. 179. Primary norms are obligations under international law. Secondary norms are the legal consequences attached to the violations of primary obligations.
\end{flushright}
establishing a legal relation between the State or the individual and the international community as a whole.\textsuperscript{194}

In order to identify the overlap between state and individual criminal responsibility with respect to specific categories of core international crimes, a comparison between the list of wrongful acts entailing both aggravated state responsibility and individual criminal responsibility under international law must be drawn. Such dual responsibility is conditioned upon the overlap between the material (or objective) elements\textsuperscript{195} of breaches entailing state and individual criminal responsibility as well as the overlap between their subjective elements\textsuperscript{196} (i.e., the prohibited conduct must be attributable both to an individual and to a State) of international crimes. There is an overlap between aggravated state responsibility and individual criminal responsibility with respect to the following international crimes: aggression, war crimes, crimes against humanity, genocide and torture. Thus, the carrying out of such prohibited conduct gives rise to a dual responsibility under international law. The core international crimes will be examined from this perspective.

Aggression

The international legal order prohibits the use of force in international relations, in particular it prohibits aggression. According to the UN Charter,\textsuperscript{197} the practice of the SC,\textsuperscript{198} the ICJ case law,\textsuperscript{199} and the 1974 UN Definition of aggression,\textsuperscript{200} States committing a very serious violation

\textsuperscript{194} Bonafè, B. I., \textit{supra} note 9, p. 24.
\textsuperscript{195} Material’ (or ‘objective’) element of international crimes consists of the description of the prohibited conduct. War crimes, crimes against humanity, genocide, etc. are broad categories covering specific sub-categories of prohibited conduct. Accordingly, the material element of international crimes can be considered as formed by, on the one hand, \textit{specific elements} of the offence (murder, torture, etc.) and, on the other, \textit{general pre-requisites} (nexus with an armed conflict, systematic attack against the civilian population, etc.) allowing the specific offence to be listed in one of the broader categories of international crimes.
\textsuperscript{196} The ‘subjective’ element of international crimes concerns the subjects who can commit the international offences.
\textsuperscript{197} Article 2 para. 4 of the UN Charter, and GA Resolution 2625(XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted on 24 October 1970.
\textsuperscript{200} UN General Assembly Resolution 3314 (XXIX), adopted on 14 December 1974. (Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.)
of international peace trigger an aggravated regime of international responsibility.\textsuperscript{201} On the other hand, the \textit{Nüremberg} trial recognized that the commission of crimes against peace (\textit{i.e.}, crimes of aggression), entails individual criminal responsibility under international law.\textsuperscript{202} Individual criminal responsibility for such crimes was confirmed in the codification of the ILC,\textsuperscript{203} and in the Rome Statute.\textsuperscript{204}

The crime of aggression, more than any other of the crimes within jurisdiction of the international criminal courts, involves the participation of a State. It has been generally recognized that the crime of aggression cannot be committed by an individual unless a State is internationally responsible for an act of aggression, however that responsibility is recognized: no State responsibility for an act of aggression, no crime of aggression by an individual.\textsuperscript{205} However, the concept of state responsibility for an act of aggression committed by a State needs to be distinguished from the concept of individual criminal responsibility for the crime of aggression committed by an individual.\textsuperscript{206}

With respect to the ICC Statute, Article 5 on the subject-matter jurisdiction of the Court gives no definition of aggression. The Final Act of the Rome conference established a Preparatory

\textsuperscript{201} \textit{See}, in general, the ILC Commentary on ex-Article 19 (ILC Report on the Work of its 28th Session, p. 95 et seq.) and to Article 40 of the Articles on State Responsibility (ILC Report on the Work of its 53rd Session, p. 112).

\textsuperscript{202} Aggression was first recognized as an international crime resulting in individual criminal responsibility under international law in the Charter of the IMT. Its Article 6 (a) gave the IMT jurisdiction over crimes against peace, “namely, planning, preparation, initiation or waging of a war of aggression, or war in violation of international treaties, agreements or assurances, or preparation in a common plan or conspiracy for the accomplishment of any of the foregoing.” \textit{See}, e.g., Werle, G., \textit{Principles of International Criminal Law}, Oxford University Press, 2014, p. 481, para. 1323.

\textsuperscript{203} \textit{See} Article 16 of the Draft Code of Crimes (ILC Report on the Work of its 48th Session, pp. 44–45), which reads: “An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression”.

\textsuperscript{204} Article 5 of the Rome Statute provides that “1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression. 2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations” (A/CONF.183/9, <untreaty.un.org/cod/icc/index.html>).

\textsuperscript{205} Wilmshurst, E., \textit{supra} note 170, p. 93.

\textsuperscript{206} According to the 1974 UN General Assembly Resolution 3314 on the definition of aggression, participation in a war of aggression constitutes the crime of aggression. Article 5(2) of that Resolution provides that a “war of aggression is a crime against international peace. Aggression gives rise to international responsibility.” The Article thus clearly differentiates between aggression (giving rise to international responsibility) and a war of aggression (which is a crime by individuals against peace).
Commission (hereinafter: PrepCom)\textsuperscript{207} and entrusted it with the task of drafting the elements of all crimes falling under the Court’s jurisdiction (1999–2002).\textsuperscript{208} With the entry into force of the Rome Statute, the Assembly of the States Parties decided to continue and complete the work on the crime of aggression, and established a Special Working Group on the Crime of Aggression (SWGCA).\textsuperscript{209} Thus, the PrepCom first and subsequently the SWGCA have been entrusted with the difficult task of preparing a provision on aggression. In their proposals, an act of aggression “means an act referred to in the GA Resolution 33 (XXIX) of 14 December 1974 which is determined to have been committed by the State concerned”.\textsuperscript{210}

Under international law, acts of aggression always entail a dual responsibility. Concerning the material element, only acts involving the use of armed force by States amount to aggression and give rise to state and individual criminal responsibility under international law. Accordingly, aggression is characterized by a complete overlap between aggravated state responsibility and individual criminal responsibility as far as the material element is concerned. The same is true with respect to the subjective element. Namely, the crime of aggression entails both the responsibility of the author State, and the individual criminal responsibility of the political and military leaders of the State who have planned, prepared, initiated, or waged a war of aggression.\textsuperscript{211} Indeed, under international criminal law only political and military leaders can be held accountable for this crime. International practice reveals a conception of aggression, which is strictly defined in terms of State action. The \textit{Nu\ss}emberg judgment held that possible perpetrators of crimes against peace were members of a government, persons having high-level posts in the military, diplomats, politicians and industrialists. International criminal law has not departed from this principle, and today aggression is commonly regarded as a ‘leadership crime’.\textsuperscript{212}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{207} Resolution F of the Final Act of the Rome Conference, <untreaty.un.org/cod/icc/index.html>.
\item \textsuperscript{208} For the final proposal, see UN Doc. PCNICC72002/2/Add.2, <untreaty.un.org/cod/icc/index.html>.
\item \textsuperscript{211} Bonafè, B. I., \textit{supra} note 9, p. 27.
\item \textsuperscript{212} Domestic criminal courts have underscored this specific feature of the crime of aggression (\textit{see}, for example, Audiencia Nacional, \textit{Scilingo} case, \textit{Sentencia por crímenes contra la humanidad en el caso Adolfo Scilingo}, 19 April 2005, <www.derechos.org>). On the other hand, this nature of the crime of aggression has been codified by the ILC in Article 16 of the Draft Code of Crimes. According to the ILC commentary, “the perpetrators of an act of aggression are to be found only in the categories of individuals who have the necessary authority or power to be in a position potentially to play a decisive role in committing aggression” (ILC Report on the Work of its 48th Session, 65)}
Only decision-makers can be held accountable; all other participants are excused. The individuals who can be held accountable are those who represent the State. State leaders are responsible for deciding state policy, and they can entirely possess the required *mens rea*. Therefore, they are the only ones who can properly bear the responsibility on behalf of the State, even if they have not committed any atrocity with their own hands. By contrast, it is *a priori* excluded that executioners in the broad sense possess the requisite *mens rea* and the defence of obedience to superior orders is consequently available to all of them. It is the fact that aggression can only be committed by the State apparatus which justifies such a different conclusion.

It is noteworthy that participation in *any* unlawful use of force by a State does not constitute the crime of aggression by an individual. In the line with customary international law, it is only a "war of aggression" which constitutes the crime of aggression in international law. The consequence of this is that there may be a violation by a State of an international law rule against the use of force which does not give rise to individual criminal responsibility for the crime of aggression.\(^{213}\) It must be asserted that war is not *any* unlawful use of force by a State. Had the ICC been given jurisdiction over individual participation in *any* unlawful use of force by a State, such would lead to the situation that whenever a State had a dispute with another State which included use of force by the latter, the former would be able to refer the situation to the ICC, alleging participation by individuals. If the provisions on aggression would allow a State to refer *any* allegation of unlawful use of force by another State to the ICC, the Court would be burdened by highly political questions, involving complicated determinations of State responsibility. This could create in effect an inter-state court out of a court that has been agreed to exercise jurisdiction only over individuals.\(^{214}\)

War crimes

---

\(^{213}\) Wilmshurst, E., *supra* note 170, p. 95.

\(^{214}\) *Ibidem*, p. 96.
A dual responsibility for war crimes is well established under international law.\textsuperscript{215} While the 1949 Geneva Conventions and the 1977 Protocols explicitly provide for the punishment of persons committing ‘grave breaches’, state responsibility for the same war crimes was regarded as corresponding to customary international law. Due to the ‘intransgressible’ character of the basic rules of IHL,\textsuperscript{216} their violation is viewed as entailing an aggravated state responsibility.\textsuperscript{217} In particular, aggravated state responsibility was derived from the conduct of State organs committing such crimes as well as from the violation of specific obligations by States concerning the punishment of perpetrators.

However, the overlap between state and individual criminal responsibility for the breach of such obligations is not complete as it varies with respect to the subjective and material elements of war crimes. Concerning the material element, the overlap between these regimes is limited to customary offences entailing individual criminal responsibility.\textsuperscript{218} In respect of the subjective element, war crimes can be committed by both private individuals and State organs, thus the overlap between state and individual criminal responsibility is limited to war crimes committed by State organs.\textsuperscript{219} War crimes committed by private individuals only entail individual criminal responsibility and do not lead to an overlap between state and individual criminal responsibility. Furthermore, war crimes not amounting to ‘grave breaches’ of the Geneva Conventions will only entail state responsibility; thus there will be no overlap between state and individual criminal responsibility under customary international law.

Crimes against Humanity

Crimes against humanity also give rise to a dual responsibility under international law. The universal recognition of the need to protect human rights at the international level has led to the

\textsuperscript{215} In particular, aggravated state responsibility is explicitly recognized under the 1977 Protocol I (see Article 89). See, in general, Lauterpacht, H., \textit{The Law of Nations and the Punishment of War Crimes}, 21 \textit{BYIL}, 1944, p. 65.
\textsuperscript{217} ILC Report on State Responsibility, Commentary on Article 40, p. 113, para. 5.
\textsuperscript{218} Prosecutor v. Tadić, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 94–99.
\textsuperscript{219} Over the last few decades the scope of the breaches considered to be war crimes has evolved, and therefore the violations entailing individual and state responsibility under international law have widened, particularly as regards the criminalization of war crimes committed in internal armed conflicts. This reduces the overlap between state and individual criminal responsibility even more for war crimes committed by armed opposition groups. See, in general, Zegveld, L., \textit{The Accountability of Armed Opposition Groups in International Law}, Cambridge, Cambridge University Press, 2002.
agreement of the international community with respect to the *erga omnes* nature of the most fundamental human rights and, accordingly, to the affirmation of international rules on the aggravated regime of state responsibility – and on the criminal responsibility applicable to individuals – in the case of their violation.\(^{220}\) This is confirmed in national and international case law and in various international documents embodying rules of customary law.\(^{221}\) Aggravated state responsibility for crimes against humanity has been recognized by the ILC with respect to both ‘old’ Article 19\(^{222}\) and ‘new’ Article 40.\(^{223}\) The overlap between state and individual criminal responsibility is limited to offences constituting crimes against humanity and entailing individual criminal responsibility under customary law when such crimes are committed by State organs.

**Genocide**

Genocide is now included as an independent international crime in the most important documents of the last decade, such as the ICTY Statute, the ICTR Statute, the Draft Code of Crimes and the Rome Statute.\(^{224}\) International case law confirms that both States and individuals can be held responsible for genocide. With respect to genocide, the overlap between state and individual criminal responsibility is limited to criminal acts (corresponding to definition of the crime of genocide, provided for under the Genocide convention) perpetrated by State organs. If genocide is committed by private individuals, no overlap between state and individual criminal responsibility occurs.

**Torture**

Torture has emerged as autonomous international crime giving rise to a dual responsibility under customary international law.\(^{225}\) With respect to the autonomous crime of torture, the expression

---


\(^{221}\) Individual criminal responsibility for crimes against humanity is provided for under Article 18 of the Draft Code of Crimes (ILC Report on the Work of its 48th Session, p. 49), Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, and Article 7 of the ICC Statute (<www.icc-cpi.int>).

\(^{222}\) ILC Report on the Work of its 28th Session, para. 70.


\(^{224}\) These are Article 4 of the ICTY Statute, Article 2 of the ICTR Statute, Article 17 of the Draft Code of Crimes, and Article 6 of the ICC Statute (<www.icc-cpi.int>).

‘official torture’ is generally used to distinguish this autonomous crime from torture as one of the offences regarded as a crime against humanity, and despite the fact that official torture gives rise to a separate claim, it continues to be considered a crime against humanity. Admittedly, international practice concerning official torture is not abundant, but international scholarship and jurisprudence seem to agree that two different crimes, with different definitions and requirements, now co-exist in international criminal law. The definition of the crime of torture provided for under the Torture Convention and corresponding to customary international law, makes it much easier to identify the overlap between state and individual criminal responsibility. With respect to torture, there is an overlap from the viewpoint of the subjective element, as the definition of ‘official torture’ establishes that only State organs can commit such a crime. But the overlap is limited from the viewpoint of the material element, as aggravated state responsibility is established only if the act of official torture reaches a certain degree of seriousness.

To conclude, it is nevertheless clear that the relationship between state responsibility and individual criminal responsibility differs according to the crime and the context in which it is committed. It is clear that concurrence is possible only in situations where the prerequisite _ratione personae_ and the prerequisite _ratione materiae_ are met. The former is met where wrongful act is committed by a person, whose conduct can be attributed to the State. In cases of perpetrators of core international crimes the circle of potential perpetrators is limited to State and military leaders, whose conduct shapes the final aspects of mutual relation between both responsibility regimes. Concurrence between state and individual criminal responsibility in a proper sense of the word is meaningful only where identical duties are prescribed for a State and an individual by international law (_prerequisite _ratione materiae_).

---


227 Gattini, A., _supra_ note 144, p. 123.
2.4. The Dualistic Model as Prevailing Approach

Examination of various approaches towards the relationship between state and individual criminal responsibility shows that the dualistic model represents a prevailing opinion on a parallel existence of state and individual criminal responsibility in international law. Both regimes of international responsibility are embraced as separate regimes which complement (and not exclude) one another.\(^{228}\) When compared to the monistic model, the dualistic approach is based on exactly antipodal presumptions: a legal personality of an individual is taken as self-evident,\(^{229}\) activity of international tribunals is not construed as a sanction against a State and, finally, punishment of an individual is not taken as part of secondary obligations of a State.\(^{230}\) Although a common goal is usually highlighted (i.e., a suppression of international criminality), it is clear that both responsibility regimes are based on different material and procedural rules,\(^{231}\) which reveal their dissimilarity – whereas state responsibility holds its reparative nature,\(^{232}\) individual criminal responsibility has a typically criminal character with *mens rea* as a cornerstone of the whole discipline. Individual criminal responsibility is responsibility for international crimes, whereas state responsibility pertains to internationally wrongful acts.

Despite various distinctions between both responsibility regimes, the protagonists of dualism admit that “some degree of overlap may occur.”\(^{233}\) The dualistic approach nevertheless rejects the opinion that a determination on state responsibility is formally dependent on a previous conclusion about criminal responsibility of an individual. A previous criminal decision can be used for evidentiary purposes, but it cannot in any way predetermine the outcome of inter-state proceedings.\(^{234}\) Namely, the foundation of a State conduct rests in behaviour of individuals acting as State agents, but it can not act as a factor of *de jure* subordination between both regimes – here, State organ conduct has relevance only for the fulfilment of the objective and subjective elements within the state responsibility for wrongful act, but has no connotation as far

---

\(^{228}\) Trindade, A. A. C., *supra* note 10, p. 255.


\(^{230}\) According to Zimmermann, duty to punish perpetrators of crimes under international law is part of primary norms, compare Zimmermann, A., *supra* note 165, pp. 304-5.

\(^{231}\) Dupuy, P. M., *supra* note 10, p. 1094.

\(^{232}\) The idea of punitive dimension of state responsibility was persuasively rejected both in theory and practice. Pellet, A., *supra* note 29, p. 4. Compare Genocide case, para. 178.

\(^{233}\) Bianchi, A., *supra* note 147, p. 18.

as criminal guilt and individual criminal punishment are concerned. Accordingly, both responsibility regimes are independent, separate and do not influence conclusions adopted in the other area of international law.\textsuperscript{235}

2.4.1. Dual attribution

The dual nature of the regime of international responsibility is now established as a general rule.\textsuperscript{236} It is generally accepted that international crimes give rise to dual responsibility, of the State as well as of the individual.\textsuperscript{237}

Some scholars argue that state responsibility neither depends on nor implies the legal responsibility of individuals. They contend that the traditional notion of indivisibility between individual and State action has gradually evolved into a regime of parallel responsibility for individuals and States. For example, Nollkaemper argues that only “a limited number of acts can lead both to state responsibility and individual responsibility,” including “planning, preparing or ordering wars of aggression\textsuperscript{238}, genocide\textsuperscript{239}, crimes against humanity\textsuperscript{240}, killings of protected persons in armed conflict\textsuperscript{241}, terrorism\textsuperscript{242}, and torture\textsuperscript{243}.”\textsuperscript{244} These acts can be attributed twice: both to the State and the individual.

\textsuperscript{235} Nollkaemper, A., \textit{supra} note 5, p. 628.
\textsuperscript{237} This is evident, \textit{inter alia}, in the grave breaches provisions of the Geneva Conventions, where it is stated that the fact that a grave breach has been committed by a state organ does not exonerate the respective state from responsibility for the said crime. Thus, no form of responsibility absorbs the other, and the duality of responsibilities is maintained.
\textsuperscript{238} See \textit{supra} notes 197-206.
\textsuperscript{239} Convention on the Prevention and Punishment of the Crime of Genocide, UNTS, vol 78, No 1021 (1951) 277; Article 7(2) ICTY Statute, 32 IML (1993) 1192; Article 6 (2) ICTR Statute 33 ILM (1994) 1602; Article 27 ICC Statute.
\textsuperscript{240} For individual criminal responsibility, see Article 7 of ICC Statute. State responsibility for the crimes against humanity is expressly recognized for the crime of apartheid: see International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 (Article 1 and 2). Furthermore, acts for which individuals could be charged with crimes against humanity could be considered in any case in terms of state responsibility for (gross) violations of human rights.
\textsuperscript{241} Such acts can be qualified as grave breaches under Article 146 Geneva Convention [IV]. Also, such acts could be considered as breaches of the prohibition of states to murder protected persons under Article 32 of the same Convention.
\textsuperscript{243} See \textit{supra} note 225 \textit{et seq}.
\textsuperscript{244} Nollkaemper, A., \textit{supra} note 5, pp. 615, 622.
Current international law is called upon to solve “special unlawful situation” where identical conduct activates parallel legal consequences both in the province of state and individual criminal responsibility. If an individual acting as a State organ, whose conduct is therefore fully attributable to his home-State, perpetrates an international crime, his unlawful performance gives rise not only to his own individual criminal responsibility, but initiates as well state responsibility for serious violation of peremptory norms of international law. Such is evidenced by concurrent legal proceedings before inter-state court (International Court of Justice – ICJ) and criminal tribunal (International Criminal Tribunal for the Former Yugoslavia – ICTY) which pertain to identical factual situation – genocide in Srebrenica. Notably, in its judgment in the Genocide case the ICJ adopted the concurrent approach to responsibility, observing that the duality of responsibility continues to be a constant feature of international law.\(^{245}\) It should be emphasized that the concurrence of the two responsibility regimes does not mean that state responsibility is criminal in nature. This possibility was decisively rejected by the ICJ in the Genocide case.\(^{246}\)

Notwithstanding their distinct historical origins, the concepts of individual and state responsibility are closely intertwined as a legal and practical matter. Most significantly, under the accepted doctrine of state responsibility, conduct attributable to any State organ can generate international responsibility of the State.\(^{247}\) This is true even in cases in which the official has overstepped his authority and acted without the support of higher ranks in the State bureaucracy.\(^{248}\) Thus, in addition to the individual criminal responsibility, the very commission of an international crime by a State official automatically generates legal responsibility for the State.\(^{249}\) Moreover, a number of international instruments prescribing international crimes – including the Geneva Conventions, the Torture Convention and the Genocide Convention – require States to prevent and punish crimes committed by individuals situated within its territory, even if they constitute crimes against humanity.

---

245 Genocide case, para. 173.
246 Ibidem, para. 170: ‘the Applicant accepts that general international law does not recognize the criminal responsibility of States’.
247 Article 4 ARSIWA.
248 ILC Report on State Responsibility, Commentary on Article 58, para. 3.
249 Nollkaemper, A., supra note 5, p. 619.
including its own State officials. Failure to address international crimes and punish their perpetrators may therefore constitute an independent basis for designating state responsibility.

General acceptance of dual responsibility is evident, inter alia, in the law on war crimes. Article 29 Geneva Convention [IV] provides that: ‘The party to the conflict, in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred’. Thus, the grave breaches provisions of the Geneva Conventions specify that the fact that a grave breach has been committed by a State organ does not exonerate the respective State from responsibility for the said crime. Accordingly, no form of responsibility absorbs the other, and the duality of responsibilities is maintained. This duality may be caused by the violation by an act of one single norm generating both State and individual criminal responsibility, or by the breach of two separate rules addressing the State and the individual respectively.

The Charter of the Nüremberg Tribunal and the ILC Draft Code of Crimes expressly allowed for the punishment of individuals for acts of State, which means ‘acts committed on behalf of the State or in their capacity as members of the government, State administration or high command of the armed forces’. The act of the individual derived its unlawful character from the unlawfulness of the State act. Both in its work on the Draft Code of Crimes and on State Responsibility, the ILC has taken the position that responsibility of individual State organs does not exclude state responsibility. In its commentary to former Article 19, the ILC said that individual criminal responsibility ‘certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs’ and that ‘the State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime’. It also stated that ‘the criminal

---

250 See e.g., Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 75 UNTS 287; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 7, U.N. Doc. A/39/51 (1984); Genocide Convention, Art. VI.
responsibility of individuals does not eliminate the international responsibility of States for the acts committed by persons acting as organs or agents of the State.\textsuperscript{254}

Furthermore, state practice leaves room for a proposition that, in cases where responsibility has been allocated to an individual, there can be attribution to the State as well. After the Second World War, both Germany and Japan were declared liable, even though the political and military leaders were prosecuted for individual crimes.\textsuperscript{255} The fact that four individuals, who were assumed to be agents of Libya, were held responsible for bomb attacks in a bar in Berlin in 1986\textsuperscript{256} did not discourage the suggestion that Germany should claim compensation from the State of Libya. The prosecution and conviction of the individuals responsible for the Lockerbie bombing, considered to be an agent of Libya,\textsuperscript{257} did not preclude subsequent claims against Libya for compensation by the United Kingdom and the United States.\textsuperscript{258} The effectuation of responsibility of individual agents of Yugoslavia for acts during the armed conflict between 1992 and 1995 in the ICTY and national courts did not preclude claims by BiH and Croatia in the ICJ.

Other authorities have recognized the non-exclusive nature of individual and state responsibility. The ICTY Trial Chamber in the \textit{Furundžija} case laid down a general theory of responsibility for the crime of torture.\textsuperscript{259} In support of the existence of dual state-individual responsibility for the crime of torture, the Chamber held that “under current international humanitarian law, in addition to individual criminal responsibility, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or punish torturers.”\textsuperscript{260} When carried out on an extensive scale, torture may constitute a particularly grave wrongful act generating state

\begin{footnotesize}
\begin{enumerate}
\item Dupuy, P. M., \textit{supra} note 10, p. 1086.
\item In November 2001 a German court convicted four individuals, see <http://www.labelle-trial.de/mainmid/verdict_main_en.htm. The German court was 'convicted that the Libyan state bears a considerable co-responsibility at least' for the bomb attack, as 'agents of the Libyan secret service played a leader role in planning it'.
\item The Scottish High Court in the Netherlands acquitted one suspect and convicted Abdel Basset al-Megrahi. The Scottish High Court of Justiciary at Camp Zeist (The Netherlands), Her Majesty’s Advocate v Al Megrahi (31 January 2001), 40 ILM 582. The conviction was confirmed on appeal on 14 March 2002.
\item After the conviction of Abdel Basset al-Megrahi, who was said to be a member of the Libyan secret service, the United States and the United Kingdom made renewed calls on Libya to provide compensation. See \textit{The Guardian} (London), 15 March 2002, p. 4.
\item \textit{The Prosecutor v. Furundžija}, ICTY Trial Chamber Judgment of 10 December 1998, IT-95/17/1 (hereinafter: \textit{Furundžija} Trial Judgment), para. 142.
\item \textit{Ibidem}.
\end{enumerate}
\end{footnotesize}
responsibility. This passage is quite illustrative of the way in which the ICTY looks at responsibility for the crime of torture. Emphasis is placed on the ‘importance of outlawing this heinous phenomenon’ and state and individual criminal responsibility are complementary instruments to suppress torture. Along similar lines, under human rights law, although international responsibility is primarily focused on States, States are under obligation to punish torture as a criminal offence under domestic law and to exercise their jurisdiction to investigate, prosecute, and punish offenders.

Furthermore, in its judgment on Preliminary Objections in the Genocide case, the ICJ said with respect to Article IX of the Genocide Convention:

The reference in Article IX to the responsibility of a State for genocide or for any other acts enumerated in Article III does not exclude any form of State responsibility. Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by ‘rulers’, or ‘public officials’.

2.4.2. Complementarity (and coexistence) between State Responsibility and Individual Criminal Responsibility

According to proponents of dualism, state responsibility and individual criminal responsibility are not mutually exclusive, but rather complement each other. This is so because a State agent operates on behalf of the State, and both the State and its agent answer for the acts or omissions imputable to both respectively. The international criminal responsibility of the individual does not exempt that of the State; the two co-exist, an acknowledgment of this being of crucial importance to the eradication of impunity. Both the State and its agents are the direct addressees of norms of contemporary international law; the conduct of both is foreseen and regulated by it. Thus, both the State and its agents ought to be accountable for the consequences of their acts and omissions.

While an international tribunal on human rights (such as the European and Inter-American Courts, and, in the future, the African Court) or an inter-state court (ICJ) cannot determine the international criminal responsibility of the individual, and an international criminal tribunal

---

261 Ibidem.
262 Ibidem, para. 146.
263 Ibidem, para 145.
264 Genocide case, Preliminary Objections, para 32.
ICTY, ICTR, ICC) cannot determine the responsibility of the State, impunity is most likely bound to persist, being only partially sanctioned by one and the other. Yet, there does not appear to be any juridical impediment for the associated determination of the international responsibility of the State and the international criminal responsibility of the individual, despite the insufficient development of the matter, reflected in the persistent compartmentalized approach to these two regimes of international responsibility.\footnote{Trindade, A. A. C., supra note 10, p. 258.}

The State, as a juridical person and an international legal subject, has rights and duties under international law; its conduct is directly and effectively foreseen by the law of nations (droit des gens).\footnote{Trindade, A. A. C., The Construction of a Humanized International Law, A Collection of Individual Opinions Crime of State and Aggravated International Responsibility (1991 – 2013), p. 587.} Thus, both the State and its agents ought to be accountable for the consequences of their acts and omissions. The determination of the individual criminal responsibility is not, thus, sufficient, as the State, in whose name its agents committed a crime, contributed itself, as a juridical person of international law, to the perpetration or occurrence of such a crime. At a conceptual level, it is surely difficult not to admit the occurrence of a crime of State in general international law, above all insofar as there is intention (fault or guilt), or tolerance, acquiescence\footnote{Acquiescence means tacit consent. See Muller Cottier, J.P., Acquiescence, in Bernhardt, R. (ed), Encyclopaedia of Public International Law, Vol. I, Amsterdam, 1992, pp. 14–16. In the Gulf of Maine case, the ICJ defined acquiescence as being ‘equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent.’ See the Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) (Judgment) (1984) ICJ Report 246, para. 130.}, negligence, or omission, on the part of the State in relation to grave violations of human rights and of international humanitarian law perpetrated by its agents, in pursuance of a state policy. In such circumstances, societas delinquere potest.\footnote{Trindade, A.A.C., supra note 266, p. 589.} The juridical personality of a collective entity (such as the State) is a legal construction, and constitutes a unit of imputation of its conducts, undertaken by the individuals who compose this collective entity and act on its behalf; thus, both the juridical persons as well as those individuals ought to be accountable for the consequences of their acts or omissions, particularly when they bring about grave violations of human rights and humanitarian law.\footnote{Ibidem.}

Article 40 ARSIWA characterizes aggravated responsibility by the fact that it flows from ‘a serious breach by a State of an obligation arising under a peremptory norm of general

\footnote{Trindade, A. A. C., supra note 10, p. 258.}
international law. The underlying characteristic will be that the acts that led to the breach of international law were part of a systemic policy of the State. A majority of cases in which the international community is concerned with individual criminal responsibility will be part of a systemic policy of the State. Crawford noted that ‘it is a characteristic of the worst crimes of the period since 1930 that they have been committed within and with the assistance of State structures’. In the cases of Germany and Japan after the Second World War, Cambodia after the Khmer Rouge regime, and Yugoslavia after the armed conflict in 1991-1995, the individual transgressions of international law could not be separated from the acts of the State. In particular, in cases of aggression, genocide and crimes against humanity, it will mostly be impossible to separate the individual from the State. Nollkaemper notes that in certain cases it may be more important for the enforcement of ‘the provisions of international law’ to address States, rather than to confine legal responses to single individuals who carry out a state policy.

The practice of holding State officials criminally responsible under international law has largely developed in reaction to frustration with the practical difficulties in holding States responsible for violating their international obligations and with the limited deterrence that the law on state responsibility seems to have generated. Indeed, States, being, as the Nüremberg tribunal observed, mere “abstract entities”, may be less amenable to pressure and punishment than individual leaders, who may fear trial and imprisonment. Thus, efforts to increase the compliance-pull of international norms may support the move towards imposing legal responsibility not only on international law-violating States, but also on those individual leaders who played a key role in orchestrating or executing such violations. According to this line of thought, individual criminal responsibility complements state responsibility and compensates for

---

270 Article 40 (1) ARSIWA.
272 Definition of ‘crimes against humanity’ in Article 7 ICC Statute.
274 Nollkaemper, A., supra note 5, p. 625.
275 The Trial Of German Major War Criminals Judgment of the International Military Tribunal of September 30 - October 1, 1946, at 41 (hereinafter ‘Nüremberg Judgment’).
276 Lauterpacht, H., supra note 215, p. 40 (“unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one”).
277 Franck, T. M., The Power of Legitimacy Among Nations, 1990, p. 28 (“Different rules of the international community appear to have different strength to exert compliance-pull”).
its shortcoming in preventing and punishing violations of international law.\textsuperscript{278} At the same time, state responsibility may address some of the structural limits of individual criminal responsibility, such as the lack of a comprehensive victim compensation scheme, and the inability to prosecute all responsible individuals.\textsuperscript{279} This complementary view of individual and state responsibility has been expressed by the ICJ. For example, in the \textit{Bosnian Genocide} case Judge Tomka sounded an optimistic note about the complementary relationship between his court and the ICTY:

\begin{quote}
“The activity of the Court has thus complemented the judicial activity of the ICTY in fulfilling the Court’s role in the field of State responsibility for genocide, over which the ICTY has no jurisdiction. Hopefully, the activities of these two judicial institutions of the United Nations, the Court remaining the principal judicial organ of the Organization, contribute in their respective fields to their common objective – the achievement of international justice – however imperfect it may be perceived.”\textsuperscript{280}
\end{quote}

There is, however, another possible explanation for the move from state to individual criminal responsibility. The growing emphasis on individual criminal responsibility in international law may derive from the increased aversion of States to applying collective forms of legal responsibility.\textsuperscript{281} In an age of human rights, where international law is increasingly viewed as a vehicle for enhancing individual welfare, imposing sanctions on State may be regarded as a crude form of collective punishment of a particularly large magnitude – punishing millions of

\textsuperscript{278} For an economic analysis of incentives created by international criminal law, see Posner, E. A., and Sykes, A. O., \textit{An Economic Analysis of State and Individual Responsibility Under International Law}, 9 \textit{Am. L. & Econ. Rev.} (2007) 72, 75 (“citizens should be personally responsible under international law for harms they cause to other states only if the combination of state responsibility with the available remedies under domestic law is inadequate to produce proper deterrence of harmful acts”). See also \textit{Furundžija} Trial Judgment, para. 142 (state responsibility may ensue “in addition to individual criminal liability”); Trindade, A. A. C., \textit{supra} note 10, pp. 253, 260 (individual and state responsibility “appear complementary to each other”).

\textsuperscript{279} For example, the UN Compensation Commission, established in the aftermath of the 1990-1991 Gulf War, channelled almost 30 billion U.S. dollars paid in reparations by Iraq to its war-related victims. http://www.uncc.ch/status.htm. The recourse to a monetary compensation scheme may have been dictated in part by the inability of putting Saddam Hussein on trial. Murphy, J., \textit{supra} note 31, pp. 1, 48; Libera, R. E., \textit{Divide, Conquer, and Pay: Civil Compensation for Wartime Damages}, 24 International and Comparative Law Review, 2001, 291, pp. 309-310.


citizens whose involvement in the unlawful state policies may have been marginal at best.\footnote{282} Imposing individual criminal responsibility, which focuses attention and retribution on those having the “greatest responsibility” for the violation,\footnote{283} could thus be viewed as preferable from a normative perspective. Thus, according to this view, individual criminal responsibility should eventually displace state responsibility.\footnote{284}

There is a definite link between state responsibility and individual criminal responsibility in terms of certain of the criteria used to determine which acts are criminal. Indeed, it could be argued that all acts which constitute international crimes may in principle entail individual or state responsibility, or both, depending on the nature and circumstances of the breach, and that the two notions can complement each other. As Jennings and Watts have pointed out, although the Draft Code of Crimes is related to the international criminal responsibility of individuals rather than of States, ‘a number of the particular acts giving rise to such international criminal responsibility are likely by their nature be as much, if not more, State acts as acts committed by individuals in their private capacity’.\footnote{285} In the report prepared for the ILC it is stated:

Under the Draft Articles, states as juridical entities may incur responsibility if they breach fundamental rules of conduct securing a civilized state of affairs in international relations. Additionally, for the same acts, those who hold leadership positions in the governmental machinery of such states may be made accountable in their individual capacity….There is no denying the fact that rules imposing obligations upon states must be framed differently from rules that address individuals. Notwithstanding this technical difference the substantive background is the same. In both instances, the foundations of the international community are at stake.\footnote{286}


\footnote{283} UN SC Resolution 1315 [on the Situation in Sierra Leone], UN Doc. S/RES/1315 (2000) adopted by the SC at its 4186th meeting, on 14 August 2000, 248, at para. 3 (“the special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2”).

\footnote{284} \textit{Genocide} case, Joint declaration of Judges Shi and Judge Vereshchetin, ICJ Report 1996 ICJ, p. 631 (in light of the availability of individual criminal responsibility proceedings, “it might be argued that this Court is perhaps not the proper venue for adjudication of the complaints which the Applicant has raised”).


The State as such is inevitably involved in any crime against peace and security of mankind, either directly as the active and, in some cases, the sole agent, or indirectly because of its failure to act or its own improvidence.\textsuperscript{287}

3. Conclusion

The review of relevant literature reveals a scholarly consensus regarding the main characteristics of the relationship between state and individual criminal responsibility, namely, the dual attribution and complementarity. There are certain acts that may be attributable to both States and individuals, and thus entail dual responsibility under international law.\textsuperscript{288} Complementarity entails that individual and state responsibility for serious breaches of the most fundamental norms of international law are viewed as complementary regimes and the emphasis is generally on the fact that individual criminal responsibility cannot exhaust state responsibility for the same serious wrongful acts.\textsuperscript{289}

Any approach which purports to apply a single model of connection between state and individual criminal responsibility broadly to all categories of crimes is bound to fail. International crimes differ with regard to the role of the State in their commission. It follows that a distinction must be made between those international crimes whose nature implies a direct involvement of a State apparatus, or at least a collective organization, and those crimes which, while being directly related to actions of the State, are liable autonomously to be imputed to an individual. It is generally accepted that aggression, genocide, and most cases of crimes against humanity belong to the former category, while war crimes belong to the latter.\textsuperscript{290}

Concurrence between state and individual criminal responsibility was discussed by the ILC during its codification work on state responsibility for internationally wrongful acts and individual criminal responsibility for crimes against the peace and security of mankind. Both


\textsuperscript{289} \textit{Ibidem}.

\textsuperscript{290} Dupuy, P. M., \textit{supra} note 10, p. 1088.
documents, ARSIWA (2001) and the Draft Code of Crimes (1996), contain a provision expressly defining their scope which differentiates them from responsibility rules applicable towards an individual or a State, respectively. In particular, Article 58 ARSIWA (without prejudice clause) states that “these articles are without prejudice to any question of the individual criminal responsibility under international law of any person acting on behalf of a State.” The identical wording is used in the Draft Code of Crimes: its Article 4 provides that “the fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.” Commentaries of both codifications reveal that the ILC highlighted the non-exclusive character of state and individual criminal responsibility (without prejudice clause)\textsuperscript{291} and the principal distinction existing between them.\textsuperscript{292} While concurrence between state and individual criminal responsibility is claimed by the ILC as a matter of fact, there is no detailed analysis of the mutual relationship between both regimes anywhere in the aforesaid codifications. Whereas points of contact between both regimes were explored by the ILC, the relationship between state and individual criminal responsibility is nevertheless characterized by separateness. That is, the ILC rejected any conceptual links between state and individual criminal responsibility and emphasized their dissimilarity.

It is undisputed that the Articles on state responsibility are one of the most important and elaborate projects of codification and progressive development of international law.\textsuperscript{293} Nevertheless, important developments of individual criminal responsibility for international crimes were not taken into account by the drafters other than by a mere insertion of the ‘without prejudice’ clause. While a clear separation of state and individual criminal responsibility would be but artificial, it cannot be overlooked that the group of most prominent international law scholars could not agree on including the notion of parallel responsibility for States and individuals in the most recent restatements of international law in the relevant field. Regrettably, the ILC did not analyse the mutual relation between state and individual criminal responsibility regimes in more detail, and was satisfied with a mere superficial enunciation of their simultaneous existence.

\textsuperscript{292} YILC 2001, Vol. 2, Part Two, p. 142, para. 3.
\textsuperscript{293} Crawford, J., \textit{supra} note 58.
General statements on the difference and separateness of state and individual criminal responsibility for international crimes do not provide a clear picture of the relationship between these two regimes. While these statements do not necessarily exclude some kind of relationship between them, they do not reveal which are the characteristics of such a relationship. The approach(es) favouring separateness respond to a concrete need to prosecute those responsible for international crimes and develop a regime of individual criminal responsibility separate and independent from state responsibility. They are essentially focused on the differences between state and individual criminal responsibility for international crimes. Under such approach, it is crucial to dissociate the conduct of the State from that of its organs. While in traditional international law, the establishment of individual criminal responsibility was very rare, the conceptual dissociation of the two regimes of responsibility after the Second World War led to the evolution of a general principle of individual criminal responsibility for breaches of international obligations, whether committed by private individuals or by State organs. Thus, from this perspective, individual criminal responsibility is inevitably distinct from state responsibility. The proponents of this view assume that international crimes of an individual stand on their own and are not necessarily attributable to a State in a manner which would implicate the law on state responsibility. Accordingly, the dissociation approach implies separate responsibility at the international level, meaning that the two regimes of responsibility are separate and mutually independent. In particular, these regimes differ with respect to the subject, which can commit international crimes, the contents of the responsibility implied by the commission of international crimes and the enforcement mechanism, which should guarantee

294 The evolution of Lauterpacht’s position on the subject is well known: in the sixth edition of Oppenheim’s International Law (London, Longmans, 1940), he recognized the existence under customary international law of the principle of individual criminal responsibility. Generally, the debate arising from the affirmation of individual criminal responsibility under international law has focused on whether individuals can be regarded as international subjects (see, in particular, I. Brownlie, Principles of Public International Law, 6th edn, Oxford University Press, 2003, pp. 561–564, and 580–581; Tornaritis, C.G., The Individual as a Subject of International Law and International Criminal Responsibility, in M.C. Bassiouni and V.P. Nanda (eds.), A Treatise on International Criminal Law (Springfield, Thomas, 1973), pp. 103–121.


296 Traditional focus on state responsibility failed to deal directly with those state agents whose acts, omissions and decisions actually shape unlawful state policies (Nuremberg Judgment, p. 41). Piercing the veil of state responsibility renders it more difficult for individuals in positions of authority to act with a sense of impunity and lack of moral blameworthiness. See e.g., Allott, P., supra note 151, pp. 1, 14.

297 Genocide case, Preliminary Objections, p. 595 et seq.

298 Rosenne, S., supra note 78, pp. 65–106.

299 Bassiouni, C., supra note 104, p. 19.
compliance with primary rules. \(^{300}\) Accordingly, the two regimes serve parallel functions within their respective spheres of application and can therefore develop each their own respective rules in perfect independence from each other. \(^{301}\)

As will be illustrated in Part I and Part III, such an extreme approach is not reflected in international practice, which is more complex and pays more attention to the points of contact between the two responsibility regimes. \(^{302}\) On the one hand, international practice shows a certain tendency to keep state responsibility separate from individual criminal responsibility. \(^{303}\) These regimes may well share a common origin, i.e. the breach of obligations owed to the entire international community, nonetheless, they remain two different legal regimes of international responsibility aiming at governing the consequences of distinct types of conduct. In particular, international criminal law only concerns individual conduct, not State conduct. The principle of individual criminal responsibility applies to all individuals, those forming part of State organs as well as private individuals. International case law has made it plain that no state policy need be demonstrated as a condition for holding State organs accountable when they commit international crimes. To be convicted, every defendant must have had a certain mens rea, and this element can never be presumed, not even with respect to high ranking individuals forming part of State organs. On the other hand, international practice reveals that there are various points of contact between the two regimes which can hardly be eliminated. As will be argued in Part II, the manner in which international criminal tribunals establish the material element of international crimes is very similar to the manner in which the State act amounting to an internationally wrongful act is demonstrated. The general context of a violation serves a fundamental role in proving that material element. Furthermore, particular modes of liability have been elaborated to address the collective dimension of international crimes more efficiently (i.e. JCE, superior responsibility). The more international criminal law focuses on and develops tools to deal with collective criminality, the more the assessment of individuals’ crimes reveals traits of overlap with the assessment of States’ violations. At a minimum, it deals with the same

\(^{300}\) Gaeta, P., supra note 173, p. 643. For a similar view expressed in more general terms, see Dupuy, P. M., supra note 10, pp. 1085–1099; Cassese, A., supra note 158, pp. 271–272.

\(^{301}\) Ibidem.

\(^{302}\) Bonafè, B. I., supra note 9, p. 67.

\(^{303}\) Ibidem, p. 221.
facts that are capable of invoking state responsibility.\textsuperscript{304} This dissertation argues that these common denominators make it hard to simply dissociate state responsibility and individual criminal responsibility for international crimes.

Part I has identified the traditional dualistic approach as the prevailing doctrinal approach to the relationship between state and individual criminal responsibility for international crimes, which accepts certain overlap between both responsibility regimes, but at the same time rejects the idea of formalized mutual dependency. Accordingly, the prevailing dualistic approach accepts a connection between a system based on state responsibility and a system based on individual criminal responsibility and acknowledges the double attribution and complementarity as the main characteristics of this relationship. Recognizing there is no hierarchical relationship between different international jurisdictions,\textsuperscript{305} a concurrent jurisdiction over the same set of facts may be exercised by different international courts and tribunals. The finding of individual criminal responsibility before an international criminal tribunal or court is not a legally compelling argument for establishing state responsibility before another international tribunal. Nor can it relieve the State of its own autonomous responsibility under international law.\textsuperscript{306} However, proceedings before international criminal tribunals may occasionally be used as evidence in inter-state proceedings. For instance, many of the allegations before the ICJ in the \textit{Genocide} case had previously ‘been the subject of the processes and decisions of the ICTY.’\textsuperscript{307} The Court made a careful use of such materials distinguishing their evidentiary value on the basis of strict criteria.\textsuperscript{308}

The dualistic approach suggests these two regimes of responsibility should not exclude each other, but, on the contrary, being inevitably intertwined, they appear complementary to each other.\textsuperscript{309} In certain cases the circle of potential perpetrators of international crimes is inevitably

\textsuperscript{304} See, e.g. \textit{Genocide} case, para. 403 (the ICJ asserted that ‘the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it, and […] takes fullest account on the ICTY’s trial and appellate judgments dealing with the events underlying the dispute’).

\textsuperscript{305} Bianchi, A., \textit{supra} note 147, p. 23.

\textsuperscript{306} The idea that international law can be developed by having a ‘small band of unfortunate factotums’ punished by international criminal tribunals rather than by preventing the state policies which may lead to lawless behaviour is heavily criticized by Jennings, R., \textit{The Pinochet Extradition Case in the English Courts}, in L. Boisson de Chazournes and V. Gowlland-Debbas (eds), \textit{The International Legal System in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab}, The Hague, Martinus Nijhoff, 2001, p. 693.

\textsuperscript{307} \textit{Genocide} case, paras. 202-230.

\textsuperscript{308} \textit{Ibidem}.

\textsuperscript{309} Trindade, A. A. C., \textit{supra} note 10, p. 260.
limited to political and military leaders, as these crimes are always committed by, or on orders from, individuals occupying the highest decision-making positions in the political or military apparatus of the State. In such cases the individual criminal responsibility of the authors of particularly serious violations of international law must be complemented with the responsibility of the State. Moreover, state responsibility should not be considered as precluding individual criminal responsibility of the leaders or organizers of the same crimes. Crimes such as genocide, war crimes, and crimes against humanity can thus be considered as amounting to either “crimes of States” \(^{310}\) or individual crimes or both, depending on the circumstances of the breach.

Attempts to introduce legal accountability in the aftermath of wars and mass atrocities reveal the actual difficulty of drawing clear lines of separation between individual and state responsibility.\(^ {311}\) Such distinctions are especially difficult to make when they implicate the individual criminal responsibility of political and military leaders, whose acts are closely identified with State policies. Part II and Part III aim to demonstrate that in cases of complicity by way of provision of military aid a clear separation of the acts of political and military leaders from the policies of the respective States is but artificial. While distinctions between individual and state responsibility continue to be drawn in these cases (international criminal courts only have jurisdiction over individuals, whereas inter-state courts may only adjudicate state responsibility cases) their legal and moral interconnectedness militates in favour of adopting a more holistic approach towards responsibility management. The succeeding analysis will show that in the "foreign assistance cases" individual criminal responsibility of a political or military leader can not be established in isolation from state responsibility, and accordingly, a determination of individual criminal responsibility necessarily triggers state responsibility.

\(^{310}\) Ibidem.

\(^{311}\) Nollkaemper, A., supra note 5, p. 618; Trindade, A. A. C., supra note 10, p. 260 (individual and state responsibility are “ineluctably intertwined”).
PART II – THE PROVISION OF MILITARY AID AS COMPLICITY IN INTERNATIONAL CRIMINAL LAW

4. Introduction

For the past several years, the US government – alongside other States – has provided assistance, including military aid, military training, and arms, to the Free Syrian Army (FSA) and other rebel groups engaged in conflict with both the Syrian government and, more recently, with extremist rebel groups such as the Islamic State in Iraq and Syria (ISIS).312 During this same period, the world has watched in horror as forces affiliated with the Syrian government have committed widespread atrocities, including torture, extrajudicial killings, attacks on civilians, and the deployment of chemical weapons.313 The crimes of ISIS, moreover, have been headline news for the past two years.314 The US officials involved in providing this assistance were aware that some of the aid—however well intended—will unavoidably find itself directed toward criminal activity. Part II will address the question whether such knowledge is sufficient to hold such officials criminally responsible for aiding and abetting the crimes facilitated by their assistance.

Accordingly, Part II examines individual criminal responsibility for complicity in international crimes on the basis of a two-step analysis. First, a systematic analysis of jurisprudence of


international criminal tribunals and some particularly problematic aspects of the individual complicity will outline a general legal framework of individual criminal responsibility for complicity. Second, this normative framework will be applied on the landmark case of individual complicity by way of provision of military aid, i.e. the Perišić case. The examined case study will argue that the provision of military aid does not *ipso facto* render the political and military leaders of the assisting States individually criminally responsible for aiding and abetting the crimes committed during such armed conflicts, simply because they provided such aid. Furthermore, it will demonstrate that the *ad hoc* tribunals have employed the wrong methodology to identify the putative customary international law of complicity in cases of provision of military aid. Part II argues that for the determination of individual criminal responsibility for complicity it must be shown that one has aided and abetted the commission of *specific crime(s)* during an armed conflict, an act which is distinct, and apart, from the mere provision of military aid. By holding military leaders external to a conflict criminally responsible for aiding and abetting crimes committed by another State’s army or a non-state actor operating in another State, new boundaries are drawn in the international criminal law. Part II proposes the normative boundaries to individual criminal responsibility for complicity that ensure adequate protections against over-criminalization and offers the kind of normative analysis that international tribunals have declined to explicitly undertake.

The question of individual criminal responsibility for extraterritorial provision of military aid has proven particularly challenging in cases of prosecutions of senior political and military officials external to a conflict and thereby remote from the actual perpetration of offences (i.e. the “foreign assistance cases”). This is particularly so in the context of international crimes physically carried out by individuals or groups that are not subordinate to an accused but rather belong to another, independent and separate army of another State to which some form of military aid has been provided. Despite almost twenty years of concerted judicial application of the rules regarding individual criminal responsibility for international crimes, recent decisions by the *ad hoc* tribunals have created uncertainty regarding the law on complicity. This jurisprudence has been fractured in relation to the requirements for individual criminal responsibility in cases of aid or assistance, whereby the “specific direction” element of aiding and abetting as a mode of criminal responsibility proved particularly controversial.
Different international courts have effectively addressed an issue whether military or political leaders may be convicted for knowingly facilitating crimes by foreign armed forces not under their direct control or by armed groups operating in another State. Both the ICTY and the Special Court for Sierra Leone (hereinafter: SCSL) examined this question in the cases of prominent defendants accused of aiding and abetting international crimes – Momčilo Perišić, the former Head of the Yugoslav Army, and Charles Taylor, the former Liberian President. Accordingly, Part II explores the appropriate legal standard to convict a political or military leader who aids or abets international crimes committed by a foreign army or an armed group operating in another State.

These two cases are among the most significant cases in the history of international criminal law not only because they raised novel legal issues, concerned mass atrocities and involved high-profile defendants; these two cases also stand out because both international courts impliedly, and at times overtly, weighted how international relations could be affected by a precedent under which a top State official is convicted for providing military assistance to a foreign armed group responsible for international crimes. Yet, the courts reached vastly different conclusions.

Moreover, the Perišić and Taylor trials were landmark cases not only because of the positions held by the respective accused, but because of the circumstances in which their alleged criminal conduct took place. They each were convicted of crimes outside the borders of their own State, perpetrated by armed groups who were not from their own State and whom they did not command. At the appellate level, the Perišić and Taylor cases came to very different final resolutions; namely, Perišić was acquitted on all charges whereas Taylor’s conviction was upheld. The contrasting results were due to the very divergent interpretations of the parameters of aiding and abetting liability applied in these judgments.

In Perišić, the ICTY Appeals Chamber deemed that a facilitator’s knowledge that the recipients of military aid are perpetrating crimes is essentially irrelevant, absent proof that the facilitator’s

---

315 The Perišić case, see supra note 3.
316 SCSL, Prosecutor v. Taylor, Case No. SCSL-03-1-T (hereinafter; the Taylor case or Taylor).
actions were ‘specifically directed’ to assist crimes — a requirement tantamount to proof that the facilitator knew his acts facilitate the commission of (the) crimes. The aftermath of Perišić reflects continued disagreement on the process by which courts should determine the content of individual criminal responsibility for complicity in “foreign assistance cases”, with the standards of accomplice liability depending very much on which tribunal – and which particular judge – happens to decide the case. Namely, the SCSL held that the controversial Perišić precedent did not comport with customary international law, and therefore affirmed the conviction of Taylor for knowingly assisting atrocities by rebel forces during the Sierra Leone civil war. The SCSL explicitly refused to follow the precedent set by the ICTY Appeals Chamber in Perišić by emphasizing that proof of “specific direction” is not required under customary international law, as it is sufficient that the facilitator provided substantial assistance with the general knowledge that the recipient armed forces were committing crimes. Accordingly, the SCSL affirmed the conviction of Taylor, who had been convicted at trial of aiding and abetting crimes by rebel forces in Sierra Leone’s civil war, which coerced child soldiers and murdered, raped, mutilated, and amputated civilians on a vast scale.

Moreover, since Perišić, two differently composed ICTY Appeals Chambers have twice repudiated the specific direction standard. Specifically, less than a year later the decision in the Prosecutor v. Šainović at al. (known as the Milutinović case) held that the Perišić Appellate judgment deviated from both ICTY jurisprudence and customary international law. The Šainović panel announced that it “unequivocally reject[ed]” the Perišić standard since “specific direction” is not a requisite element of aiding and abetting, thereby siding with the SCSL’s holding in Taylor. Most recently in December 2015, a divided panel reversed the Trial Chamber

318 ICTY, Prosecutor v. Momčilo Perišić, Appeals Judgment of 27 March 2013 (hereinafter: Perišić Appeals Judgment), paras. 73-74 (requiring proof of »acts specifically directed to assist, encourage or lend moral support to [crimes]«).
319 SCSL, Prosecutor v. Taylor, Case No. SCSL-03-1-A, Judgment (Appeals Chamber), 26 September 2013 (hereinafter: Taylor Appeals Judgment), paras. 472-81, 486, 708 (holding that the Perišić Appeals Judgment »omitted any discussion of customary international law« and advanced unreasonable »novel elements in its articulation of specific direction«).
320 Ibidem, paras. 260, 280, 518-21 (discussing the Trial Chamber's findings regarding crimes against civilians and Taylor's role therein).
322 Šainović Appeals Judgment, para. 1650 (»The Appeals Chamber….unequivocally rejects the approach adopted in the Perišić Appeals Judgment as it is in direct and material conflict with the prevailing jurisprudence on the acus reus of aiding and abetting liability and with customary international law in this regard.«).
Judgment in Stanišić that had applied Perišić to acquit two Serbian security officers accused of aiding and abetting crimes committed in Bosnia and Croatia by paramilitary units that the defendants had established, financed, trained, and otherwise supported. With no formal mechanism – such as en banc review – for resolving the split, these judgments have left the ICTY with a conflicted jurisprudence.

The ICC Statute includes a complicity provision (as of yet untested) that appears to enforce a stricter, purpose-based version of complicity that arguably resembles the Perišić approach.

Part II argues in favour of setting a relatively high legal standard to convict a top State official for facilitating atrocities from a remote location, as adjudicated by the appellate decision in Perišić. Accordingly, Part II explores the impact that Perišić might have on international relations if other courts opted to follow this precedent, such as by considering the political repercussions of their decisions. It shall be examined whether requiring additional proof that a defendant’s actions were “specifically directed” to assist crimes would be reasonable under these circumstances or would it create an unprecedented hurdle for convicting leaders who enable atrocities by a foreign army. While an apparent solid majority of experts disagree with the requirement of “specific direction”, certain experts have defended it.

---

324 Stanišić Appeals Judgment, paras. 103-108. The Appeals Chamber further ordered a re-trial of the accused (see Appeals Judgment, para. 127).
326 See Article 25 (3)(c) of the Rome Statute.
327 See infra Chapters 6.3 and 6.4.
328 See infra Chapter 6.4.
329 Critics of the Judgment have worried that its strict approach provides a manual for officials on how to support atrocities without fear of criminal responsibility. As Marko Milanović has argued, for example, the acquittal essentially boils down to the conclusion that it will be practically impossible to convict under aiding and abetting any political or military leader external to a conflict who is assisting one of the parties even while knowing they are engaging in mass atrocities, so long as the leader is remote from the actual operations and is not so thoroughly stupid to leave a smoking gun behind him. See Milanović. M., The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momčilo Perišić, EJIL: TALK! (11 March 2013), http://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/; see also Roth, K., Opinion, A Tribunal’s Legal Stumble, New York Times, 9 July 2013, www.nytimes.com/2013/07/10/opinion/global/tribunals-legal-stumble.html.
Like Perišić, who was essentially accused of supporting the army of the Bosnian Serb Republic (a non-state actor operating within the boundaries of a foreign State)\textsuperscript{331}, Taylor was accused of supporting rebel forces in Sierra Leone’s civil war.\textsuperscript{332} The issues in these two cases were so closely related that many experts considered Perišić the death knell of criminal responsibility for the likes of Taylor.\textsuperscript{333} Had the SCSL not explicitly declined to follow the legal standard set in Perišić, Taylor would plausibly have been acquitted on appeal.

4.1. Determination of the Appropriate Mode of Responsibility

Determination of an appropriate mode of participation for prosecuting the provision of military aid to direct perpetrators of international crimes is a challenging task. International criminal tribunals have used aiding and abetting as a form of responsibility to hold individuals responsible in a wide range of factual contexts, targeting accused that ranged from high-ranking political and military leaders to low-level detention-facility officers. These cases have covered a variety of ways in which the accused assisted the crimes, from those financing a group, supplying weapons or other equipment, to what are described as willing or enthusiastic onlookers to crimes. Aiding and abetting has played and will continue to play a critical role in international criminal justice, and will likely often be the most appropriate mode of responsibility for the highest level accused responsible for fuelling atrocity campaigns from a distance as seen in the recent disparate judgments in Perišić and Taylor.

The post-war trials had provided precedents, but in the context of codifying the laws of war, the focus was mainly on setting down the primary rules, rather than clarifying in any great detail secondary rules concerning individual criminal responsibility. In the World War II era, a variety of tribunals prosecuted individuals as accomplices to war crimes under international law. Among other notable cases, a British military tribunal convicted two executives of a company that

\footnotesize{http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/ (»As long as aiding and abetting's mens rea requires no more than knowledge, the specific direction requirement is a necessary and useful element of aiding and abetting's actus reus).}

\textsuperscript{331} See infra Chapter 6.1. In 1992 the Bosnian Serbs declared an independent Republic of Srpska (RS). While the RS had not been recognized by the UN, one could argue that at the relevant period the RS indeed met the requirements of statehood under international law: territorial sovereignty, population and political leadership as the three governing criteria for statehood.

\textsuperscript{332} Taylor Appeals Judgment, paras. 260, 280, 518-21.

\textsuperscript{333} Jouet, M., supra note 317, p. 1096.
supplied the poison gas used by the Schutzstaffel (SS) in the Auschwitz gas chambers,\textsuperscript{334} and a US military tribunal convicted two German industrialists for making large donations to a fund that financed the SS.\textsuperscript{335}

The grave breaches provisions of the 1949 Geneva Conventions, for example, refer only to those persons “committing or ordering to be committed” serious violations of those treaties.\textsuperscript{336} At the 1949 Diplomatic Conference in Geneva, it was explained that modes of criminal liability and related matters were not the concern of the delegates:

These should be left to the judges who would apply the national laws. The Diplomatic Conference is not here to work out international penal law. Bodies far more competent than we are have tried to do it for years.\textsuperscript{337}

Amongst the treaties of IHL, the Additional Protocol I stands as something of an exception in that it specifically includes superior responsibility as a distinct form of individual criminal responsibility for war crimes.\textsuperscript{338} When the UN Security Council established a number of international criminal tribunals beginning in the early 1990s, superior responsibility was included alongside various other modes of liability, thus casting a wide net for criminal responsibility. The statutes of the \textit{ad hoc} tribunals provide that those persons who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime” are liable to prosecution.\textsuperscript{339} In contrast, the Rome Statute provides a more detailed treatment of the various forms of individual criminal responsibility in Articles 25 and 28.\textsuperscript{340}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{334} \textit{Case No. 9, The Zyklon B Case, Trial of Bruno Tesch and Two Others, in 1 UN War Crimes Commission, Law Reports of Trials of War Criminals 93, 102, 1947}, (hereinafter: \textit{The Zyklon B Case}).
\item \textsuperscript{335} \textit{Trials of War Criminals Before The Nüremberg Military Tribunals Under Control Council Law No. 10: The Flick Case 1222-23, 1952} (hereinafter: \textit{The Flick Case}).
\item \textsuperscript{336} See e.g., Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 50.
\item \textsuperscript{337} Fourth report drawn up by the Special Committee of the Joint Committee, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 2, Federal Political Department, Berne, 12 July 1949, Section B, p. 115.
\item \textsuperscript{338} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Art. 86.
\item \textsuperscript{339} Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/RES/827, 25 May 1993 (hereinafter: ICTY Statute), Art. 7(1); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between January 1, 1994 and December 31 1994, UN Doc. S/RES/955, 8 November 1994 (hereinafter: ICTR Statute), Art. 6 (1). See also Statute of the Special Court for
\end{itemize}
\end{footnotesize}
In determining the scope of individual criminal responsibility, the ad hoc international tribunals have interpreted their own constitutive documents with reference to customary international law. This has often served as a euphemism for drawing on the limited practice of the post-Second World War trials, as exemplified in the ICTY’s jurisprudence on joint criminal enterprise liability. Customary international law has also featured in the recent jurisprudence concerning aiding and abetting, although it was not mentioned in the first brief discussion of this mode of liability in obiter dictum of the ICTY Appeals Chamber in the seminal Tadić case. The Appeals Chamber explained that aiding and abetting involves the carrying out of “acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime […] and this support has a substantial effect upon the perpetration of the crime”. Assistance may be logistical (e.g. delivery of weaponry or military equipment, provision of fuel, payment for military supplies, unauthorized donations), technical or personnel assistance (e.g. provision of personnel, training of personnel, payment of salaries, deployment of troops). According to Tadić, an aider and abettor must know that his or her acts assist the commission of a specific crime. Similarly, the provision of military aid by a State in breach of its obligation under customary international law has been defined by the ICJ in terms of “recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in another State”.

It is argued that accomplice liability is of particular relevance to persons who supply the means to commit international crimes, or who contribute in other ways to such commission. While joint criminal enterprise and superior responsibility have attracted considerable judicial and scholarly

---

340 See also Zgaga, S., Posredno storilstvo in sostorilstvo mednarodnih hudodelstev, Zbornik znanstvenih razprav, 70 (2010), p. 333 (Noting that international judicial practice sometimes prefers one form of participation in wrongdoing while at times favours others. Once the court decides for one model of participation, the tendency is to continue preferring the selective form. Doing so, it attenuates the elements for selected form of participation in order to justify its selection even though the facts of the case might prefer the use of another form of participation. In any event, none of the existing forms of participation is flawless. It is worth mentioning that the ICC distanced itself from the use of JCE and instead favours traditional forms of participation in a criminal offence.)


342 Ibidem, para. 229.

343 Ibidem.

344 Nicaragua case, para. 228.
attention, and a certain degree of infamy, aiding and abetting proved to be relatively uncontroversial at the *ad hoc* tribunals. This form of liability was cast into the spotlight, however, when it featured to varying degrees in a series of ICTY judgments that saw the acquittals of several high-ranking accused individuals, most notably Momčilo Perišić, the former chief of the general staff of the Yugoslav Army. The spotlight’s glare became even more intense when the Appeals Chamber of the ICTY, in an unprecedented turn of events, “unequivocally” rejected the aiding and abetting standard that it had previously endorsed and applied in Perišić.

Complicity is a particular way of contributing to a wrongdoing – a way of participating in a wrong committed by another actor. In accounting for complicity in law, there are principled reasons for holding accomplices responsible for their own contribution to the principal’s wrong, rather than for the wrong itself. In criminal law, the central means of achieving this end is through a differentiated mode of participation in a wrongdoing, distinguishing principals from other participants in the wrong. The denomination of a mode of participation as a form of accessory liability suggests that a person’s act had a substantial effect on the commission of a crime by someone else, while in the case of commission as a principal, the crime is ascribed to one’s own conduct. Distinguishing principal perpetrators and accomplices carries an implied suggestion that the latter are less blameworthy than the former. When the ICTY Appeals Chamber introduced joint criminal enterprise in *Tadić*, it stated that treating as aiders and abettors those that “in some way made it possible for the perpetrator physically to carry out that criminal act … might understate the degree of their criminal responsibility”.

---


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

347 Šainović Appeals Judgment, para. 1650.


350 *Tadić* Appeals Judgment, para. 192.
While criminal law might treat the facilitator more leniently than the physical perpetrator, the former’s role should not be neglected in the context of core international crimes. Aiding and abetting is aimed at those who knowingly provide assistance, which has a substantial effect on the commission of crimes. As will be argued below the relevant mens rea requirement according to jurisprudence of ad hoc tribunals is a double knowledge standard, whereas Article 30 of the Rome Statute lays down “intent and knowledge” as the general standard – although with respect to superior responsibility, for example, military commanders can be criminally responsible for subordinate’s crime of which they “should have known”. This form of liability (i.e., superior responsibility), however, is “predicated upon the power of the superior to control or influence the acts of subordinates”, whereas for aiding and abetting, it is not necessary to show that an accomplice “had any power to control those who committed offences”. The emphasis is instead on the significant influence that the assistance has on the commission of crimes.

Similarly, joint criminal enterprise (hereinafter: JCE) as a form of liability is predicated upon showing that the accused shared the principal’s intent, whereas for aiding and abetting the requisite mental element is knowledge that the acts performed assist the commission of a specific crime by the principal. The Trial Chamber of the ICTY in Kvočka held that as soon as an accomplice shared the intent of the perpetrator, he would become a perpetrator himself. While it remains difficult to draw a clear distinction between joint liability and complicit liability, the need for the latter alongside joint liability is obvious. Considering the law of state responsibility, many acts falling short of rendering a State a co-principal involve it in activity that substantially contributes to the wrongful act of another State, such that an international legal prohibition is needed. State practice has found liability in many such instances. Where a State’s role is ancillary, it should be deemed complicit only, regardless of the seriousness of the act of the principal.

---

351 Rome Statute, Article 28(a)(i).
354 Tadić Appeals Judgment, para. 228.
While the ILC in its Articles on State Responsibility prohibits States from *inter alia*, assisting in the maintenance of a situation involving serious breaches of peremptory norms, the rules do not require the assisting State to share the principal’s intent, and this, as well as the fact that the responsibility it entails is clearly apart from that of the principal, sets it apart from co-perpetration. Nevertheless, Article 16 ARSIWA, prohibiting States from aiding and assisting in the commission of an internationally wrongful act by another State, requires intent on the part of the facilitating State. This does not mean that the assisting State needs to share the principal’s intent; rather, it must intend by its assistance to facilitate the commission of an internationally wrongful act.

Both areas of law distinguish between those who ‘commit’ an act and those who assist in its commission. Whereas the former bear full responsibility for the act itself, the latter’s responsibility is derivative in nature, and often involves lesser consequences. The relevant provisions are Article 25 (c) ICC Statute (‘aids, abets or otherwise assists’) and Article 16 and 41 ARSIWA (‘aid and assistance’), reflecting relatively new trends in international law. ‘Aiding and abetting’ as opposed to ‘commission’ was first explored in-depth in the 1990s, before the *ad hoc* tribunals. Both, the ICC Statute and the law of state responsibility rely on the notion of control to distinguish those that carry full responsibility from those whose responsibility is derivative.

---


358 See *infra* Part III, Chapter 9.


360 In the *Katanga* case, the ICC Trial Chamber relied on the criterion of control, detailing: “under article 25(3)(a) of the Rome Statute, the perpetrators of a crime are those who control its commission and who are aware of the factual circumstances allowing them to exert such control. Thus the indirect perpetrator has the power to decide *whether and how the crime will be committed* insofar as that person determines its perpetration. An accessory, however, exerts no such control. By way of example, whereas participation as an instigator under article 25(3)(b) may entail a position of authority, it requires a contribution consisting solely of prompting or encouraging a decision to act − the power to decide on the execution of the crime remains the preserve of another person. The Chamber emphasises that article 30 finds application in these two scenarios.” See *Katanga* Trial Judgment, para. 1396.

It remains difficult to draw a sharp distinction between joint liability and complicit liability. The ILC made it clear that Draft Article 27 (now Article 16) does not address co-perpetration.\textsuperscript{362} Brownlie addressed the problem:

\begin{quote}
[M]any strong cases of ‘aid or assistance’ will be primarily classifiable as instances of joint responsibility and it is only in the more marginal cases that a separate category of delict is called for. No doubt the law is undeveloped in this context but the distinction which is to be sought is sufficiently clear.\textsuperscript{363}
\end{quote}

Brownlie suggests examples of distinction between complicity and joint liability fall into the two categories:

\begin{quote}
Thus, the supply of weapons, military aircraft, radar equipment, and so forth, would in certain situations amount to ‘aid and assistance’ in the commission of an act of aggression but would not give rise to joint responsibility. However, the supply of combat units, vehicles, equipment, and personnel, for the specific purpose of assisting an aggressor, would constitute a joint responsibility.\textsuperscript{364}
\end{quote}

Brownlie’s interpretation, however, does not correspond to the one advocated by the ICJ.\textsuperscript{365}

Furthermore, the Appeals Chamber in \textit{Tadić} sought to construe broadly the portion of the Statute concerning derivative liability, which makes no distinction between conspiracy and aiding and abetting. Recognizing that “the Tribunal’s Statute does not specify nor expressly nor by implication the objective and subjective elements of this category of collective criminality,” the Appeals Chamber proceeded to identify them.\textsuperscript{366} The \textit{Tadić} Appeals Chamber decided not only to clarify the doctrine of conspiracy but to contrast it with aiding and abetting liability, announcing in dictum:

\begin{quote}
In the case of aiding and abetting…the principal may not even know about the accomplice’s contribution. The aider and abettor carries out acts \textit{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 its support has a \textit{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 \textit{in some way} are directed to furthering the
\end{quote}

\textsuperscript{362} ILC Report on State Responsibility, p. 99.
\textsuperscript{363} Brownlie, I., \textit{supra} note 35, p. 191.
\textsuperscript{364} \textit{Ibidem}.
\textsuperscript{365} See \textit{infra} Chapter 14.
\textsuperscript{366} \textit{Tadić} Appeals Judgment, para. 194.
common plan or purpose. In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required ([for example], either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes…were likely to be committed).367

Whereas an accomplice’s acts must be specifically directed to assist a perpetrator and have a substantial effect, a conspirator’s need only be “in some way directed” to furthering the conspiracy. The language of Tadić judgment suggests that, if a given act has a plausible, non-criminal explanation, it would be insulated as a basis for accomplice liability, regardless of the substantiability of its effect on the commission of a war crime.

367 Ibidem, para. 229 (emphasis added).
5. The Law on Complicity in International Criminal Law

5.1. The Authorities

The word ‘complicity’ itself is not used in the statutes of the various international criminal tribunals, as the preferred nomenclature includes such terms as ‘planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime’,\(^{368}\) ‘orders, solicits or induces the commission of a crime’\(^{369}\), ‘aids, abets or otherwise assists, including providing the means for [a crime’s] commission’\(^{370}\) and ‘committed, participated as accomplice, organized or directed others’.\(^{371}\)

The principle of complicity lacks definition. Neither the law of state responsibility nor international criminal law attaches a fixed meaning to the word ‘complicity’. The term was explicitly rejected for use in the ILC’s project on codification and development of general rules on state responsibility as it invited inappropriate associations with domestic criminal law concept.\(^{372}\) The Genocide and Torture Convention both contain a single reference to ‘complicity’ as a form of banned participation. The only international criminal law Statute to use the term is that of the ICTR, and its inclusion there is commonly explained with reference to poor drafting practices.\(^{373}\)

The responsibility of accomplices was recognized in the Statute of the International Military Tribunal only in a general way: ‘[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.’\(^{374}\) Many of those convicted at Nuremberg were held responsible as accomplices rather than as

\(^{368}\) ICTY Statute, Article 7(1); ICTR Statute, Article 6(1); SCSL Statute, Article 6(1).
\(^{369}\) Rome Statute, Article 25(3)b.
\(^{370}\) *Ibidem*, Article 25(3)c.
\(^{372}\) Quigley, J., *supra* note 356, p. 79.
\(^{374}\) Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.), 1951, 82 UNTS 279, Article 6.
The ILC’s Nüremberg Principles, stating certain core principles of liability, deal
with accomplice liability. Namely, the seventh and final principle states: “Complicity in the
commission of a crime against peace, a war crime, or a crime against humanity…is a crime
under international law,” but says nothing about the forms and elements of complicity.376 The
concept of complicity is also recognized in the Genocide Convention,377 the Torture
Convention,378 and the International Convention on the Suppression and Punishment of the
Crime of Apartheid.379 The Statutes of the ad hoc tribunals contain a general provision on
complicity, applicable to all of the offences over which the tribunals have subject matter
jurisdiction. They establish criminal responsibility for persons who have ‘planned, instigated,
ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a
crime’ within the Tribunal’s jurisdiction.380 The ILC’s Draft Code of Crimes, while failing to
identify the elements of complicity, nevertheless declared that individual criminal responsibility
would be incurred, in the case of crimes against humanity and war crimes, by a person who
‘knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such
a crime, including providing the means for its commission’.381 The Rome Statute of the ICC
imposes criminal responsibility upon an individual who ‘[f]or the purpose of facilitating the
commission of such a crime, aids, abets or otherwise assists in its commission or its attempted
commission, including providing the means for its commission’.382

According to the Rwanda Tribunal, aiding means giving assistance to someone, while abetting
involves facilitating the commission of an act by being sympathetic thereto.383 The two terms are
disjunctive, and according to the Tribunal it is sufficient to prove one or the other form of

375 Formulation of Nuremberg Principles, Report by J. Spiropoulos, Special Rapporteur, UN Doc. A/CN.4/22, para. 43. Tadić Trial Judgment, para 674: the Trial Chamber noted that the post-Second World War judgments generally failed to detail the criteria upon which guilt was determined.
377 Genocide Convention, Article III(e).
378 Torture Convention, Article 4(1).
380 ICTY Statute, Article 7(1); ICTR Statute, Article 6(1).
382 Rome Statute, Article 25(3)(c).
participation.\textsuperscript{384} War crimes case law provides many examples of prosecution of accomplices.\textsuperscript{385} The accused who is not physically present when the crime takes place may still be accomplice. As the ICTY observed, ‘direct contribution does not necessarily require the participation in the physical commission of the illegal act. That participation in the commission of the crime does not require an actual physical presence of physical assistance appears to have been well accepted at the Nuremberg war crimes trials’.\textsuperscript{386} Sometimes, complicity is established because the accused is employed in a criminal enterprise or belongs to some civilian or military unit. But complicity should never be equated with collective guilt, by which members of a regime or of its armed forces are deemed, by that fact alone, to share criminal responsibility.\textsuperscript{387}

As the ICTY Trial Chamber has declared in the Čelebići case, “that individuals may be held criminally responsible for their participation in the commission of offences in any of several capacities is in clear conformity with general principles of criminal law.”\textsuperscript{388} Another Trial Chamber has identified a customary law basis for the criminalization of accessories or participants.\textsuperscript{389} The boundaries of different forms of participation may shift. Moreover, the line between principalship and accomplice liability drawn by the control theory\textsuperscript{390} remains a matter of discussion in international criminal law practice and scholarship.\textsuperscript{391} Wherever that line is drawn, doctrines of complicity sit around principalship, inculpating those who help the principal to commit the wrong or influence his decision to do so.\textsuperscript{392}

5.2. Aiding and Abetting in the Ambit of the ad hoc Tribunals

As has traditionally been the case with international criminal tribunals, the ICTY Statute prohibits aiding and abetting without specifying the elements required to establish this form of

\textsuperscript{384} Prosecutor v Kayishema and Ruzindana (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para 197.

\textsuperscript{385} See, e.g. the Zykon B case, the Flick case.


\textsuperscript{389} Tadić Trial Judgment, paras. 666, 669. The Trial Chamber provided several examples of post-second war cases to support its assertion.

\textsuperscript{390} See supra note 360.


\textsuperscript{392} Jackson, M., supra note 348, p. 65.
Accordingly, the ICTY has instead purported to apply rules of accomplice liability derived from uncodified customary international law and discovered primarily through consulting the case law of international criminal tribunals.

5.2.1. The actus reus Elements (The Conduct Elements/ The Objective Elements)

The first ICTY Appeals judgment setting out the parameters of aiding and abetting was the Tadić Appeals Judgment, rendered in 1999, which described the actus reus of criminal responsibility for aiding and abetting as follows:

“The aider and abettor carried 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”.

Accordingly, at the ad hoc tribunals, the conduct element of aiding and abetting liability consists of acts or omissions directed at providing practical assistance, encouragement or moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime. It is important to emphasize that this work concerns complicity by way of

393 The ICTY’s Statute merely provides as follows: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in . . . the present Statute, shall be individually responsible for the crime.”; ICTR Statute (same); Article 6(1), SCSL Statute (same); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001), as amended by NS/RKM/1004/006 (Oct. 27, 2004), Article 29 (hereinafter: ECCC Statute) (“Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.”); S.C. Res. 1757, annex, Statute of the Special Tribunal for Lebanon, art. 2(b)(1)(a) (Mar. 29, 2006) (hereinafter: STL Statute) (“A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person . . . committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute . . . .”); London Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 82 U.N.T.S. 279 (hereinafter: London Charter) (“Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”); Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity art. II(2), Dec. 20, 1945, 3 Official Gazette Control Council For Germany 50–55 (1946) (hereinafter Control Council Law No. 10) (“Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.”).

394 Tadić Appeals Judgment, para. 229.

provision of military aid and does not focus on encouragement or moral support. Assistance, often termed as “practical” assistance by the tribunals, 396 is in many cases relatively straightforward, and encompasses the range of conduct aimed at helping the principal to commit crime. 397 Examples are provision of weapons, transport, or information concerning location of potential victims to the principal perpetrator. 398 While the ad hoc tribunals have proposed that “aiding and abetting include all acts of assistance in either physical form or in the form of moral support”, 399 the ICTY already in its first judgment on aiding and abetting called for a minimum actus reus requirement 400. Consequently, two additional, unwritten actus reus elements for aiding and abetting have been introduced, and both have been held to reflect customary international law. Some Chambers have held that the contribution must have had a substantial effect on the commission of the crime, whereas others have cumulatively put forward a direct effect requirement.

5.2.1.1. The Substantial Effect Requirement (the Nexus Requirement)

Different causation standards exist in international criminal law (i.e., conditio sine qua non link, substantial effect/contribution requirement). No causation requirement forms part of ‘aiding and abetting’ provision of the Statutes of ad hoc tribunals. Rather this element has developed in case law. 401 In respect of complicity, there is not much support for a condition sine qua non link in neither national nor international criminal law. Rather, the substantial contribution requirement adopted in tribunal jurisprudence is suited to limiting aiding and abetting to the extent that it provides for an appropriate standard of culpable assistance to crime. 402


396 Blaškić Appeals Judgment, para. 46.
400 Compare infra Part III, Section 9.3.1.
401 Furundžija Trial Judgment, para. 231.
The substantial effect requirement was introduced by the Tadić Trial Chamber as an actus reus threshold to give aiding and abetting quantifiable limits. Bound to apply only customary international law, in both Tadić and Furunđija the respective Trial Chamber has worked towards giving substantial effect a customary basis. In order to determine what “amount of assistance” an aider and abettor must have provided in order to be held responsible under customary international law, the Tadić Trial Chamber examined post-World War II cases. Holding that from these examples no general rule as to the required extent of participation had yet crystallized, the Trial Chamber rather simplistically concluded that “aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support”.

The ICTY has specified that criminal participation must have a direct and substantial effect on the commission of the offence. It has endorsed the approach of the ILC requiring that assistance be ‘substantial’, noting that while the latter provided no definition of ‘substantially’, the post-World War II cases it had reviewed required ‘a contribution that in fact has an effect on the commission of the crime’. The ICTY has left open to what degree the effect of the accused’s acts must be “substantial.” The question of whether an act constitutes “substantial assistance” to a crime is a fact-based inquiry. In other words, there must be a nexus between the alleged acts of the accused and the commission of the crime.

While the ICTY indicated that participation is substantial if ‘the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in

---

404 Tadić Trial Judgment, para. 688.
406 The ILC required that accomplices participate ‘directly and substantially’ in the commission of the crime. In addition, the commentary to the Draft Code noted that ‘the accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way.’ Report of the International Law Commission on the work of its forty-eight session, 6 May-26 July 1996, UN Doc. A/51/10, p. 24.
407 Orić Trial Judgment, para. 783. Substantial is the more commonly used term when defining aiding and abetting, but the term “significant” has also been used by this Tribunal. See Kvočka Trial Judgment, para. 256.
408 Blagojević Appeals Judgment, para. 134; Mrkšić Appeals Judgment, para.200.
409 Popović Trial Judgment, para. 1018.
fact assumed"\textsuperscript{410}, assistance need not constitute an indispensable element, that is, a \textit{conditio sine qua non} for the acts of the principal.\textsuperscript{411} Similarly, the Rome Statute does not provide any indication as to whether there is some quantitative degree of aiding and abetting required to constitute the \textit{actus reus} of complicity. The absence of words like ‘substantially’ in the ICC Statute, and the failure to follow the ILC draft is offset by its \textit{mens rea} requirement.\textsuperscript{412}

Notably, the \textit{actus reus} threshold goes back to the works of the ILC, which was also unable to substantiate it in a more elaborate way than to determine that a “significant” facilitation was needed.\textsuperscript{413} The Tadić Trial Chamber relied on the works of the ILC, namely, the 1996 ILC Draft article 2(3)(d), which stipulates that the aider and abettor must contribute “\textit{directly and substantially}” to the commission of the crime.\textsuperscript{414} The ILC commented that the assistance “facilitates the commission of a crime in some significant way,”\textsuperscript{415} marking the contrast to its previous drafts, such as the 1991 Draft Code, which remained silent on any quantitative threshold.\textsuperscript{416}

Finally, the Tadić Trial Chamber held that any contribution that has an effect on the commission of the crime is a substantial contribution – such deprived the word “substantial” of its quantitative connotation.\textsuperscript{417} Following Tadić, the Trial Chamber in Furundžija also attempted to base the substantial effect requirement on customary international law. Methodologically it took a similar path as in Tadić, and also failed to pin down the quantitative \textit{actus reus} threshold. In addition to the 1996 ILC Draft Code of Crimes, the Furundžija Trial Chamber relied on both \textit{Einsatzgruppen} and \textit{Zyklon B} when dealing with the required extent of participation for aiding and abetting. It found that substantial effect meant that “[h]aving a role in a system without influence would not be enough to attract criminal responsibility.”\textsuperscript{418} The two cases share the subject matter of State-sponsored mass exterminations – either in institutions or by roaming

\textsuperscript{410} Tadić Trial Judgment, para. 688.
\textsuperscript{411} Furundžija Trial Judgment, para. 209; Orić Trial Judgment, para. 284.
\textsuperscript{412} See infra Section 5.3.
\textsuperscript{413} Noto, F., Secondary Liability in International Criminal Law, A Study on Aiding and Abetting or otherwise Assisting the Commission of International Crimes. Dike, Zurich 2013, p. 79.
\textsuperscript{415} Ibidem, p. 1693.
\textsuperscript{417} Eser, A., supra note 349, p. 800.
\textsuperscript{418} Furundžija Trial Judgment, para. 233.
death squads. However, in Zyklon B the defendants were businessmen providing dual use goods for institutionalized exterminations, whereas in Einsatzgruppen the accused were formal members of a Nazi sub-organization with the sole purpose of managing death squads. Thus, to put both subject matters on the same heading may stretch the point when it comes to authoritatively establish the actus reus of accessories under customary international law.

Even though both Tadić and Furundžija remained unsatisfactorily vague, substantial effect has become firmly entrenched in the jurisprudence of international criminal tribunals. No Chamber concerned with this subject matter has ever questioned this prerequisite for aiding and abetting or proposed a different approach to tackle the marginal assistance to international crimes.\textsuperscript{419}

The \textit{ad hoc} tribunals have given different answers to the question as to “what amount of assistance”\textsuperscript{420} an aider or abettor must lend to the commission of the crime. The following categorization of the tests applied will show they have done so on the basis of a fact-based inquiry. Regrettably, no clear pattern is evident and the various tests applied shed little light on a substantive definition of substantial effect.

\begin{itemize}
\item[a.] The encouragement by mere presence test in Tadić
\end{itemize}

Tadić was found guilty as an aider and abettor to the mistreatments of inmates at Omarska concentration camp because he had been encouragingly present when the crimes were committed and had insulted and helped to carry off brutalised victims.\textsuperscript{421} Thus, he was held responsible for both physical and psychological assistance. The Trial Chamber found that with both forms of assistance he had substantially changed the course of events at Omarska, for it deemed that “the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed”.\textsuperscript{422} It is noteworthy that Tadić was not invested with any authority in the camp; even so, the Trial Chamber found him responsible for having been

\textsuperscript{419} The Trial Chamber in Kvočka case further determined that a significant assistance made a criminal undertaking more efficient: “By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution.” See Kvočka Trial Judgment, para. 309; Equally, the Orić Trial Chamber stated that the aider and abettor’s contribution had to be “substantial and efficient enough to make the performance of the crime possible or at least easier”. See Orić Trial Judgment, para. 282.

\textsuperscript{420} Tadić Trial Judgment, para. 681.

\textsuperscript{421} Ibidem paras. 277-280, 726, 730.

\textsuperscript{422} Ibidem, para. 688.
present passively, thereby paving the way for convictions for abetting by mere presence without authority. The Trial Chamber ruled that due to his encouraging presence in those instances in which he was not himself the perpetrator, Tadić “intentionally assisted directly and substantially in the common purpose of [the group] inflicting physical suffering upon [the victims] and thereby aided and abetted in the commission of the crimes”. 423

b. The encouragement by authority test in Akayesu, Aleksovski and Furundžija

Akayesu was found guilty by the ICTR for aiding and abetting for having spoken out words of acquiescence. 424 Akayesu was a mayor of the Taba commune in Rwanda; a well known and a popular leader whose de facto authority over the community largely exceeded his de jure powers as a mayor. 425 The fact that Akayesu had possessed de facto authority over the principals committing crimes in front of his office mattered greatly in as much as he had encouraged the crimes merely by tacit signs of tolerance. The Trial Chamber held that he had sent a signal of official tolerance for the killings and acts of sexual violence committed around his office “without which these acts would not have taken place”. 426

Thus, in a number of cases the aid rendered was found to be substantial because the aider and abettor had, to a certain extent, authority over the principal. To convict for aiding and abetting, the ad hoc tribunals have repeatedly relied on the notion that authority plus silence could amount to moral support. This substantial encouragement by authority design also led to individual criminal responsibility for Aleksovski, the de facto commander of the Kaonik military prison in central Bosnia in 1993. 427 The Trial Chamber held that although he had neither ordered the mistreatments nor explicitly approved them, by being present and not objecting when the mistreatments were committed, Aleksovski had shown signs of support and encouragement to the perpetrating prison guards. 428 According to the Trial Chamber, the fact that he did not oppose or repress the recurring brutality occurring in the vicinity of his office was a sign of his approval.

423 Ibidem, paras. 726, 730.
424 Akayesu Trial Judgment, para. 706.
426 Ibidem, paras. 693-694.
427 Aleksovski Trial Judgment, paras. 93, 95.
428 Ibidem, paras. 59, 87.
Accordingly, the Trial Chamber convicted him as an aider and abettor even for the abuses taking place in his absence.\textsuperscript{429}

Moreover, in Furundžija, the Trial Chamber explained the rationale for establishing substantial effect through the contributor’s authority or position. According to Furundžija Trial Chamber, the substantial encouragement formula focused on the aider and abettor’s influence on the commission of the crime according to his ability to prevent the crimes, or, when he could have done to prevent or mitigate the crimes. Accordingly, substantial effect presupposed having a role in a system with influence, as it was one’s influential position that determined whether lack of objection against the unlawful actions of others could lead to individual criminal responsibility.\textsuperscript{430} Lack of objection had to make some difference to the commission of the crimes.\textsuperscript{431} If, by contrast, objection was futile due to the low rank, no responsibility would ensue. As to the futility of protest, the Trial Chamber would not only consider the formal rank or position, and also the feasibility or reasonableness to protest may play a role.\textsuperscript{432}

c. The efficiency test in Kvočka and Orlić

The Trial Chamber in Kvočka was seized with crimes committed in the Omarska camp and determined that it had functioned as a systemic form of a joint criminal enterprise.\textsuperscript{433} The Trial Chamber held that the accused contributed “to the commission of the crimes by playing a role that allows the system or enterprise to continue its functioning.”\textsuperscript{434} Furthermore, it determined that a significant assistance made a criminal undertaking more efficient:

“By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution.”\textsuperscript{435}

\textsuperscript{429} Ibidem, para. 88.
\textsuperscript{430} Furundžija Trial Judgment, para. 233.
\textsuperscript{431} Ibidem, para. 221.
\textsuperscript{432} Ibidem, para. 224.
\textsuperscript{433} Kvočka Trial Judgment, paras. 4, 610.
\textsuperscript{434} Ibidem, para. 312.
\textsuperscript{435} Ibidem, para. 309.
The Trial Chamber underlined that the camp significantly gained efficiency by “the considerable role” defendant Kvočka played in maintaining its functioning.436 Also, the Appeals Chamber adopted the test when acquitting defendant Žigić for lack of efficiency gained; his acts had formed “only mosaic stones in the general picture of violence and oppression”.437 Equally, the Orić Trial Chamber stated that the aider and abettor’s contribution had to be “substantial and efficient enough to make the performance of the crime possible or at least easier”, a requirement that was ultimately found to be lacking because the accused had been unable to prevent wanton destruction of Bosnian Serb property by civilians and fighters in the region.438 If the efficiency test had been applied in the Perišić case, the Chamber would have to determine whether Perišić was able to prevent the crimes committed in Sarajevo and Srebrenica. However, such a determination would arguably place Perišić in a position of a commander vis-à-vis the principal perpetrator(s) and his criminal responsibility under Article 7(3) of the ICTY Statute (i.e. the command responsibility) would be a more appropriate mode of liability to pursue.

d. The quantitative test in Perišić, Krstić and Blagojević and Jokić

In a number of cases concerning the notorious events in and around Srebrenica, the substantiality of an aider and abettor’s support has been determined by the sheer amount of material support, and, thus, has been understood quantitatively. In Krstić, the Appeals Chamber found that only the high number of vehicles, personnel and equipment lent by the accused to the VRS Main Staff were found to have enable the Main Staff “to carry out its plan to execute the Bosnian Muslim of Srebrenica”.439 The Appeals Chamber explicitly held that the accused’s contribution to the Srebrenica genocide by providing Drina Corps resources under his command to the Main Staff was substantial because “without the use of Drina Corps resources, the Main Staff would not have been able to implement its genocidal plan”.440 The same test was used by the Appeals Chamber in Blagojević and Jokić for inquiry as to whether the accused’s acts amounting to permitting resources and personnel to the Bratunac Brigade Military Police to logistically support the murder and persecution of the Bosnian Muslim population of Srebrenica constituted

436 Ibidem, para. 414.
437 Kvočka Appeals Judgment, para. 599.
438 Orić Trial Judgment, paras. 684-685, 688.
439 Krstić Appeals Judgment, para. 238.
440 Ibidem, paras. 137, 238.
Finally, in providing that the accused had substantially contributed to various crimes committed in Srebrenica, the Prosecution in the Perišić case chiefly relied on the quantity of the Yugoslav personnel and material that the accused had let as reinforcement to the VRS.\(^\text{442}\)

\[\text{e. The conclusion on the variety of the tests applied}\]

In Tadić, the test related to substantial encouragement was relied on because the role of the accused in the commission of the principal crime had remained unclear – which violates fundamental principles of criminal law in terms of procedural right of the accused.\(^\text{443}\) The second problem is that the tests applied in the examined case law said nothing about why the encouraging assistance was a \textit{substantial} one. The point to be addressed should be the extent of encouragement, but the reasoning is circular in that a contribution is said to be substantial because it has encouraged the principal. As a result, encouragement simply becomes synonymous for substantial encouragement.\(^\text{444}\)

The second issue, lack of significance, also appears to impede the efficiency test applied in both Kvočka and Orić, which focused on whether the accused had made the commission of the crime easier in terms of an efficiency gain. Again, the test says little about whether the aider and abettor facilitated the crime \textit{substantially} or not; rather, it seems that the efficiency test merely replaces one formula that needs to be substantiated with another that equally needs to be given meaning. In none of the cases under this category it was required that the risk of the commission of the crime had been augmented to such an extent that it was dependent on the aider and abettor’s act or omission; rather, the test seemed to require that the accused had noticeably augmented the chances of the crime being committed. This is where the problem lies with the way the Chambers have applied this test; they have simulated quantitative precision \textit{ex ante}, whereas in reality they had to operate with \textit{ex post} probabilities and a retrospective, normative assessment of the facts.

\(^{441}\)Blagojević and Jokić Appeals Judgment, para. 134.
\(^{442}\)See Revised Second Amended Indictment against Momčilo Perišić, 5 February 2008 (hereinafter: Perišić Indictment), paras. 8, 9, 24, 44, 60.
\(^{443}\)Noto, F., \textit{supra} note 413, p. 94.
\(^{444}\)\textit{Ibidem}. 
A number of cases related to Srebrenica concerned the quantity of material support. The extent of logistic support to the forcible transfer and killing of the Bosnian Muslims was indeed so extensive that without the facilitation by Krstić’s Drina Corps and Blagojević’s Bratunac brigade “Operation Krivaja 95” to eliminate the enclave would have been much harder to accomplish or may have failed.\textsuperscript{445} Thus, Krstić’s and Blagojević’s assistance undoubtedly had a substantial effect on the crimes. The quantity of material support may also play an important role in establishing an aider and abettor’s mens rea, particularly with respect to dual use of goods, which, depending on the circumstances, either serve an illicit or legal purpose.

In sum, neither category of tests applied by the \textit{ad hoc} tribunals to determine whether the assistance had a substantial effect on the commission of the crime is truly convincing. The tests are either tantamount to circular reasoning or are inherently vague and therefore undesirable.\textsuperscript{446} For instance, in the drafting process of the U.S. Model Penal Code\textsuperscript{447}, a substantial effect requirement was “rejected on the grounds of inacceptable uncertainty”.\textsuperscript{448} What can be deduced from the above is that first, the term substantial needs to be given meaning, and second, in giving it meaning a normative choice has to be made as to what should constitute substantial aid.\textsuperscript{449} The obvious implication of such normative choice is that a juror is compelled to decide on a case-by-case basis whether particular assistance should be regarded as criminal. Regrettably, the cases offer no explanation as to the methodology of selection of tests to corroborate substantial effect. Thus, the question as to which test has been applied for what reason is left open.

The substantial effect presupposes that the contribution has a certain impact on the commission of the crime: in \textit{Orić}, the Trial Chamber called this a “nexus” between the contribution and the crime committed by the principal, a link that establishes a substantial effect on the commission of the crime.\textsuperscript{450} Accordingly, substantial effect equals the required nexus between the

\textsuperscript{445} Krstić Appeals Judgment, paras. 78, 137; Blagojević and Jokić Appeals Judgment, para 119; Blagojević and Jokić Trial Judgment, paras. 674, 677, 784, 787.
\textsuperscript{447} American Law Institute, Part 1, paras. 1.01 to 2.13 Model Penal Code and Commentaries 318 (1985). The U.S. Model Penal Code (MPC) is widely regarded to have served as the basis for Article 25(3)(c) of the Rome Statute. Accordingly, it is argued that Article 25(3)(c) of the Rome Statute echoes the approach originally developed by the in the MPC, which requires that an accomplice act “with the purpose of promoting or facilitating the commission of the offense” [Section 2.06(3)(a)(ii)].
\textsuperscript{448} Smith, K. J. M., \textit{supra} note 22, p. 86; Smith, K. J. M., \textit{supra} note 446, p. 246.
\textsuperscript{449} Smith, K. J. M., \textit{supra} note 446, pp 246-247.
\textsuperscript{450} Orić Trial Judgment, paras. 284-285.
contribution and the crime committed. According to the ICTY, substantial effect is an *elevated nexus requirement* calling for a qualified link between the aider and abettor’s conduct and the commission of the crime. In that sense, the substantial effect requirement can also be explained in terms of a *causal nexus*, because substantial effect and causality go hand in hand. As Smith explains, “[t]o claim that anything suffices is tantamount to accepting that causality has no role” as far as aiding and abetting is concerned.\(^{451}\) To view the substantial effect requirement form the perspective of causality serves for the purpose of attribution of responsibility; as the Trial Chamber has put it, to participate in a crime is “to have made a causal contribution to the impairment of the protected interest”.\(^{452}\)

The *ad hoc* tribunals have strictly followed a non-causal approach to aiding and abetting. Even though the ICTY has repeatedly underlined the “central place assumed by the principle of causation in criminal law”\(^{453}\) it has consistently rejected any causality requirement whatsoever with respect to aiding and abetting. The ICTY’s non-causal approach stems from the fact that the vast majority has rejected causality because it has understood causality as a *condition sine qua non* to the success of the crime, namely, a but-for condition without which the crime would not have happened.\(^{454}\) Accordingly, a causal nexus was never required as long as the assistance had a substantial effect on the commission of the crime. As shown above, the test applied by various chambers of the *ad hoc* tribunals have only modestly substantiated the requirement. In fact, the flexibility with which the *ad hoc* tribunals seem to have applied the tests reveals a rather pragmatic choice of a suitable test after the blameworthiness of the aider and abettor’s conduct has been decided on.\(^{455}\)

5.2.1.2. The Direct Effect Requirement

In addition to the substantial effect requirement, the *Tadić* Trial Chamber rather boldly determined that under customary international law, aiding and abetting presupposed a “direct contribution” to the commission of the crime.\(^{456}\) By stipulating this requirement, the Trial

---

\(^{451}\) Smith, K. J. M., *supra* note 22, p. 86.

\(^{452}\) Orić Trial Judgment, para. 342.

\(^{453}\) Furundžija Trial Judgment, para. 232-233 (leading case); Alekovski Trial Judgment, para. 61; Blaškić Trial Judgment, para. 285; Blaškić Appeals Judgment, para. 48; Kvočka et. al. Trial Judgment, para 255.

\(^{454}\) See the ICTY’s discussion on causality with respect to superior responsibility in Delalić *et al.* Trial Judgment, para 398; Kordić and Čerkez Trial Judgment, para 447.

\(^{455}\) Noto, F., *supra* note 413, p. 103.

\(^{456}\) *Tadić* Trial Judgment, paras. 678-680.
Chamber must have had recourse to the 1996 ILC Draft Article 2(3)(d) again; however, probably due to the fact that the ILC offered no explanation as to this threshold whatsoever, the Trial Chamber chose to support the customary nature of direct effect through post-WWII case law alone. It held that in the Justice case\textsuperscript{457}, the judges required a “deliberate act if an accused is to be held criminally culpable and this deliberate act must directly affect the commission of the crime itself”.\textsuperscript{458} The Trial Chamber gave no interpretation and reasoning, thus one can only speculate about the Trial Chamber’s reading of that case. In its effort to further outline the direct effect requirement, the Tadić Trial Chamber drew a very interesting conclusion from the Zyklon B case. It asserted that the British military judges “necessarily must have made the determination that without the supply of gas the exterminations would not have occurred in that manner, and therefore that the actions of the accused directly assisted in the commission of the illegal act of mass extermination”.\textsuperscript{459} Trial Chamber offered no further explanation as to its interpretation of the Zyklon B case, which remains only remotely supported by the records. Moreover, the Trial Chamber ultimately did not subsume any evidence under direct effect. Nevertheless, its reasoning indicates that a direct contribution was meant to reflect the requirement that, without the accessory’s assistance, the crime would not have occurred in the manner it did. As was the case with respect to the substantial effect requirement, the Trial Chamber followed a non-causal approach with respect to direct effect; unlike the defence, which called for a “significant causal relation” between the commission of the crime and the aider and abettor’s contribution, the Trial Chamber did not mention causality anywhere.\textsuperscript{460}

Thus, it remains speculative how the Tadić Trial Chamber itself distinguished between the direct and substantial effect requirement: in fact, it defined both elements identically by holding that, without the contribution of the aider and abettor, the criminal act “would not have occurred in that manner” or, respectively, “would not have occurred in the same way”.\textsuperscript{461} Direct effect requirement from Tadić has only been reaffirmed in three judgments – Akayesu, Strugar and

\textsuperscript{458} Ibidem, para. 678.
\textsuperscript{459} Ibidem, para. 680.
\textsuperscript{460} Ibidem, para. 672.
\textsuperscript{461} Ibidem, paras. 680, 688.
Čelebići.\textsuperscript{462} In two appeals judgments the Appeals Chamber confirmed the \textit{Tadić} Trial Chamber’s \textit{actus reus} elements of aiding and abetting but omitted the direct effect requirement without explaining why.\textsuperscript{463} In other cases, the ICTY either explicitly rejected\textsuperscript{464} or simply did not mention\textsuperscript{465} \textit{Tadić}’s direct effect requirement when assessing the \textit{actus reus} requirements of aiding and abetting. Even in the three mentioned judgments it is neither apparent what the requirement exactly called for nor whether the conduct of the accused had met the requirement.

Firstly, in \textit{Akayesu} direct effect was deemed a prerequisite but ultimately not applied to the facts of the case. Secondly, in \textit{Strugar} the Trial Chamber arguably mismatched direct effect. It held that direct effect meant that the aider and abettor carried out acts “\textit{specifically directed}” to support the perpetration of the crime.\textsuperscript{466} This wording is borrowed from \textit{Tadić} where the Appeals Chamber \textit{ex proprio motu} explained the distinction between a joint criminal enterprise and aiding and abetting in an \textit{obiter dictum}.\textsuperscript{467} Furthermore, it is contested whether a “specific direction to assist” forms part of \textit{actus reus} or \textit{mens rea} of aiding and abetting. The Appeals Chamber held that this was an \textit{actus reus} element, but, peculiarly, not an essential one.\textsuperscript{468} In \textit{Čelebići}, the Trial Chamber followed \textit{Tadić} in merging direct and substantial effect into one single \textit{actus reus} element.\textsuperscript{469}

Yet, in \textit{Orić}, the Trial Chamber rejected the requirement of a direct contribution “if it was to express more than the necessary ‘proximity’ (in terms of a link) between the assistance and the principal act”.\textsuperscript{470} It could thus be argued that direct effect was intended to reflect the necessary causal chain between the assistance lent and the commission of the crime. A similar position was put forth by the Appeals Chamber in \textit{Mrkšić}: although it nowhere confirmed the direct effect requirement, the Appeals Chamber mentioned direct effect when addressing the necessary link between the murders of the 200 prisoners of war held at Ovčara and the withdrawal of the

\textsuperscript{462} \textit{Akayesu} Trial Judgment, para. 477; \textit{Strugar} Trial Judgment, paras. 349, 355; \textit{Delalić et al.} Trial Judgment, para. 326.

\textsuperscript{463} \textit{Tadić} Appeals Judgment, para 229; \textit{Delalić et al} Appeals Judgment, para. 352.

\textsuperscript{464} \textit{Furundžija} Trial Judgment, para. 232; \textit{Orić} Trial Judgment, para. 285.

\textsuperscript{465} \textit{Aleksovski} Trial Judgment; \textit{Tadić} Appeals Judgment; \textit{Blaškic} Trial Judgment and Appeals Judgment; \textit{Kvočka et al}, Appeals Judgment; \textit{Mrkšić at al.} Appeals Judgment.

\textsuperscript{466} \textit{Strugar} Trial Judgment, para. 349, fn. 1042 [emphasis in original].

\textsuperscript{467} \textit{Tadić} Appeals Judgment, para. 229.

\textsuperscript{468} \textit{Mrkšić} Appeals Judgment, para 159, citing \textit{Blagojević and Jokić} Appeals Judgment, para. 189.

\textsuperscript{469} \textit{Strugar} Trial Judgment, para. 349, fn. 1042.

\textsuperscript{470} \textit{Orić} Trial Judgment, referring to \textit{Furundžija} Trial Judgment, paras. 232, 234.
military police stationed there; it held that the withdrawal “had an immediate and direct effect” on the crimes committed.471

The function of direct effect in terms of a causal chain between the assistance lent and the commission of the crime is reflected in some findings in the trial against the Dutch businessman Frans van Anraat, charged in 2004 with aiding and abetting genocide and war crimes for having supplied the Iraqi regime of Saddam Hussein with Thiodiglycol (TDG), knowing that this raw material would be used in the production of mustard gas eventually employed in the attacks on several towns in Kurdistan in 1987 and 1988.

Even though it was held that according to both Dutch and international criminal law, the aider and abettor’s contribution was not required to have a causal effect on the crime, but needed to advance the crime or facilitate its commission,472 both the District Court and Court of Appeal required a connection between the deliveries and the production as well as between the production and the use of mustard gas. The Court of Appeal indicated that “mathematical proof” for the occurrence of TDC contributed by van Anraat on the battlefield was not necessary,473 but established that van Anraat’s TDG very likely ended up in ammunition used for the attacks in question.474 In other words, the Court underlined that a causal chain had to be established between van Anraat’s deliveries and the crimes committed. Since he provided raw materials, this necessarily translated into a two step test; as a consequence, the latter was reflected in the assessment of the accused’s mens rea: the Court of Appeals backed the Court of first instance475 when observing that the accused was aware that the TDG would be used for the production of mustard gas and that he knew that the mustard gas was going to be used for a war crime.476

Furthermore, the quality of the assistance provided does matter: the provision of goods specifically designed to kill, such as Zyklon B, Judge Scheindlin argued, bore “a closer causal connection to the principal crime than […] the provision of loans”.477 Accordingly, when assessing the claims relating to IBM’s sales of computer hardware and software to the South

472 Van Anraat Appeals Chamber, para. 12.4; affirmed in Van Anraat SC, para 2.2.
473 Van Anraat Appeals Chamber, para. 12.1.3.
474 Ibidem, paras. 12.2.6, 12.3, 12.5
475 Ibidem, para. 6.5.2.
476 Ibidem, paras. 11.9, 11.16.
477 South African Apartheid Litigation, District Court, p. 44.
African Government, she upheld them with respect to the crime of apartheid, because “customized computerized systems were indispensable” for the implementation of apartheid “in a nation of million”; whereas she dismissed them as regards the crime of torture and other cruel, inhuman or degrading treatment, because “computers were not an essential element […] or the means by which it was carried out”.478

Some authors consider the direct effect requirement as a limitation to the number of links in the causal chain between the contribution and the commission of the crime.479 Certainly, it can be argued that the supply of poison gas to an extermination camp contributes more directly to the principal crime committed than a financial contribution that is ultimately used to buy poison gas for the same purpose. As was the case with van Anraat’s supply of raw materials, the financial contribution first needs to be swapped for the instruments to commit the crime. Unlike the direct provision of the instrument, which raises the question whether the latter has been used for the killings, the contribution of loans or raw materials necessitates a two step test with respect to causality. Accordingly, the question in van Anraat was not merely whether the raw materials provided for were used for the production of mustard gas, but also whether the mustard gas ended up on the battlefield.480 It is also for this reason that the required nexus between an aider and abettor’s financial contribution and the modalities of the crime is difficult to establish. When Flick’s defence argued that his payments to Himmler’s account stood in no casual connection with the crimes committed by the SS481 the Tribunal simply concurred with the Prosecution in that it saw no need to establish that the funds were “directly used for specified criminal activities”.482

As the District Court in van Anraat put it, causality is not to be confused with the excuse that the crimes would also have occurred without the aider and abettor’s contributions “because someone else would certainly have made the contribution”.483 For the purpose of accessory liability, it

478 Ibidem, p. 44.
480 Van Anraat Trial Judgment, para. 11; Van Anraat Appeals Judgment, paras. 11.16, 12.1.3.
481 Opening Statement for the defendant Flick, pp. 115-134, closing statement for Flick, pp. 1128-1172; p. 1164.
482 Causality was not discussed in Flick because the merits ultimately did not concern aiding and abetting but knowingly supporting a criminal organization instead.
483 Van Anraat Trial Judgment, para. 13.
should matter little how many steps need to be taken in the causal chain to link the assistance to the crime, as long as all steps are covered by the required *mens rea*.

5.2.1.3. The Specific Direction Requirement

The following Section presents the analysis of jurisprudence on *specific direction* and offers a critique of the legal analysis and practical problems underpinning this requirement.

While the Wold War II-era precedents do not provide much guidance on the divisive question of specific direction, the ILC’s 1996 Draft Code does specify that the aider or abettor must “directly and substantially” assist the principal’s crime, but it does not elucidate what is meant by the word “directly.”\(^{484}\) The ICTY Appeals Chamber has repeatedly defined the *actus reus* for aiding and abetting as acts “specifically directed” to assist, encourage, or lend moral support to the perpetration of a crime, which have a substantial effect on the commission of the crime.\(^{485}\) The “specific direction” saga started to unfold when *Perišić* Appeals Chamber held 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.”\(^{486}\) The *Perišić* Appeals Chamber asserted that “previous appeals judgments had not conducted extensive analyses of specific direction because 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.”\(^{487}\) 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.\(^{488}\) In such case, the existence of specific direction, which demonstrates the culpable link between the individual’s assistance and the crimes of principal perpetrators, will be self-evident. However, not all cases of aiding and abetting will involve proximity of an individual’s relevant acts to crimes committed. Where an


\(^{485}\) *Tadić* Appeals Judgment, para.229(iii); *Vasiljević* Appeals Judgment, para.102(i); *Blagojević* Appeals Judgment, para.127; *Kvočka* Appeals Judgment, para.89; *Blaškić* Appeals Judgment, para.45. See also, *Rukundo* Appeals Judgment, para.52; *Kalimanzira* Appeals Judgment, paras.74, 86; *Muvunyi* Appeals Judgment, para.79; *Seromba* Appeals Judgment, para.44; *Nahimana* Appeals Judgment J, para.482; *Ntagerura* Appeals Judgment, para.370; *Ntakirutimana* Appeals Judgment, para.530.

\(^{486}\) *Perišić* Appeals Judgment, para. 36.

\(^{487}\) *Ibidem*, para. 38.

\(^{488}\) For example, an individual may have been physically present during the preparation or commission of crimes committed by principal perpetrators and made a concurrent substantial contribution. See, e.g. *Lukić and Lukić* Appeals Judgment, paras. 419-461; *Kvočka et al.* Appeals Judgment, paras. 563-564; *Furundžija* Appeals Judgment, paras. 124-127.
individual is remote from relevant crimes, evidence proving other elements of aiding and abetting may not be sufficient to prove specific direction. In such circumstances, explicit consideration of specific direction may be required.\(^{489}\)

Relying on \textit{Tadić} and \textit{Perišić}, the Trial Chamber in \textit{Stanišić and Simatović}\(^{490}\) acquitted the defendants of aiding and abetting war crimes on the grounds that “the accused’s assistance was not specifically directed towards the commission of the crimes.”\(^{491}\) Contrary to the Appeals Chamber in \textit{Perišić}, the SCSL Appeals Chamber in \textit{Taylor} concluded that the specific direction is not a requisite element of \textit{actus reus} of aiding and abetting. Moreover, a different panel of judges on the ICTY Appeals Chamber subsequently reversed the legal standard set in \textit{Perišić} less than a year earlier. Namely, in \textit{Prosecutor v. Šainović et al.} the appellant Lazarević had been convicted for having provided various forms of support and assistance to soldiers of the Yugoslav Army involved in forcible displacement in Kosovo.\(^{492}\) The Šainović Appeals Chamber held that the \textit{Perišić} had been wrongly decided\(^{493}\) as it deviated from both ICTY jurisprudence and customary international law. The Šainović panel announced that it “unequivocally reject[ed]” the \textit{Perišić} standard since “\textit{specific direction}” is not a requisite element of aiding and abetting,\(^{494}\) thereby siding with the SCSL’s holding in \textit{Taylor}.\(^{495}\)

Having reached that conclusion, the Šainović judgment evidenced no attempt to consider whether principles of justice might require a specific direction requirement in the kinds of “\textit{foreign assistance cases}” exemplified by \textit{Perišić}. Indeed, the judgments rejecting the specific direction standard correctly observe that none of the early (World War II-era) cases mention specific direction as an element of aiding and abetting\(^ {496}\), however, the vast majority of these

\(^{489}\) Mrkšić and Šljivančanin Appeals Judgment, para. 81 (finding that in the context of the \textit{actus reus} of aiding and abetting, substantial contribution may be geographically and temporally separated from crimes of principal perpetrators); \textit{Perišić} Appeals Judgment, paras. 38-39.


\(^{491}\) \textit{Ibidem}, para. 2360.


\(^{494}\) \textit{Ibidem}, para. 1650 (“The Appeals Chamber….unequivocally rejects the approach adopted in the Perišić Appeals Judgment as it is in direct and material conflict with the prevailing jurisprudence on the \textit{actus reus} of aiding and abetting liability and with customary international law in this regard.”).

\(^{495}\) \textit{Ibidem}, para. 1649.

\(^{496}\) \textit{Ibidem}, paras. 1627-42; \textit{Taylor} Appeals Judgment, para. 474 (The Appeals Chamber has independently reviewed the post-Second World War jurisprudence, and is satisfied that those cases did not require an \textit{actus reus} element of
cases do not raise the problem encountered in Perišić, namely of generalized or so-called “neutral” assistance provided to a recipient who uses it for both legitimate and illegitimate purposes. However, Zyklon B and Flick appear to be exceptions. In the former case, the accused argued that they had supplied insecticide to the SS for the legitimate purpose of delousing buildings.\footnote{\textit{The Zyklon B Case}, para. 94.} The Judge Advocate instructed that the Tribunal could convict based on a finding “that the accused knew that the gas was to be used for the purpose of killing human beings.”\footnote{\textit{Ibidem}, para. 101.} Even here, the instructions do not distinguish between a scenario in which the accused knew that all of the gas was to be used for killing human beings, and one in which the accused knew that only some or much of it was to be so used. Nevertheless, it is to be emphasized that the law does not demand an exclusively criminal purpose. Indeed, as pointed out by Perišić, in Zyklon B it was evidenced “that defendants arranged for S.S. units to be trained in using this gas to kill humans in confined spaces.”\footnote{Perišić Appeals Judgment, para. 44, note 115.}

In the \textit{Flick} case, one of the Nürenberg Military Tribunal cases, the Tribunal convicted two of the accused on charges of having contributed funds used to support the SS. The Tribunal noted that “[o]ne who knowingly by his influence and money contributes to the support [of an organization which on a large scale is responsible for war crimes and crimes against humanity] must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.”\footnote{\textit{The Flick Case}, para. 1217.} In the \textit{Flick} case, moreover, the Tribunal did acknowledge the probability that not all the accused’s financial donations to the personal use of SS commander Heinrich Himmler went to illegitimate ends. The judgment finds it “reasonably clear” that a portion of the funds “were used purely for cultural purposes,” but nevertheless justifies the conviction of Flick and Steinbrinck on the grounds that they could not “reasonably believe” that their contributions were used “solely for cultural purposes.”\footnote{\textit{Ibidem}, para. 1220.} The Tribunal further expressed “no doubt” that “some of this money” was used in support of criminal activity.\footnote{\textit{Ibidem}.} Given this broad reading, this language conveys a breathtakingly broad view of criminal responsibility according to which a donor is criminally responsible for a mere negligent failure to realize that some portion of a financial

\begin{flushleft}
\footnotesize
\textsuperscript{specific direction’} in addition to proof that the accused's acts and conduct had a substantial effect on the commission of the crimes.«
\footnote{\textit{The Zyklon B Case}, para. 94.}
\footnote{\textit{Ibidem}, para. 101.}
\footnote{Perišić Appeals Judgment, para. 44, note 115.}
\footnote{\textit{The Flick Case}, para. 1217.}
\footnote{\textit{Ibidem}, para. 1220.}
\footnote{\textit{Ibidem}.}
contribution will be directed by the recipient toward criminal ends. However, other passages caution against such a broad reading, indicating that perhaps what the judgment really means to say is that defendants must have known, and hence did know, of the uses to which their contributions were put. Moreover, the IMT also took the position that any use of the accused’s contributions for legitimate cultural activities was likely insignificant during the wartime period.\textsuperscript{503}

These cases, however, are potentially distinguishable on the grounds that they involve aiding and abetting \textit{of} a criminal enterprise: the defendants were convicted of providing assistance to the SS, which the Nüremberg Military Tribunal had already determined to be a criminal organization.\textsuperscript{504} The distinction between generalized and particular assistance can depend on the context, including the anticipated use of assistance. General monetary aid to an armed group becomes easier to characterize as substantial assistance to crime when the donor realizes that the recipient is a criminal enterprise or that most or all the funds will be directed by the recipient toward criminal ends. Thus, the \textit{Zyklon B} and \textit{Flick} cases are noteworthy on the account of the fact that they deal with assistance to the SS, an entity that the IMT had determined to be a criminal organization. This fact played a central role in the reasoning of \textit{Flick}, as the IMT determined it to be “clear from the evidence that [Flick and Steinbrinck] gave to Himmler, the Reich Leader SS, a blank check. His criminal organization was maintained and we have no doubt that some of this money went to its maintenance. It seems to be immaterial whether it was spent on salaries or for lethal gas.”\textsuperscript{505} In the \textit{Zyklon B} case, the accused directly supplied the SS with insecticide.\textsuperscript{506}

For this reason, Heller has argued that \textit{Zyklon B} is compatible with \textit{Perišić}. In particular, he notes that “the SS was not an organization that was engaged in lawful and unlawful activities” as the VRS undoubtedly was. “On the contrary, \textit{all} of the SS’s activities were unlawful, which is

\textsuperscript{503} \textit{The Flick Case}, para. 1220.
\textsuperscript{504} The Nüremberg IMT determined that the SS, along with the other entities it deemed to be criminal, was used for »criminal purposes« In particular, it found »[t]he SS was utilized for purposes which were criminal under the Charter involving the persecuting and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labour program and the mistreatment and murder of prisoners of war.« See 1 Trial of the Major War Criminals Before the International Military Tribunal 171, 219 (1947), \textit{United States v. Goring et al.}, p. 276, 273.
\textsuperscript{505} \textit{The Flick Case}, para. 1221.
\textsuperscript{506} \textit{The Zyklon B Case}, para. 98.
precisely why the IMT specifically deemed it a criminal organization”.

This argument suggests a way to read both the Zyklon B and Flick cases that is broadly consistent with Perišić’s specific direction requirement. The outcome of Zyklon B does not offend specific direction, as any support for a criminal enterprise such as the SS was necessarily illegitimate, whereas the narrow reading of Flick supports, at best, a de minimis exception to the specific direction requirement in cases where an insignificant portion of assistance is directed toward legitimate ends.

Schabas has suggested that while there is no reference to specific direction in the Article 25(3)(c) of the Rome Statute, the formulation of aiding and abetting does seem to require that the accused acted purposively, perhaps requiring a specific intent rather than mere knowledge. According to Schabas, this might be deduced from the acts of the accused, and it would likely be satisfied where assistance was specifically directed towards criminal acts, although such specific direction may not be essential. As regards specific direction at the ICC, the jurisprudence to date has simply not addressed this matter in any great detail.

It should be emphasized that Perišić and other ICTY acquittals gave rise to considerable political and scholarly criticism. Specific direction itself was seen as a conscious raising of responsibility standards that could render accountability for international crimes more difficult. While the concept first appeared in the Tadić appellate judgment, the single reference to “specific direction” lacked explanatory analysis. Only passing references to the concept of


512 For Kenneth Roth of Human Rights Watch, it could cripple future efforts to prosecute senior officials responsible for human rights crimes (see Roth, K., A Tribunal’s Legal Stumble, in: New York Times, 9 July 2013).

513 Reference to »specifically directed« actions in Tadić was mere »obiter dictum«.
“specific direction” were previously made in the bulk of the ICTY’s aiding and abetting jurisprudence. The concept remained obscure until the Appeals Chamber’s decision in Perišić. Judge Liu’s dissent from Perišić Appeals Judgment observed that most cases cited by the Majority “simply restate[d] language from the Tadić Appeals Judgment without expressly applying the specific direction requirement.” Judge Ramaroson concurred that most prior cases reiterated the Tadić language “verbatim” and “never” applied “specific direction” to the facts of these cases. As underlined by Judge Liu in his dissenting opinion, “specific direction has not been applied in past cases with any rigor.” The Appeals Chamber’s opinion itself acknowledges that “previous appeals judgments have not conducted extensive analyses of specific direction.”

An air of uncertainty thus surrounds the law on aiding and abetting at the ICTY. The Taylor and Šainović Appeals Judgments, together with a subsequent Trial Chamber Judgment from the Extraordinary Chambers in the Courts of Cambodia, may possess sufficient force to dissuade any further divergence. It is noteworthy that a slightly differently constituted Appeals Chamber denied a prosecution motion in Perišić to overturn his acquittal in light of Šainović, considering that there were no cogent reasons for it to depart from its earlier jurisprudence regarding reconsideration of final judgments. It is quite rare for an Appeals Chamber to depart from its own earlier jurisprudence, especially in an apparent climate of acrimony, or for other tribunals to reject precedent so forcefully. In the modern era there has been a notable degree of

514 Perišić Appeals Judgment, pt. VIII, para. 2 (Judhe Liu, dissenting).
515 Ibidem, pt. IX, para. 4 (Judge Ramaroson, concurring).
516 Ibidem, pt. VIII, para. 3 (Judge Liu, dissenting).
521 ICTY, Prosecutor v. Perišić, Case No. IT-04-81-A, Decision on Motion for Reconsideration (Appeals Chamber), 20 March 2014.

\textit{Prosecutor v. Tadić}\footnote{Tadić Appeals Judgment.}

The first ICTY Appeals judgment setting out the parameters of aiding and abetting was the \textit{Tadić} Appeals Judgment, rendered in 1999, which described the \textit{actus reus} of individual criminal responsibility for aiding and abetting as follows:

The aider and abettor carried out acts \textit{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.\footnote{Ibidem.}

In defining the elements of aiding and abetting liability, the \textit{Tadić} Appeals Judgment contrasted aiding and abetting with JCE, distinguishing the modes of liability on the basis of specific direction. The Appeals Chamber underscored that, while \textit{actus reus} of JCE requires only ‘acts that in some way are directed to the furthering of the common plan or purpose’ the \textit{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.\footnote{Ibidem.} Many subsequent ICTY and ICTR appeals judgments explicitly referred to ‘specific direction’ in enumerating the elements of aiding and abetting, often repeating verbatim the \textit{Tadić} Appeals Judgment’s relevant holding.\footnote{See Blagojević and Jokić Appeals Judgment, para. 127; Kvočka \textit{et al.} Appeals Judgment, para. 89; Blaškić Appeals Judgment, para. 45; Vasiljević Appeals Judgment, para. 102; Krnojelac Appeals Judgment, para. 33; Muvunyi Appeals Judgment, para. 79; Kalimanzira Appeals Judgment, para. 74.}

\textit{Prosecutor v. Blagojević}\footnote{Blagojević and Jokić Appeals Judgment.}
Blagojević was the commander of the Bosnian Serb Army, convicted of aiding and abetting genocide and crimes against humanity. His role in the events surrounding Srebrenica massacre was one of oversight and instruction; he supervised the forced transfer of refugees by members of his brigade and coordinated such efforts against the Bosnian Muslims. Finding that Blagojević rendered substantial assistance to the primary perpetrators, the Trial Chamber convicted him of aiding and abetting genocide, despite the Prosecutor’s failure to establish that he had knowledge of the executions at Srebrenica when rendering the assistance. However, because he undoubtedly had knowledge of his inferiors’ “cruel and inhumane” acts towards and torture of the refugees and because his assistance was “practical”, the Trial Chamber concluded that genocidal intent could be inferred from evidence of other culpable acts systematically targeting the same group. However, the Appeals Chamber took the view that no trier of fact could find beyond a reasonable doubt that, without knowledge of the mass killings, Blagojević’s awareness of the other facts relating to the forcible transfer operation satisfied the mens rea for complicity in genocide. The fact of his command responsibility did not override the necessity of proving his particular mens rea (knowledge) concerning the acts themselves. The Appeals Court addressed the confusion Tadić had engendered:

[W]hile the Tadić definition has not been explicitly departed from, specific direction has not always been included as an element of the actus reus of aiding and abetting. This may be explained by the fact that such a finding will often be implicit where the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime...[T]he fact that his or her participation amounted to no more than his or her “routine duties” will not exculpate the accused.

Thus, the Appeals Chamber held that specific direction ought not constitute the focus, because it had effectively served as a proxy for practical assistance having a substantial effect on commission of the crime. In the subsequent decision, namely the Prosecutor v. Brdjanin specific direction played no part in upholding convictions for aiding and abetting detention camp killings. The Appeals Chamber in Brdjanin held that “Brdjanin’s inactivity and openly laissez-

528 See generally Blagojević and Jokić Trial Judgment.
529 Blagojević and Jokić Appeals Judgment, para. 123 (summarizing the Trial Chamber's analysis).
530 Blagojević and Jokić Trial Judgment, para. 755-59.
531 Blagojević and Jokić Appeals Judgment, para. 123.
532 Ibidem, para. 189.
533 Brdjanin Appeals Judgment.
fairy attitude towards the camps and detention facilities, coupled with his failure to “take a stand” against the events in the camps, had a substantial effect on the commission of torture, and, as a result, encouraged and supported the perpetrators of the crime.” 534 Inactivity and an indifferent attitude could hardly be “specifically directed” toward facilitating the commission of detention camp killings (inactivity is just as suggestive of innocence as guilt). Therein lay the problem to which Brđanin court was responding – that of conditioning the actus reus of complicity on some observable character of the assistance itself.

Prosecutor v. Kupreškić 535

While the Appeals Chamber has not expressly defined “specific direction” the Appeals Chamber in Kupreškić provided an informative analysis when determining whether the conduct at issue amounted to acts specifically directed to the commission of the underlying crime. Namely, the Appeals Chamber found that evidence that Vlatko Kupreškić was seen unloading weapons from his car was not sufficient for finding that his acts were specifically directed towards assisting the crime of persecution. 536 Kupreškić Appeals Judgment importantly noted that the six-month length of time between when Vlatko Kupreškić was observed unloading the weapons and when the attack on Ahmici actually occurred “diminishes the likelihood that the weapons were intended to be used for attacking the Muslim population.” 537 Kupreškić Appeals Judgment further found that the accused’s mere presence outside the building where the plan for the attack on Ahmici was discussed, one day before the attack occurred, could not amount to an act specifically directed towards the commission of the underlying crime. 538

Thus, the Kupreškić Appeals Judgment clearly demonstrates that not any act of assistance provided to the commission of a crime constitutes aiding and abetting. Only acts that are specifically directed towards assisting a crime are sufficient.

Prosecutor v. Mrkšić and Šljivančanin 539

534 Ibidem, para. 189.
535 Prosecutor v. Kupreškić, Case No. IT-95-16-A.
536 Kupreškić Appeals Judgment, para. 277.
537 Ibidem [emphasis added].
538 Ibidem, para. 283.
539 Prosecutor v. Mrkšić, Case No. IT-95-13/1-A.
The Šljivančanin Appeals Chamber explicitly held that “specific direction is not an essential ingredient of the *actus reus* of aiding and abetting.\(^{540}\)

Importantly, “specific direction” had been explicitly included as an element of the *actus reus* for aiding and abetting in two recent ICTR appeals judgments rendered after Mrkšić Appeals Judgment. Kalimanzira Appeals Judgment referred to acts “specifically directed” to assist the perpetration of a crime.\(^{541}\) Likewise, Rukundo Appeals Judgment applied a variation of the “specific direction” notion, namely that the acts must be “specifically aimed” at assisting the perpetration of a crime.\(^{542}\)

The jurisprudence of the ICTY and the ICTR prior to the Perišić case, therefore, demonstrates that “specific direction”, albeit as either an *explicit* or an *implicit* element, had continued to form an integral part of the *actus reus* for aiding and abetting. The Mrkšić Appeals Judgment was thus (until Perišić) strikingly inconsistent with the ICTY jurisprudence. Similarly, the SCSL, in two trial judgments, had held that specific direction is a requisite element of the *actus reus* for aiding and abetting.\(^{543}\)

*Prosecutor v. Perišić*

In finding that specific direction is not a required element of the *actus reus* of aiding and abetting, the Perišić Trial Chamber relied on the Appeals Chambers’ judgments in Mrkšić and Blagojević.\(^{544}\) It is proposed that such reliance seems misplaced as Blagojević Appeals Judgment accepted that specific direction forms a part of the *actus reus*, stating “such a finding [of 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.”\(^{545}\) Moreover, Blagojević Appeals Judgment expressly noted, “the Tadić definition [of the *actus reus* for aiding and abetting] has not been explicitly departed from.”\(^{546}\)

---

\(^{540}\) Mrkšić and Šljivančanin Appeals Judgment, para. 159. This holding was affirmed in a subsequent case, Lukić & Lukić Appeals Judgment, paras. 424-425.

\(^{541}\) Kalimanzira Appeals Judgment, para.74.

\(^{542}\) Rukundo Appeals Judgment, para.52.

\(^{543}\) Sesay (RUF) Trial Judgment, para.277; Fofana (CDF) Trial Judgment, para. 229.

\(^{544}\) Perišić Trial Judgment, para. 126.

\(^{545}\) Blagojević Appeals Judgment, para.189 [emphasis added].

\(^{546}\) Ibidem, para.189.
It is imperative to note that Mrkšić Appeals Judgment relied solely on Blagojević Appeals Judgment for the proposition that the Appeals Chamber has “confirmed that ‘specific direction’ is not an essential ingredient of the actus reus of aiding and abetting.”547 This was not the case. Contrary to Mrkšić Appeals Judgment’s assertion, Blagojević Appeals Judgment actually accepted the continued applicability of specific direction, finding the notion to be “often […] implicit.”548 Therefore, Mrkšić Appeals Judgment, standing alone, is misguided in this instance and cannot overshadow the Appeals Chamber’s previously repeated adoption of the concept of “specific direction” in defining the actus reus for aiding and abetting (prior to Perišić).549 Had Blagojević Appeals Judgment wished to reject this notion, it would have expressly done so.

Perišić Appeals Chamber held 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.”550 In Blagojević, an implicit finding of specific direction was held to inhere whenever the accused accomplice provided to the principal practical assistance having a substantial effect on commission of the crime. By the same reasoning, an explicit finding of specific direction might be necessary only if assistance did not have a substantial effect. The Trial Chamber found that Perišić’s assistance did have a substantial effect on the commission of war crimes, and as such, it completely refrained from engaging in a specific direction inquiry.551 Arguing that precedent demanded independent proof of specific direction, the Appeals Chamber posited two potential aiding and abetting scenarios. First, where acts of assistance were geographically proximate to the principal’s acts, proximity itself satisfies specific direction. Second, in the case of Perišić, where assistance was not geographically proximate, the Prosecution sufficiently proves specific direction only “if the VRS was an organization whose sole and exclusive purpose was the commission of crimes”, or if Perišić “endorsed a policy of assisting their crimes.”552

After Tadić, Blagojević and Perišić, the ICTY complicity jurisprudence assumed the following form: if aid of assistance was “geographically or otherwise proximate to” the crimes of the

547 Mrkšić Appeals Judgment, para.159.
548 Blagojević Appeals Judgment, para.189.
549 Ibidem.
550 Perišić Appeals Judgment, para. 36.
551 Perišić Trial Judgment, para. 1627 (finding that Perišić’s »logistical assistance and personnel assistance, individually and cumulatively, had a substantial effect on the crimes perpetrated in Sarajevo and Srebrenica«).
552 Perišić Appeals Judgment, para. 52.
principal(s) (proximate assistance), the assistance has a substantial effect on the perpetration of the principal’s crime, and specific direction is satisfied implicitly, whereas specific direction must be satisfied explicitly by a finding that the aid rendered is not merely a “general assistance which could be used for both lawful and unlawful activities,” but is rather of a type that almost always attends the commission of punishable crimes, or where aid could be “general assistance for lawful means,” by finding that (i) the sole purpose of the assisted organization is the commission of crimes or (ii) the accused “endorsed a policy of assisting the organization’s crimes.”

Appeals judgments have subsequently been issued in the Šainović et al., the Popović et al. and Stanišić cases, departing from the approach adopted in the Perišić case.  

**Prosecution v. Šainović et al.**

The Šainović Appeals Judgment, issued subsequent to Perišić clarified that specific direction is not an element of aiding and abetting liability. After reviewing the jurisprudence of the ICTY and the ICTR in this regard and re-examining the elements of aiding and abetting liability under customary international law, the Appeals Chamber observed that, neither in the jurisprudence of the Tribunal and the ICTR nor under customary international law, had specific direction been considered to be an element of aiding and

---

553 For further assessment and application to the Perišić case see Chapter 6.5.1.
554 Prosecutor v. Šainović et al., Case No. IT-05-87-A.
557 Šainović et al. Appeals Judgment, paras. 1626-1648. The Appeals Chamber examined the jurisprudence derived from cases which dealt with crimes committed during the Second World War and found that, in none of these relevant cases, was “specific direction” required as a distinct element. See Šainović et al. Appeals Judgment, paras 1627-1642. The Appeals Chamber also reviewed national law and held that requiring specific direction for aiding and abetting is not a general, uniform practice in national jurisdictions. See Šainović et al. Appeals Judgment, paras. 1643-1646. Finally, the Appeals Chamber examined international instruments (the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission in 1996 and the ICC Statute) and found no support for the proposition that specific direction is an element of aiding and abetting liability under customary international law. See Šainović et al. Appeals Judgment, paras. 1647-1648, 1622.
abetting liability. As a result, it rejected the approach adopted in the \textit{Perišić} and held that this approach was “in direct and material conflict with the prevailing jurisprudence on the \textit{actus reus} of aiding and abetting liability and with customary international law”. The Appeals Chamber re-affirmed that, “under customary international law, the \textit{actus reus} of aiding and abetting consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime”. The \textit{Šainović} case should, however, be differentiated from \textit{Perišić} as it did not concern the question of “remote assistance”. It may be correct, as Judge Tuzmukhamedov held in his dissent, that the \textit{Perišić} specific direction requirement arguably did not apply because in \textit{Šainović} the assistance provided was not “remote” in the same way as in \textit{Perišić} case, meaning that the Appeals Chamber’s decision to reject the analysis in \textit{Perišić} “unequivocally” may not have been strictly necessary.

Moreover, a detailed reading of the analysis conducted by the \textit{Šainović} Appeals Chamber, far from demonstrating that specific direction is not a requirement, rather goes to prove that a degree of flexibility exists at the national level as to whether specific direction is required or not. But further analysis of the approach to aiding and abetting in some of the national legal systems mentioned in the \textit{Šainović} shows that such flexibility indeed exists even within domestic jurisdiction itself. As a common basis, for aiding and abetting liability to arise, national legislation and the jurisprudence of domestic courts require the provision of assistance or support which facilitates the commission of a crime. However, national jurisdictions conceptualise the link between the acts of assistance and the crime in the context of \textit{actus reus} and the required degree of \textit{mens rea} in various different ways in accordance with principles in their respective legal systems.

\begin{itemize}
\item \textit{Ibidem}, paras. 1623-1625, 1649.
\item \textit{Ibidem}, para. 1650.
\item \textit{Ibidem}, para. 1625.
\item \textit{Ibidem}, para. 1650.
\item \textit{Ibidem}, Judge Tuzmukhamedov dissenting opinion, paras. 42-44.
\item Judge Agius Dissenting Opinion in \textit{Stanišić} Appeals Judgment.
\item For example, Article 13(VI) of the Federal Criminal Code of Mexico provides that a participant in the offence is a person who “wilfully” [dolosamente] aids or abets another person in the commission of that offence. The Supreme Court of Justice has held that the accomplice “is an efficient assistant aware of the plans and conduct of the material perpetrator, instigator or necessary co-perpetrator (the accomplice’s intervention is required for the commission of the crime), who contributes to the crime by means of the previous or simultaneous use of means for its commission, but who does not have control over the crime” (Suprema Corte de Justicia de la Nación, Tesis CXXI/2007, vol. XXV, June 2007, p. 208; and Contradicción de Tesis 414/2010, vol. VIII, May 2012, p. 975). Section 107 of the Indian Penal Code stipulates that a person abets, inter alia, by “intentionally aid[ing], by any act or illegal omission”.
\end{itemize}
Subsequently, in the *Popović et al.* Appeals Judgment, the Appeals Chamber re-affirmed that “‘specific direction’ is not an element of aiding and abetting liability under customary international law.”\(^{565}\)

*Prosecution v. Stanišić*

Invoking *Tadić* and *Perišić*, the Trial Chamber in *Stanišić* acquitted the defendants of aiding and abetting war crimes on the grounds that “the accused’s assistance was not specifically directed towards the commission of the crimes of murder, deportation, forcible transfer, or persecution.”\(^{566}\) In its *actus reus* inquiry, the court, in assessing whether defendants’ assistance

---

\(^{565}\) *Popović et al.* Appeals Judgment, para. 1758, quoting *Šainović et al.* Appeals Judgment, para. 1649. See also *Popović et al.* Appeals Judgment, paras. 1764, 1783.

\(^{566}\) *Stanišić* Trial Judgment, para. 2360.
had a substantial effect on the perpetration of the crimes looked to specific direction, and found lack of specific intent to dictate a finding of no substantial effect. Thus, aiding and abetting liability could not be attached to the defendants’ acts of assistance because they were not geographically proximate to the principals’ crimes, nor were they specifically directed, because evidence of defendants’ intent did not support a finding of substantial effect (nor, presumably, endorsement of the VRS crimes), and the military objectives of the VRS were not solely and exclusively the commission of crimes punishable under the ICTY Statute.567

The Stanišić Appeals Judgment took the position that the Stanišić Trial Chamber erred in its position that “specific direction” is an element of aiding and abetting.568 Nevertheless, Judge Koffi Kumelio A. Afande’s view underscored in his dissent:

I have some sympathy for the approach taken by the Majority, if one is seeking answers to the question of whether “specific direction” is an element of aiding and abetting, however in my view the question itself is wrong. The more meaningful question in my view, which has been evaded or ignored throughout this longstanding discussion and jurisprudential battle, is a very simple one: “Whether, without making a finding on ‘specific direction’, a trier of fact can find beyond reasonable doubt that the contribution, supposed to be substantial (actus reus), and/or the intent (mens rea) of the alleged aider and/or abettor (accessory) was set to aid and abet the crimes committed by another (principal)?”569

As demonstrated above, the question of specific direction requirement is preliminarily semantic and linguistic by nature, before becoming a legal issue at the second level. Primarily there must be a link of causality or nexus, in the sense that “what is provided” shall aim at “achieving an end” or “achieving a purpose”. Brought into the legal domain at the second level, this means that “what is provided” by the accomplice shall aim at achieving the resulting “end” (namely, the crimes committed by the principal). Therefore, Judge Afande argues that “it should be clearly demonstrated that the resulting crimes have occurred specifically because the aider or abettor has provided such objective element and/or such subjective element. This means that without such

568 *Stanišić* Trial Judgment, paras. 103-108.
objective and subjective elements on the part of the aider and/or abettor, being specifically directed to achieve the resulting crimes, these could not have been committed.\textsuperscript{570}

Greenawalt also concurs that the debate on specific direction may have more to do with semantics than substance. He argues that the idea of \textit{specific direction} may be something already implicit in the idea of aiding and abetting; for example, there is a difference between actually assisting criminal behaviour, on the one hand, and, on the other hand, engaging in more general activities that somewhere along the line will have the effect of remotely assisting an offender’s culpable conduct.\textsuperscript{571} The evidence from the seminal \textit{Tadić} Appeals Judgment – which introduced the language of specific direction into the international criminal jurisprudence – suggests a distinction along these lines.\textsuperscript{572} The language makes its appearance in a passage distinguishing the culpability involved in aiding and abetting from that resulting from participation in a JCE, where individual criminal responsibility can be established based on general contributions to the shared criminal enterprise rather than by proof of contributions to particular crimes committed by the enterprise. Whatever the precise meaning of the words “\textit{specifically directed},” it is argued that criminal prohibitions against aiding and abetting are generally concerned with behaviour that has both a more specific and a more direct relationship to crime than the JCE approach contemplates.

This dissertation proposes that it is irrelevant to argue whether specific direction constitutes a part of the \textit{actus reus} or the \textit{mens rea} of aiding and abetting liability. Rather, “\textit{specific direction}” is a methodological threshold for the test of certainty about the nexus between an accused’s contribution and the resulting crime. Accordingly, it is meant to prevent errors in assessing whether contribution was meant for criminal purposes.\textsuperscript{573} As a result of a flexible approach in domestic legal systems, it appears that it is paramount that the “\textit{specific direction}” be specifically looked for, in any case where there is no direct evidence establishing the objective and/or subjective link between the contribution of the accused and the crimes charged. According to Judge Koffi Kumelio A. Afande’s view:

\textsuperscript{570} \textit{Ibidem}, para. 24.  
\textsuperscript{572} \textit{Tadić} Appeals Judgment, para. 229.  
\textsuperscript{573} \textit{Ibidem}, para 25.
“[S]pecific direction could be assessed in either the actus reus or the mens rea, but it is not required to be found in both before entering a conviction. This assessment is fact-based and can vary from one case or situation to another. Indeed, in the situations in which the “specific direction” is obvious and easily inferable from the actus reus or the mens rea, as established based on the evidence, there would be no need to further or specifically search for it. However, in situations where “specific direction” is not obvious and easily inferable, then there would be a need to further or specifically search for it. This approach allows trial chambers, who are best placed to assess the entirety of the evidence, a level of flexibility that allows them to tailor the requirements on a case-by-case basis.574

5.2.2. The mens rea Elements – The Fault Element

With a broad conduct element and underdeveloped nexus element for aiding and abetting, much of the burden in delimiting individual criminal responsibility is shifted to the fault required of the accomplice. The purposive approach to aiding and abetting seeks to prevent the overextension of criminal responsibility through a narrow mens rea requirement. In the United States, for example, the influential Model Penal Code provides, “A person is an accomplice of another person in the commission of an offense if…with the purpose of promoting or facilitating the commission of the offense, he…aids or agrees or attempts to aid such other person in planning or committing it.”575 The codes and case law of several other common law jurisdictions include similar language,576 as does the Rome Statute.577

However, at the ad hoc tribunals, the fault requirement has been formulated in different terms.578 The classic formulation is that the aider and abettor must know that his conduct assists in the commission of the crime of the principal perpetrator and be aware of the essential element of the crime ultimately committed.579 A common formulation is that of the Trial Chamber in Kunarac,

574 Ibidem, para. 30.
576 In Šainović, the ICTY Appeals Chamber cited the examples of Australia, Canada, Ghana, Israel and England. See the Šainović Appeals Judgment, para. 1645, note 5417-18.
577 See infra Chapter 5.3.
579 Blaškić Appeals Judgment, para. 49, Orić Appeals Judgment, para. 43.
namely the aider and abettor must ‘take the conscious decision to act in the knowledge that he thereby supports the commission of the crime’.\textsuperscript{580}

The requisite mental element (\textit{mens rea}) of aiding and abetting under the case law of the \textit{ad hoc} tribunals is knowledge that the assistance aids the commission of the specific crime of the principal perpetrator along with awareness of the essential elements of these crimes.\textsuperscript{581} Many scholars agree that standard reflects customary international law.\textsuperscript{582} In contrast, the Rome Statute explicitly adopted a “purpose” \textit{mens rea} for most crimes of complicity.\textsuperscript{583}

\textbf{5.2.2.1. A Knowledge-based \textit{mens rea} Threshold}

In \textit{Tadić}, the Trial Chamber held that the “clear pattern” emerging from relevant cases required that the aider and abettor knew of the crime committed by the perpetrator and, despite his or her knowledge, took a “conscious decision to participate” in the crime by supporting it.\textsuperscript{584} Interestingly, the Trial Chamber neither explained what a “conscious decision to participate” meant nor mentioned this mental element again in the remainder of the judgment, not even in a subsequent paragraph in which it summarised the \textit{mens rea} elements for aiding and abetting.\textsuperscript{585} As the Trial Chamber in \textit{Aleskovski} has interpreted the term, “conscious decision to participate” meant that aider and abettor had participated in the act of the perpetrator “in full knowledge of what he was doing”.\textsuperscript{586} Other Chambers have consistently applied the knowledge standard:\textsuperscript{587} in both \textit{Aleskovski} and \textit{Kvočka}, the applied \textit{knowledge plus intent standard} comprised a cognitive

\textsuperscript{580} \textit{Kunarac} Trial Chamber Judgment, 22 February 2001, p. 92. See Boas at al, \textit{supra} note 578, p. 321.
\textsuperscript{581} \textit{Mrkići and Šljivančanin} Appeals Judgment, para. 159; \textit{Orić} Appeals Judgment, para. 43; \textit{Seromba}, Appeals Chamber, Judgment, 12 March 2008, para. 56; \textit{Blagojević and Jokić} Appeals Judgment, para. 127; \textit{Simić} Appeals Judgment, para. 86; \textit{Blaškić} Appeals Judgment, paras. 45-46, 49; \textit{Vasić} Appeals Judgment, para. 102.
\textsuperscript{582} Farrell, N., \textit{supra} note 479, pp. 885-889; Noto, F., \textit{supra} note 413, p. 175.
\textsuperscript{583} See Article 25.3(c) of the Rome Statute.
\textsuperscript{584} \textit{Tadić} Trial Judgment, paras. 674, 675; See also \textit{Delalić et al.} Trial Judgment, para. 326.
\textsuperscript{585} \textit{Tadić} Trial Judgment, para. 692; See Noto, F., \textit{supra} note 413, p. 114.
\textsuperscript{586} \textit{Aleskovski} Trial Judgment, para. 61.
\textsuperscript{587} In \textit{Furundžija} the Trial Chamber held that the threshold was “knowledge, rather than intent” (\textit{Furundžija} Trial Judgment, para 237). The Appeals Chamber in \textit{Blaškić} held that \textit{Furundžija} was correct to find that the applicable mental element was knowledge of the act of assistance alone (\textit{Blaškić} Appeals Chamber, para. 49). As the Trial Chamber in \textit{Orić} explained, it was “undisputed that the aider and abettor had to deliberately support the commission of the crime by the perpetrator” (\textit{Orić} Trial Judgment, para. 286).
element of knowledge and a volitional element of intent.\textsuperscript{588} The Trial Chamber in Orić also confirmed Tadić with what it called a “\textit{double intent}” standard.\textsuperscript{589} It held:

“[The aider and abettor’s \textit{mens rea}] must contain a cognitive element of knowledge and a volitional element of acceptance, whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that in consequence of his contribution, the commission of the crime is more likely than not.”\textsuperscript{590}

Discomforted by the very use of the term \textit{intent} with respect to the \textit{mens rea} of aiding and abetting, in Furundžija the cognitive-volitional approach was rejected as misleading. Although the Trial Chamber explicitly endorsed the \textit{mens rea} definition in Tadić in principle,\textsuperscript{591} it held that the accurate threshold was “knowledge, rather than intent”.\textsuperscript{592} The Appeals Chamber in Blaškić held that Furundžija was correct to find that the applicable mental element was knowledge of the act of assistance alone.\textsuperscript{593} As the Trial Chamber in Orić explained, it was “undisputed that the aider and abettor had to deliberately support the commission of the crime by the perpetrator.”\textsuperscript{594}

In the jurisprudence of the \textit{ad hoc} tribunals there has been no fundamental disagreement as to a knowledge-based standard for aiding and abetting. Some Chambers’ insistence on a “knowledge alone standard” should be seen not as a rejection of the volitional element but as a mere clarification that intent with respect to the act of contributing to a crime must not be misunderstood as implying a purpose standard with respect to aiding and abetting.\textsuperscript{595}

5.2.2.2. A Double Knowledge Standard

The aider and abettor’s knowledge need not only cover the elements of the crime committed but also the aider and abettor’s own conduct. In accordance with the maxim that the subjective elements must cover all objective elements, in Kvočka it was correctly pointed out that the aider and abettor not only had to be aware that his conduct furthered the crime by the principal, but

\textsuperscript{588} Aleskovski Trial Judgment, para 61, Kvočka et al Trial Judgment, para. 255; SCSL, Prosecutor v. Taylor, Case No. SCSL-03-1-T, Judgment (Trial Chamber II), 26 April 2012 (hereinafter: Taylor Trial Judgment), para. 487.
\textsuperscript{589} Orić Trial Judgment, para. 299.
\textsuperscript{590} Ibidem, para. 288.
\textsuperscript{591} Furundžija Trial Judgment, para. 241.
\textsuperscript{592} Ibidem, para. 237.
\textsuperscript{593} Blaškić Appeals Judgment, para. 49.
\textsuperscript{594} Orić Trial Judgment, para. 286.
\textsuperscript{595} Noto, F., \textit{supra} note 413, p. 121.
that it did so to a *substantial degree*.\(^{596}\) Hence, the *ad hoc* tribunals’ more recent formula to require knowledge that his conduct supports the perpetrator’s crime, coupled with awareness of substantial effect, is as essential an element of the aider and abettor’s *mens rea* as knowledge of the crime itself. Thus, it can be argued that a *double knowledge standard* most accurately reflects the shapes given to the *mens rea*; this has been recognized by the Appeals Chamber in *Orić* and *Mrkšić*, namely it required the aider and abettor to be aware of both the crime committed *and* that his conduct supported the commission of the crime.\(^{597}\)

5.2.2.3. A Purpose-based *mens rea* Standard

With respect to special intent crimes such as persecution or genocide, the question whether the aider and abettor has to share the perpetrator’s *mens rea* has been discussed controversially. The *ad hoc* tribunals are in strong favour of a knowledge standard, since the *ad hoc* tribunals have consistently held that the aider and abettor’s knowledge of the crime included the principal’s state of mind.\(^{598}\) Accordingly, it is unsurprising that in *Kvočka*, the leading case on that matter, the Trial Chamber held that the aider or abettor had to “be aware that the crimes being assisted or supported are committed with a discriminatory intent”.\(^{599}\) Moreover, the *Kvočka* standard has been consistently conformed by the Appeals Chamber.\(^{600}\)

The fact that the *ad hoc* tribunals have put forward no shared intent requirement for aiding and abetting, neither for specific intent crimes nor any other types of offences, simply reflects that shared intent had already marked a primary function in the system of participation. Various modes of liability have their own *actus reus* and *mens rea* requirements, irrespective of which crime they are applied to. As Judhe Shahabuddeen put it:

“Intent must always be proved, but the intent of the perpetrator of genocide is not the same as the intent of the aider and abettor. The perpetrator’s intent is to commit genocide. The intent of the aider

\(^{596}\) *Furundžija* Trial Judgment, para. 245 (leading case); *Aleskovski* Appeals Judgment, paras. 162, 164; *Vasiljević* Appeals Judgment, para. 102; Lukić and Lukić Trial Judgment, para. 902; Đorđević Trial Judgment, para. 1876.

\(^{597}\) *Orić* Appeals Judgment, para. 43; *Mrkšić et al* Appeals Judgment, para 49; similarly *Aleksovski* Appeals Judgment, para. 164.

\(^{598}\) *Furundžija* Trial Judgment, para. 245.


\(^{600}\) *Blagojević* and *Jokić* Appeals Judgment, para. 127; *Vasiljević* Appeals Judgment, para. 142; *Krstić* Appeals Judgment, para. 140; *Popović et al.* Trial Judgment, para. 1017; *Taylor* Trial Judgment, para. 487.
and abettor is not to commit genocide; his intent is to provide the means by which the perpetrator, if he wishes, can realise his own intent to commit genocide.\textsuperscript{601}

The Appeals Chamber explained that sharing the direct perpetrator’s intent was one of the distinguishing factors between aiding and abetting and participation in a JCE:

“In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to [participate in and further the criminal activity or purpose of a group]) […]”\textsuperscript{602}

\textit{Kvočka} Trial Chamber held that as soon as an accomplice shared the intent of the perpetrator, he would become a perpetrator himself.\textsuperscript{603}

### 5.3. Aiding and Abetting under the Rome Statute

#### 5.3.1. The \textit{Actus Reus} Standard

According to Article 25(3) (c) of the Rome Statute, “a person shall be criminally responsible and liable for punishment of a crime […] if that person, for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission”. Due to the limited jurisprudence having emanated from the ICC so far, authors have often drawn analogies to the case law of the \textit{ad hoc} tribunals when determining the scope of aiding and abetting within subparagraph (c) of the Rome Statute.

It follows from the term “aids, abets or otherwise assists” that both aiding and abetting are forms of providing assistance to the perpetrator. As the word “including” suggests, providing the means for the commission of a crime is but an illustrative example of such assistance.\textsuperscript{604} It is equally clear that, in accordance with the case law of the \textit{ad hoc} tribunals, both practical and moral contributions are covered by Article 25(3)(c),\textsuperscript{605} notwithstanding a note by the ILC Special

\begin{itemize}
\item \textsuperscript{601} \textit{Krstić} Appeals Judgment, Dissenting Opinion of Judge Shahabuddeen, para. 66.
\item \textsuperscript{602} \textit{Tadić} Appeals Judgment, para. 229.
\item \textsuperscript{603} \textit{Kvočka et al} Trial Judgment, paras. 273, 284, 285.
\item \textsuperscript{604} Werle, G., \textit{supra} note 202, p. 491.
\item \textsuperscript{605} Eser, A., \textit{supra} note 349; Ambos, K., \textit{Article 25, supra} note 104, p. 20.
\end{itemize}
Rapporteur on the Draft code of Crimes, who, while clearly distinguishing between physical and moral acts of assistance, stated that aiding and abetting were “specific physical acts”.606

The actus reus must evidently at least reach the stage of an attempt, otherwise the aider cannot be held criminally responsible for his assistance.607 This means that the drafters conceived aiding and abetting as a form of derivative liability,608 a view shared by the Lubanga Trial Chamber.609 The provision remains silent on aiding ex post facto, i.e. whether assistance can also be given after the commission of the crime. The ILC adopted the view that aiding ex post facto only falls into the ambit of Article 25 if such assistance has both “a causal connection with the final accomplishment of the crime” and has been agreed upon prior to the perpetration of the crime.610

5.3.2. A Substantial Effect Requirement in Article 25(3)(c) of the Rome Statute
To acknowledge that both practical and mental acts of assistance are covered by Article 25(3)(c) inevitably leads to the question whether the wording covers ancillary acts of assistance or whether there are objective minimum requirements for accessory liability. Such a threshold can be introduced not only by an elevated mens rea but, alternatively or cumulatively, by a heightened actus reus requirement such as a substantial effect requirement.

Considering a substantial effect requirement in Article 25(3)(c) of the Rome Statute, the ICC in Lubanga sided with the case law of the ad hoc tribunals and interpreted Article 25(3)(c) as requiring substantial effect. Yet, as it did so in an obiter dictum when discussing the accused’s responsibility as a co-perpetrator under Article 25(3)(a),611 this subject may still be open to debate.612 For policy reasons a substantial effect requirement may be persuasive as it may be

---

609 Lubanga Dyilo Trial Judgment, para. 998.
611 Lubanga Dyilo Trial Chamber, para. 997.
612 Notably, the drafters of the Rome Statute did not incorporate the rule set out in the 1996 Draft Article 2(3)(d), according to which the aider must contribute “directly and substantially” to the commission of the crime. See the Report of the ILC on the work of its forty-eighth session, p. 18. Accordingly, some writers claim that the drafters have implicitly rejected the substantial effect requirement advocated by the ad hoc tribunals (see Schabas, W. A., Enforcing International Humanitarian Law: Catching the Accomplices, 83 International Review Red Cross, 2001,
unjustified to attribute too minor a contribution to an accessory.\textsuperscript{613} Also, the gravity threshold in Article 17(1)(d) Rome Statute in itself is in effect similar to a substantial effect requirement.\textsuperscript{614} Even so, the Trial Chamber’s inclusion of a substantial effect requirement stretches the wording of Article 25(3)(c), which rather tends towards a qualified \textit{mens rea} than a restrictive \textit{actus reus}. The Rome Statute itself does not provide for the latter, neither do the \textit{travaux préparatoires}. Most notably, the drafters did not incorporate the rule set out in the 1996 Draft Article 2(3)(d), according to which the aider must contribute “directly and substantially” to the commission of the crime.\textsuperscript{615} Accordingly, some writers claim that the drafters of the Rome Statute have implicitly rejected the substantial effect requirement advocated by the \textit{ad hoc} tribunals.\textsuperscript{616}

Should the ICC reconfirm a substantial effect requirement in the Article 25(3)(c), it is doubtful whether the Court will be able to come up with a satisfactory substantive definition of what a substantial contribution is; the rather unsuccessful attempts of the \textit{ad hoc} tribunals render the prospect of a meaningful test for cases of marginal assistance rather unlikely.\textsuperscript{617}

5.3.3. Specific Direction Under the Rome Statute

An obvious question is whether specific direction will feature in the aiding and abetting standard at the ICC. At first glance, the ICC judges may not need to take sides on this clearly divisive issue, given the greater level of detail in the Rome Statute and related instruments when compared to the statues of the \textit{ad hoc} tribunals. With regard to aiding and abetting, the Rome Statute makes no reference to specific direction, although the formulation of Article 25(3)(c) does seem to require that the accused acted purposively, perhaps requiring a specific intent rather than mere knowledge.\textsuperscript{618} The ICC jurisprudence to date has simply not addressed this matter in

\textsuperscript{613} Schabas, W. A., \textit{ supra} note 508, p. 435.

\textsuperscript{614} Article 17(1)(d) of the Rome Statute provides that the Court shall determine that a case is inadmissible where, the case is not of sufficient gravity to justify further action by the Court. This so-called "gravity threshold" has played a critical role in guiding the Prosecutor's selection of both situations and cases. In addition, the first Pre-Trial Chamber to consider the question has affirmed that Article 17(1)(d) imposes a requirement that must be met above and beyond the jurisdictional mandates of the Rome Statute. Yet, because "gravity" is not defined in the Statute, the appropriate scope of the term remains a matter of substantial debate.

\textsuperscript{615} Report of the ILC on the work of its forty-eighth session, UN Doc. A/51/10, p. 18.


\textsuperscript{617} Noto, F., \textit{ supra} note 413, p. 188.

\textsuperscript{618} Schabas, W. A., \textit{ supra} note 508.
any great detail. Nevertheless, specific direction might arise in the context of Article 25(3)(d) of the Rome Statute, which foresees criminal responsibility of an individual who intentionally contributes to the commission of a crime by a group acting with a common purpose. The contribution must have been made “with the aim of furthering the criminal activity or criminal purpose of the group” or “in the knowledge of the intention of the group to commit the crime”.\footnote{Rome Statute, Article 25 (3)(e).}

In \textit{Katanga}, the accused was convicted under this provision, and Judge Van den Wyngaert commented on the relevant \textit{ad hoc} tribunals’ jurisprudence on specific direction:

“\textbf{I do consider that, when assessing the significance of someone’s contribution, there are good reasons for analysing whether someone’s assistance is specifically directed to the criminal or non-criminal part of a group’s activities. Indeed, this may be particularly useful to determine whether particular generic contributions – i.e. contributions that, by their nature, could equally have contributed to a legitimate purpose – are criminal or not.\textendash{}}”\footnote{ICC, Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment (Trial Chamber), 7 March 2014, Minority Opinion of Judge Christine Van den Wyngaert, para. 287.}

This was especially relevant, she felt, given the “extremely low” \textit{mens rea} and \textit{actus reus} thresholds under Article 25(3)(d). Furthermore, Judge Van den Wyngaert noted that without a specific direction requirement, there might otherwise “be almost no criminal culpability to speak of in cases when someone makes a generic contribution with simple knowledge of the existence of a group acting with a common purpose”.\footnote{Ibidem, para. 287.} The Trial Chamber convicted Katanga for having knowingly provided weapons to a group with a policy of targeting civilians, without seemingly having insisted that such provision be specifically directed to such crimes.\footnote{Ibidem, para. 1610.} Emphasis was, however, placed on the need for the contribution to be substantial and have a “significant influence on the commission of those crimes”.\footnote{Ibidem, para. 1681.} This reflects the fact that aiding and abetting jurisprudence from the \textit{ad hoc} tribunals has always underscored that the assistance provided must have had a substantial effect on the commission of crimes.

\textbf{5.3.4. Subjective Element Under Article 25(3)(c) - An Elevated \textit{mens rea} Standard}

As it has been shown in Section 5.2.2, the \textit{ad hoc} tribunals have applied a knowledge standard for aiding and abetting; a shared intent requirement has not crystallised in the \textit{ac hoc} tribunal’s
case law. Meanwhile, the knowledge standard has also been applied in van Anraat case before Dutch courts, where all three instances clearly applied a knowledge standard when assessing complicity in war crimes. For many scholars, that standard reflects customary international law. However, Article 25(3) (c) of the Rome Statute does not seem to incorporate a mens rea for aiding and abetting that would correspond to the threshold put forth by the ad hoc tribunals. Rather, Article 30 of the Rome Statute defines the general mens rea as cumulatively composing both knowledge and intent. The commentators agree that the conjunctive formula ultimately chosen in Article 30 of the Rome Statute largely reflects the dissection of mens rea into a cognitive component of knowledge and a volitional component of intent. This means that in the ambit of Article 30, the term intent is not synonymous with purpose, in the sense that the aider and abettor must share the mens rea of the principal. Besides, Article 25(3)(c) specifically requires the aider and abettor to act with the purpose of facilitating the commission of the crime, which appears to exceed the ICTY’s knowledge only standard. Moreover, most scholars interpret Article 25(3)(c) as requiring dolus directus in the first degree. On the ground that the Rome Statute does not explicitly set forth a substantial effect requirement, most authors claim that the purposive motivation balances the low objective threshold in terms of an elevated mens rea threshold. According to this view, it is not sufficient that the aider and abettor acts with knowledge; his intent must cover the consequence of the conduct of the perpetrator in that he desires the commission of the crime, the latter being the principal scope of his contribution.

To require purpose is to exclude knowing assistance. The distinction between mere knowledge on the one hand and an intentional or purposive assistance on the other has thoroughly been discussed in both common and civil law literature. For instance, various legal scholars exclude individual criminal responsibility if the aider and abettor is utterly indifferent about the criminal result brought about by the principal; the aider and abettor must act “due to” or “in order to

---

624 Van Anraat Trial Judgment, para. 6.5.2.; Van Anraat Appeals Judgment, paras, 11.9., 11.16.
625 Farrell, N., supra note 479, pp. 885, 886, 889.
627 Noto, F., supra note 413, p. 116.
628 Ambos, K, Article 25, supra note 104, pp. 639-640; Ambos, K., supra note 607, p. 10; Eser, A., supra note 349, p. 801; Schabas, W. A., supra note 508, p. 435; Giustiniani, Z., supra note 608, p. 442.
629 Ambos, K., supra note 104, p. 639; Eser, A., supra note 349, p. 801.
assist the crime committed by the principal. Other scholars instead derive a \textit{dolus directus} in the first degree interpretation from their reading of Article 25(3)(c).\textsuperscript{633}

The term \textit{purpose} has been left undefined in the Rome Statute and may therefore be open to interpretation.\textsuperscript{634} Time will tell what reading of the notion of \textit{purpose} the ICC will give to Article 25(3)(c).

\section*{5.4. The Appropriate \textit{mens rea} Standard}

This Section proposes that the \textit{mens rea} standard for aiding and abetting under international law requires proof of purpose and not just knowledge. As the statutes of the \textit{ad hoc} tribunals do not provide for a \textit{mens rea} standard for aiding and abetting, the applicable standard must derive from customary international law.\textsuperscript{635} The ICJ has held “[i]t is, of course, axiomatic that the material of customary international law is to be looked for primarily in the actual practice and \textit{opinio juris} of States.”\textsuperscript{636}

\subsection*{5.4.1. Is the \textit{ad hoc} Tribunal’s Jurisprudence Concerning \textit{mens rea} Standard under Customary International Law Flawed?}

While the ICTY Appeals Chamber has held that knowledge is sufficient for aiding and abetting liability, it has not thoroughly addressed whether this standard is supported by customary international law. The ICTY’s application of the \textit{mens rea} standard for aiding and abetting has in fact been inconsistent, with various definitions cited for this standard throughout the relevant jurisprudence.\textsuperscript{637} For example, in several cases before the ICTY and the ICTR the Chambers have referred to a requisite \textit{intention} to facilitate or assist the crime, which implies purpose,
while at the same time finding that mere knowledge is sufficient.\textsuperscript{638} Additionally, it is proposed that the Furundžija Trial Chamber, one of the ICTY’s first judgments to adopt a mere knowledge standard, is flawed.\textsuperscript{639} In view of the international community’s endorsement of a purpose standard which requires proof the aider acted with the purpose of facilitating the charged crimes, the soundness of the standard articulated in the Furundžija Trial Chamber is increasingly doubtful. Namely, Furundžija Trial Chamber incorrectly relied on Article 30 of the Rome Statute in holding that the applicable \textit{mens rea} standard for aiding and abetting is mere knowledge.\textsuperscript{640} The \textit{mens rea} for aiding and abetting is in fact clearly stated in Article 25(3)(c) of the Rome Statute, \textit{lex specialis} to Article 30.\textsuperscript{641}

\textit{Furundžija} Trial Chamber further erred by holding that post-World War II jurisprudence, such as the Einsatzgruppen,\textsuperscript{642} Zyklon B,\textsuperscript{643} and Schonfeld\textsuperscript{644} cases, established that mere knowledge is sufficient to find the requisite \textit{mens rea} for aiding and abetting.\textsuperscript{645} The Einsatzgruppen case was conducted under Control Council Law No. 10 ("CCL-10"), which did not define the \textit{mens rea} for aiding and abetting. Hence, the tribunals created by this law relied heavily on their own national legal standards in defining aiding and abetting, not international standards. This is precisely why the High Court of Australia has noted concern over accepting the opinions of these tribunals as reflecting authoritative statements of customary international law.\textsuperscript{646} The Zyklon B and Schonfeld cases were tried before British military courts. The jurisdiction of these courts was based on the Royal Warrant of 14 June 1945 and these courts applied only domestic law, unless otherwise provided.\textsuperscript{647} In fact, the \textit{Furundžija} Trial Chamber conceded that the judgments from these

\textsuperscript{638} See \textit{e.g.} Kamuhanda Trial Judgment, paras.597, 599; Kajelijeli Trial Judgment, paras.766, 768; Kvočka Trial Judgment, paras.255, 262; Bagilisheka Trial Judgment, para.32; Blaškić Trial Judgment, para.286; Čelebići Trial Judgment, para.326.
\textsuperscript{639} \textit{Furundžija} Trial Judgment, para.249. It has been approved of by subsequent Appeal Chamber judgments. See \textit{e.g.} Aleksovski Appeals Judgment, para.162; Blaškić Appeals Judgment, paras. 46, 50.
\textsuperscript{640} \textit{Furundžija} Trial Judgment, para. 244.
\textsuperscript{641} Ibidem, para. 231.
\textsuperscript{642} \textit{Trial of Otto Ohlendorf and Others}, in Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, vol. IV (hereinafter: the \textit{Einsatzgruppen} case).
\textsuperscript{644} \textit{Trial of Franz Schonfeld and Nine Others}, Essen, 11-26 June 1946, vol. XI, Law Reports, p. 64 (hereinafter: the \textit{Schonfeld} case).
\textsuperscript{645} \textit{Furundžija} Trial Judgment, paras. 236-240.
\textsuperscript{647} \textit{Furundžija} Trial Judgment, para.196.
courts are “less helpful in establishing rules of international law.” Neither of the military courts in these cases specified that they applied anything other than domestic British law.

In sum, Furundžija’s findings on the elements sufficient to establish the 
mens rea
 for aiding and abetting are based on a misreading and/or incorrect interpretation of customary international law standards.

5.4.2. Post-World War II Jurisprudence on mens rea Standard

There was no consensus in customary international law that mere knowledge was the correct standard when Furundžija was decided upon. Contrary to the passages in the Einsatzgruppen case cited by the Furundžija Trial Chamber, the Judge Advocate in Einsatzgruppen stated that, “more than mere knowledge of illegality or crime is required.” Similarly, the Furundžija Trial Chamber’s reliance on the Schonfeld case as cause to adopt a mere knowledge standard is wholly misplaced. The Schonfeld court described the mens rea for aiding and abetting as “the intention of giving assistance”, and requiring that the accused’s assistance must have been “calculated to give additional confidence to his companions.” Additionally, other CCL-10 cases, such as the Hechingen Deportation case involving complicity liability, adopted a “purpose” test requiring that the accomplice must have acted with the same mens rea as the principal perpetrator. The Ministries case declined to impose criminal responsibility on a bank officer who made a loan with the knowledge, but not the purpose, that the borrower would use the funds to finance the commission of crimes.

The Tadić Trial Chamber, which also discussed post-WWII cases with respect to the mens rea for aiding and abetting, noted “the [post-WWII] judgments generally failed to discuss in detail

---

648 Ibidem.
651 The Einsatzgruppen case, p.585 [emphasis added].
652 Furundžija Trial Judgment, para.240.
653 The Schonfeld case, p.70 [emphasis added].
654 Ibidem. [emphasis added]. This language is noted in Furundžija Trial Judgment at paragraph 201, but only with respect to the actus reus of aiding and abetting. This passage addresses the mental element and cannot be relied on for an actus reus analysis.
655 Furundžija Trial Judgment, paras.240, 248.
the criteria upon which guilt was determined.” The only “clear pattern” that the Tadić Trial Chamber found within this jurisprudence concerning the mens rea standard was “a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by [. . .] aiding and abetting in the commission of a crime.” This standard provides for a higher mens rea than mere knowledge. The Tadić Appeals Judgment states that the requisite mens rea is knowledge without providing any authority or analysis supporting this standard. To the extent that the Trial Chamber in Tadić and Furundžija also relied on the ILC Draft Code of Crimes, the Draft Code does not accurately reflect the existing customary international law.

5.4.3. Mens rea in The Rome Statute

As outlined above, the Rome Statute clearly articulates the requisite mens rea for aiding and abetting. It requires that for a person to be held criminally responsible for aiding and abetting, he or she must have acted “[f]or the purpose of facilitating the commission of [. . .] a crime.” Unlike the Model Penal Code, however, the Rome Statute does not define the word “purpose,” nor does it specify how much of the underlying offence must fall within the accomplice’s purpose. Importantly, the knowledge standard of the ICTY was considered when adopting the Rome Statute. This standard was expressly rejected in favour of the more appropriate purpose standard.

The Rome Statute reflects the international community’s consensus on the applicable mens rea standard for aiding and abetting. It has been signed and ratified by 139 and 120 States, respectively. Article 25(3)(c) establishes that the international community has promulgated a standard that requires purpose as part of the mens rea and rejected a standard of mere knowledge.

657 Tadić Trial Judgment, para. 674.
658 Ibidem, para. 674 [emphasis added].
660 Tadić Trial Judgment, para. 688; Furundžija Trial Judgment, para. 242.
662 Rome Statute, Article 25(3)(c).
663 Giustiniani, Z., supra note 646, pp.442-443. As one member of the German delegation to the Rome Conference and former ad litem judge of the Tribunal has observed, “the aider and abettor must act with ‘purpose’. . . [which] means more than mere knowledge” (Eser, A., supra note 349, p. 801).
alone for imposing aiding and abetting liability. The Pre-Trial Chamber of the ICC recently clarified this point by explaining that “unlike the jurisprudence of the ad hoc tribunals, article 25(3)(c) of the [Rome] Statute requires that the person acts with the purpose to facilitate the crime; knowledge is not enough for responsibility under this article.”

Since the seminal case of Tadić, the Appeals Chamber has expressly noted, “[the Rome Statute] was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly.” The ICTY Appeals Chamber also recognized that the “[Rome Statute] is supported by a great number of States and may be taken to express opinio juris of those States” and emphasised the “significant legal value” of the Rome Statute. The Tribunal has accordingly looked to the Rome Statute for guidance when considering the substance of customary international law.

Article 25(3)(c) of the Rome Statute embodies the development of customary international law. Since its adoption in 1998 there has been a growing trend of general acceptance that mere knowledge that crimes may be committed is insufficient to establish individual criminal responsibility as an aider and abettor.

5.4.4. Mens rea Under U.S. Courts of Appeals

The applicable mens rea standard for aiding and abetting under international law has recently been addressed by a number of U.S. Courts of Appeals. A majority of them have held that the applicable mens rea for aiding and abetting liability under international law is the “purpose”

---

665 Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para.274 (internal citations omitted). Furthermore, the knowledge standard provided under Article 30 does not alter the purpose standard in Article 25(3)(c), as this standard falls within the “[u]nless otherwise provided” clause of Article 30. 666 Tadić Appeals Judgment, para. 223. See also Furundžija Trial Judgment, para.227. 667 Ibidem (stating that the Rome Statute “by and large may be taken as constituting an authoritative expression of the legal views of a great number of States”). 668 Ibidem, para.223. 669 See e.g. Krnojelac Appeals Judgment, paras.221-222; Kunarac Appeals Judgment, para.118 & fn.147; Tadić Appeals Judgment, paras.222-223. See also Boškoski Trial Judgment, para.186; Krstić Trial Judgment, para. 541; Furundžija Trial Judgment, paras.227-235; Celebići Trial Judgment, paras.342-343 & fn.33. 670 In 2000, for example, the United Nations Transitional Administration in East Timor adopted the same purpose mens rea standard provided in Article 25(3)(c) of the Rome Statute (United Nations Transitional Administration in East Timor, Regulation Number 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, Section 14.3(c), 6 June 2000).
standard provided in Article 25(3)(c) of the Rome Statute. The U.S. Courts of Appeals for the Second and Fourth Circuits, applying customary international law, also rejected a mere knowledge standard. While the claims in these cases involved civil liability of corporations under the Alien Tort Statute (“ATS”), the courts applied international law as required by the ATS. These decisions are particularly important given that the U.S. is not a party to the Rome Statute, and the Second and Fourth Circuits nonetheless found that the Rome Statute represents an authoritative international expression on the proper mens rea standard for aiding and abetting.

5.4.5. Conclusion on the Appropriate mens rea Standard

Pursuant to its mandate, the ICTY has historically applied customary international law and found it to be a cornerstone for its decisions. In light of evolving customary international law on the elements of aiding and abetting, it is proposed that the ICTY should find that an accused cannot be convicted as an aider and abettor unless there is proof beyond a reasonable doubt he acted with the purpose of facilitating the crimes charged. Mere knowledge is an insufficient basis upon which to impose accomplice liability. While the Krstič Appeals Chamber did attempt to explain its reasoning for adopting the mere knowledge standard for aiding and abetting, its analysis is lacking. Namely, it relied on seven domestic jurisdictions in support of the knowledge standard. However, several of these jurisdictions either do not follow this standard or have not done so consistently. If the international criminal courts continue to apply the mere knowledge standard without clearly determining whether this standard is supported by customary

---

671 Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, p. 259 (2d Cir. 2009); Aziz v. Alcolac, Inc., 658 F.3d 388, p.401 (4th Cir. 2011).
672 Talisman, 582 F.3d at p. 259; Aziz, 658 F.3d at p.401.
674 Krstič Appeals Judgment, para. 141 (referring to: Germany, France, Switzerland, England, Canada, Australia, and the U.S.).
676 Namely the U.S. (see Model Penal Code (American Law Institute, 1985), § 2.06, adopting a purpose standard), Canada (Canadian Criminal Code, R.S.C. 1985, c. C-46, Art. 21, adopting a purpose standard), and England (see Gillick v. West Norfolk and Wisbesch Health Authority, 1986, 1 AC 112, requiring a “guilty mind” for aiding and abetting).
international law, they will simply perpetuate the initial underlying errors in *Furundžija*. The Rome Statute articulates a *mens rea* standard which requires more than mere knowledge. Cases discussed herein also require proof the aider and abettor acted “for the purpose of facilitating” the crimes charged. As the ICTY has recognized, it “should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.”

---

678 *Aleksovski Appeals Judgment*, para.107.
6. Application of the Law on Complicity by Way of Provision of Military Aid:

6.1. Case Study – The Case of Prosecutor v. Momčilo Perišić

In one of the most significant cases in the history of international criminal law, the ICTY effectively addressed an issue whether a military or political leader may be convicted for knowingly facilitating crimes by another State’s army. The Perišić Appeals Chamber answered this question in the negative – knowledge that the recipients of military assistance are perpetrating crimes is essentially irrelevant absent evidence that the facilitator of military aid specifically intended that such assistance facilitates the commission of the specific crime(s). It is noteworthy that, notwithstanding numerous opportunities to do so, prior to Perišić, no political or military leader had been charged before the international tribunals with aiding and abetting international crimes of another State or a non-state actor merely for the reason that he supplied them with arms or personnel.

In August 1993 Perišić was appointed Chief of General Staff of the Yugoslav Army (hereinafter: VJ), the most senior VJ officer in the FRY. Between 1993 and 1995, the VJ provided military and logistical assistance to the Army of Republika Srpska (VRS) in BiH. Given that the FRY President, Slobodan Milošević died in 2006 while facing trial, General Perišić’s case came closest to determining the responsibility of the FRY leadership for international crimes committed during the armed conflict in BiH. Unlike all other defendants in other ICTY aiding and abetting cases, General Perišić almost exclusively acted from the FRY, not only distant location from the crime scene, but also from another country, occupying the highest military post of a neighbouring army.

The Prosecution charged Momčilo Perišić with aiding and abetting the planning, preparation or execution of the crimes pursuant to Article 7(1) of the ICTY Statute. Perišić was indicted for his acts in relation to the crimes perpetrated in Sarajevo, namely, for murder, a crime against humanity, murder, a violation of the laws or customs of war, as recognized by Common Article 3 (1) (a) of the Geneva Conventions of 1949, inhumane acts (injuring and wounding civilians), a crime against humanity, an attack on civilians, a violation of the laws or customs of war as recognized by Article 51 (2) of Additional Protocol I and Article 13 (2) of Additional Protocol II
to the Geneva Conventions of 1949 pursuant to Article 7(1) of the ICTY Statute. In relation to the crimes involving forcible transfers and killings perpetrated in Srebrenica, Perišić was charged with murder, a crime against humanity, murder, a violation of the laws or customs of war, inhumane acts, a crime against humanity, persecution on political, racial or religious grounds, a crime against humanity, including murder, cruel and inhumane treatment and forcible transfer, and extermination, a crime against humanity.679

In September 2011, the ICTY Trial Chamber convicted General Perišić for aiding and abetting crimes committed by the VRS in Sarajevo and Srebrenica during 1993 and 1995.680 An ambitious expansion of the law on complicity by way of provision of military aid was proposed by the ICTY Trial Chamber. Accordingly, the Trial Chamber held Perišić responsible for his role in facilitating the provision of substantial military and logistical assistance to the VRS,681 an independent army with separate chain of command. Thus, Perišić’s conviction marked the first ICTY judgment against an official of the former VJ for the crimes committed in another internationally recognized State (i.e. BiH) by principal perpetrators being members of (belonging to) another army (i.e. VRS).682 As the top military officer in the VJ, headquartered in Belgrade, FRY, the accused had used his position to provide critical support to Bosnian Serb Army (VRS) which had engaged in “systematic and widespread sniping and shelling of civilians” in Sarajevo and killings of thousands in Srebrenica in 1995. The Trial Chamber judgment emphasized the many ways in which Perišić had “repeatedly exercised his authority to provide logistic and personnel assistance that made it possible for the VRS to wage a war that he knew encompassed systematic crimes against Muslim civilians.”683 These efforts included the “provision of weapons and ammunition, technical experts, training, medical support, fuel and operational support,”684 the payment of VRS salaries, and the transfer of over 7,000 Yugoslav Army officers to the VRS.685

679 See Perišić Indictment.
681 Perišić Trial Judgment, para. 1627.
682 Ibidem.
683 Ibidem, para. 1621.
684 Ibidem, para. 1594.
On 28 February 2013, the ICTY Appeals Chamber overruled the 2011 convictions of General Perišić on the grounds that the necessary link (nexus) was missing. The Appeals Chamber held that “specific direction” is an essential element of responsibility for the actus reus of aiding and abetting 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. The record suggests the concern by certain judges that convicting individuals like Perišić could potentially disrupt international relations by casting too wide a net for convicting leaders whose provision of military aid facilitates crimes by a foreign army or non-state actors operating in another State.

6.2. Application of actus reus Element of Aiding and Abetting in Perišić Case

6.2.1. Perišić’s Role in the Provision of Military Aid

The Trial Chamber convicted Perišić for the role he had played in the provision of logistical and other type of assistance to the VRS. The Trial Chamber classified the assistance provided by the VJ to the VRS in two broad categories: first, secondment of personnel, and second, provision of military equipment, logistical support, and military training.

With respect to the secondment of VJ soldiers to the VRS, the Trial Chamber found that Perišić had persuaded the Supreme Defence Council (hereinafter: SDC) to create the 30th Personnel Centre (hereinafter: 30th PC or PC), a unit of the VJ that served as the administrative home of VJ soldiers and officers seconded to the VRS and was used to increase and institutionalise the support already provided to seconded VJ soldiers and officers. However, the trial 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 the VRS crimes. According to the Appeals Chamber, the evidence does not suggest that VJ soldiers and officers were seconded in order to specifically assist the

---

686 Perišić Appeals Judgment.
687 Jouet, M., supra note 317, p. 1091.
688 Perišić Trial Judgment, paras. 761-940.
689 Ibidem, paras.1010-1154, 1232-1237.
690 Ibidem, paras. 763-766, 1607-1611, 793, 795.
691 Ibidem, paras. 866-915.
692 Perišić Appeals Judgment, para. 63.
VRS criminal acts. In sum, the evidence provided a basis for the conclusion that Perišić’s facilitation of secondments was directed to assist the VRS war effort, rather than VRS’s crimes.

With respect to the second category of assistance, namely, the provision of military equipment, logistical support, and military training, the Trial Chamber found that the VJ had supplied the VRS with “comprehensive” logistical aid, often not requiring payment for such assistance. The Trial Chamber concluded that the VJ had 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. Furthermore, the VJ offered military training to VRS troops and assisted with military communications.

6.2.2. Provision of Personnel Assistance to the VRS

The Prosecution alleged that the “VJ, under the command of Perišić, continued the policy of the SDC and its individual members to provide and finance the majority of officers comprising the officers corps of the VRS.” Furthermore, the Indictment alleged that by providing the majority of senior officers in the VRS by sending them to serve in the VRS, regulating their service, paying their salaries and benefits, and verifying promotions, Perišić aided and abetted the commission of crimes. According to the Prosecution the VRS was not capable of survival without substantial manpower from the VJ. Thus, through his acts and conduct Perišić had influence on the structure of those officer corps, either in terms of quantity or quality. Further, that the purpose of forming the PC was to conceal the provision of those officers. Granting certain status related rights such as salaries, and benefits attached to rank members of an army had influence on the composition, character, and activities of the VRS.

---

693 Ibidem, para. 63.
694 Ibidem, para. 63.
695 Perišić Trial Judgment paras. 1594, 1234-1237.
696 Ibidem, paras. 1035, 1597, 1116-1134.
697 Ibidem, paras. 1034-1069.
698 Ibidem, paras. 1135-1154, 1352-1358.
699 The provision of officers to the SVK is not charged under the 7(3) portion of the Perišić Indictment.
700 Perišić Indictment, paras. 8-23.
701 Perišić Opening Statement, T. 370.
702 Perišić Indictment, para. 13.
The Prosecution claimed that the purpose of the PC was to covertly supply assistance in violation of international instruments in support of the crimes charged. However, the evidence presented at the trial showed that the majority of the officers serving in the armies of the VRS were in place well before Perišić’s assignment to the post of the VJ CGS in the fall of 1993. By that time, the structures of those armies was independent and well defined.\(^{703}\)

The trial record does not establish that the specific officers requested by the VRS and dispatched from the VJ to the VRS during Perišić’s tenure contributed to or were part of the commission of the charged crimes. Moreover, the evidence failed to establish that Perišić was responsible for paying the salaries of the VRS officers whose status was regulated by the 30\(^{th}\) PC. Rather, payment of salaries fell under the authority of the FRY Ministry of Defence (MOD).

6.2.2.1. The Personnel Centre

The Prosecution alleged that in November 1993 Perišić personally established special purpose personnel centre within the General Staff of the VJ to disguise the provision and payment of those officers who comprised the majority of officer corps of the VRS.\(^{704}\)

While the order establishing the 30\(^{th}\) PC was issued by FRY President Lilić,\(^{705}\) in accordance with an SDC Decision,\(^{706}\) the Trail Chamber nevertheless found that Perišić had a decisive role in the creation of the PC and that he conceived and subsequently carefully implemented the idea to create such centre to regulate the status of all former JNA and VJ military personnel who remained in BiH and to legalise the deployment of VJ military personnel to the VRS. In doing so, Perišić intended to meet the requests for military personnel by the VRS Main Staff. According to the Trial Chamber, the evidence conclusively established that Perišić designed the formation of the PC. His role in this process was confirmed by Perišić himself, who at the SDC

---


\(^{704}\) Perišić Indictment, paras.10, 11.

\(^{705}\) See Perišić Prosecution Exhibit available at http://www.icty.org/case/perisic/4 (hereinafter: Exhibit P) P731: Presidential Order indicating inter alia that theVJ-GS is to form special personnel centres in respect of those former Yugoslav Army personnel.

\(^{706}\) Exhibit P744: Minutes from the 15th Supreme Defence Council session, Item 2.4.
Session of 30 August 1995 reminded the SDC members that he was the one who “advocated” for the idea of sending all those military personnel who originated from BiH to serve in the VRS.\textsuperscript{707}

According to the Prosecution, by creating the PC, Perišić substantially contributed to the crimes. The evidence in the trial showed that the main purpose of the PC was to effectively enable the transfer and assignment of VJ officers to the VRS\textsuperscript{708} and, if necessary, their subsequent deployment to the VJ.\textsuperscript{709} When VJ officers were formally transferred to the PC in Belgrade, they were, in fact, relocated to positions within the VRS.\textsuperscript{710} As a measure to maintain the secrecy of the VJ involvement in the transfer of VJ officers to the VRS from the local and international public, the deployment orders delivered to these officers would refer to deployment to the PC in Belgrade, but would not mention the RS.\textsuperscript{711}

The Prosecution asserted that the purpose of the PC was to hide the involvement of the VJ and the FRY Government in the provisioning and payment of the officers who served in, and were transferred to, the VRS\textsuperscript{712} and thus the PC served as a legal cover to hide the fact that the VJ was ordering its personnel to serve in BiH.\textsuperscript{713} However, it was accepted by the Prosecution that salaries and vested status-related rights were already exercised by the officers before the PC was formed.\textsuperscript{714}

During the SDC Session held on 21 July 1994, Perišić reported:

\begin{quote}
As for the VRS […] , about 6,800 officers there are taking care of the system, people and organization, and fighting successfully. To date, at their request, we have sent a total of 3,795 more on permanent transfer and 187 on rotational basis.\textsuperscript{715}
\end{quote}

\textsuperscript{707}Perišić Trial Judgment, para. 777.
\textsuperscript{709}VJ General Staff Instructions on the PCs, 8 December 1993, para. 33; Testimony of Witness MP-5, T. 2462, Testimony of Witness Rade Rašeta, T. 6026.
\textsuperscript{710}Perišić Trial Judgment, para. 781.
\textsuperscript{711}Stenographic Transcript of the 14th Session of the SDC, 11 October 1993, p. 33-34, 36, Stenographic Transcript of the 15th Session of the SDC, 10 November 1993, p. 21.
\textsuperscript{712}Perišić Indictment, para.11.
\textsuperscript{713}Perišić Opening Statement, T.381-382.
\textsuperscript{714}Perišić Indictment, para. 9-10; Perišić Opening Statement, T. 380.
\textsuperscript{715}Stenographic Transcript of the 23rd Session of the SDC, 21 July 1994, p. 19.
Trial Chamber found the main function of the PC was to regulate the status of all those former JNA/VJ officers who remained to serve in the VRS [in BiH] after the withdrawal of the JNA [from BiH] and to allow the VJ to secretly transfer VJ military personnel to the VRS, ensuring that they all continued to enjoy and exercise their rights in the VJ and FRY while serving in VRS. All SDC members, as well as Perišić, intended to keep this function and the VJ involvement in the conflicts secret in order to avoid criticism or risking further sanctions from the international community. Additionally, under the cover of a formal appointment to the PC, the VJ personnel were transferred directly to the VRS. The need and intention to keep this function secret was clearly expressed at the SDC session of 11 October 1993 while discussing the order on the establishment of the PC. At the session, Perišić admitted that the establishment of the PC had been devised in order to “avoid having anyone criticize us” for the number of former JNA and VJ personnel serving in the VRS.\(^\text{716}\) Momir Bulatović [the president of Montenegro] instead expressed his concern that, should the document fall into anybody’s hands, the FRY would face sanctions “for ten years”.\(^\text{717}\)

The orders of appointment or transfer of VJ officers to the VRS were issued by the Chief of the Personnel Administration of the VJ General Staff or by Perišić himself to meet pressing requests from the VRS. The Trial Chamber found that while the VJ appointed VJ personnel to the PC, the appointment to specific posts within the VRS was done by the VRS itself.\(^\text{718}\) Furthermore, there were instances in which VJ soldiers were appointed to the VRS on a temporary basis through the PC. Assignments would last one year, and upon termination the officers were to return to the VJ unit from which they were transferred.\(^\text{719}\)

The Trial Chamber found that although many VJ officers volunteered or readily accepted to be transferred to the VRS, those who refused or were reticent to go were pressured or coerced to do so by threats of early retirement or termination of service. The Trial Chamber further found that Perišić intended the deployment of VJ officers to the VRS to be obligatory under threat of

\(^{716}\) Stenographic Transcript of the 14th Session of the SDC, 11 October 1993, p. 32.
\(^{717}\) Ibidem, p. 36.
\(^{718}\) Perišić Trial Judgment, para. 799.
\(^{719}\) Ibidem, paras. 800, 801.
termination of service, but decided not to include any such clause in writing in order to avoid litigation that would expose the involvement of the VJ in the conflict in BiH.\textsuperscript{720}

Several witnesses testified that officers who served in the VRS through the PC received their salaries and other benefits from the VJ.\textsuperscript{721} Stamenko Nikolić, Head of VJ General Staff Personnel Administration estimated that between 4,000 and 4,700 military personnel in the VRS were entitled to a salary from the VJ.\textsuperscript{722} With particular emphasis on 1995, he testified that in that period 2,421 officers and contract soldiers received their salaries through the PC.\textsuperscript{723}

Salaries presented the largest expenditure within the VJ budget\textsuperscript{724} and thus included the necessary funds to pay members of the PC. Illustratively, at the SDC session of 7 June 1994, Perišić specified that:

\begin{quote}
In RS we support and pay for 4,173 persons, or 7.42\% from the VJ…we allot around 14 million [dinars]…each year and we need the same amount for next year, and that’s just for the salaries. That’s a great help to them.\textsuperscript{725}
\end{quote}

Those salaries were eventually paid by the FRY Ministry of Defence with funds allocated to the VJ in the national defence budget.\textsuperscript{726} Former JNA military personnel who remained in BiH to serve in the VRS received salaries as if they continued to serve with the JNA.\textsuperscript{727} The Trial Chamber concluded that Perišić was directly involved in determining the funds needed for the payment of salaries for military personnel, including members of the PC.\textsuperscript{728}

Further, members of the PC continued to be part of the VJ retirement plan, although they had served in the VRS.\textsuperscript{729} The VJ retirement plan was financed partly by contributions made by the VJ military personnel, including members of the 30\textsuperscript{th} PC, during their service, and partly by

\begin{footnotes}
\textsuperscript{720} Ibidem, para. 809.
\textsuperscript{721} Ibidem, para. 867.
\textsuperscript{722} Testimony of Witness Stamenko Nikolić, T. 10553; Minutes from the 58th Session of the SDC held on 21 November 1996.
\textsuperscript{723} Testimony of Witness Stamenko Nikolić, T. 10553-10555.
\textsuperscript{724} About 65\% of the military budget was allocated to salaries and pensions, Testimony of Witness Stamenko Nikolić, T. 10620, 10623, Testimony of Witness Borivoje Jovanić, T. 11434-11435, 11437.
\textsuperscript{725} Stenographic Transcript of the 17th Session of the SDC, 10 January 1994, pp 3, 53.
\textsuperscript{726} Testimony of Witness Borivoje Jovanić, T. 11415-11417, 11456.
\textsuperscript{727} Testimony of Witness Stojan Malčič, T. 11225-11226, 11328-9, 11373-75.
\textsuperscript{728} Perišić Trial Judgment, para. 880.
\textsuperscript{729} Ibidem, para. 881.
\end{footnotes}
funds allocated for this purpose within the annual defence budget.\textsuperscript{730} About 60 – 65\% of the VJ military budget was allocated to pensions and salaries.

The Trial Chamber found that members of the PC and their families were entitled to and benefited from medical assistance in the VJ and the FRY. Like other VJ officers, members of the PC also enjoyed various benefits, such as compensation for service under difficult conditions, health insurance and housing benefits.\textsuperscript{731}

\begin{enumerate}
\item The importance of the Personnel Centre according to the Trial Chamber
\end{enumerate}

The Trial Chamber concluded that Perišić sustained the very lifeline of the VRS by creating the PC.\textsuperscript{732} Furthermore, it found that Perišić provided \textit{practical assistance} to the VRS by creating the conditions that enabled members of the 30\textsuperscript{th} PC to continue serving in the VRS without impediments while enjoying the rights conferred to VJ members.\textsuperscript{733} According to the Trial Chamber, Perišić created such conditions by forming the PC, composed of key VRS officers, through which they legally acquired their status as VJ members with all the corresponding benefits.\textsuperscript{734} The Trial Chamber further found that Perišić sent other VJ military personnel to the VRS on an ongoing basis, which enabled the flow and rotation of personnel to continue without interruption.\textsuperscript{735}

The Trial Chamber found Perišić’s practical assistance in creating the 30\textsuperscript{th} PC and subsequently providing personnel to the VRS, regulating the status of its members, his role in the payment of salaries for 30\textsuperscript{th} PC members, and the role in the verification of promotions process facilitated or contributed to the commission of crimes in Sarajevo and Srebrenica. Furthermore, the Trial Chamber concluded that Perišić’s acts in the creation of the 30\textsuperscript{th} PC, payment of salaries, and verification of promotions had a substantial effect on the crimes committed by the VRS in Sarajevo and Srebrenica.\textsuperscript{736} With respect to the \textit{effect} of the practical assistance, which the

\begin{enumerate}
\item \textit{Ibidem}, para 882.
\item Testimony of Witness Stojan Malčič, T. 11229-11232, Testimony of Witness Mile Novaković, T. 13051-13052, 13324-13326.
\item \textit{Perišić} Trial Judgment, para. 1623.
\item \textit{Ibidem}, para. 1608, 1609, 1623.
\item \textit{Ibidem}, para. 1609.
\item \textit{Ibidem}, para. 1610.
\item \textit{Ibidem}, paras. 1603-1619, 1627.
\end{enumerate}
Chamber attributed to Perišić, it found that such assistance “was vital to help the VRS to function”\(^{737}\) and that it “created conditions for the VRS to wage a war that encompassed systematic criminal activities”\(^{738}\) through which “he facilitated the commission of the crimes in Sarajevo and Srebrenica.”\(^{739}\)

According to the Trial Chamber, by promoting and paying the salaries of members of the 30\(^{th}\) PC, Perišić contributed to the commission of the crimes by the VRS,\(^{740}\) as such salaries and other benefits were “vital to the functioning of the very core of the VRS.”\(^{741}\)

6.2.2.3. Provision of Officers and its Substantial Effect on the Commission of Crimes

According to the Prosecution, Perišić continued the policy of the SDC to provide the majority of officers comprising the officer corps of the VRS.\(^{742}\) The question that the Chamber had to resolve was whether acts of Perišić as the Chief of General Staff of the VJ substantially contributed to the commission of specific crimes in Sarajevo and Srebrenica and whether Perišić had control over the creation, Manning, or maintenance of the officer corps of the VRS, whose members were the direct perpetrators of the crimes.

According to the combat readiness report that identifies the strength of VRS units at the formation of VRS on 1 March 1993 and later on,\(^{743}\) out of a total of 182,689 VRS members, the officer corps totalled 17,046 and comprised of 6,135 officers and 10,911 non-commissioned officers. Only 2,894 of those were receiving salaries from the FRY in the relevant period.\(^{744}\) Prior to Perišić’s appointment to the position of the CGS, 2,894 active servicemen from the VRS were receiving their salaries from the FRY Ministry of Defence.\(^{745}\) In October 1993,\(^{746}\) after

\(^{737}\) Ibidem, para.1612 [emphasis added].
\(^{738}\) Ibidem.
\(^{739}\) Ibidem, para.1613 [emphasis added].
\(^{740}\) Ibidem, para.1614.
\(^{741}\) Ibidem, para. 1619 [emphasis added].
\(^{742}\) Perišić Indictment, para 9,10 (para 9 referring to the majority of senior officers in the VRS).
\(^{743}\) Exhibit P149: VRS Main Staff situation report to RS President, VJ Chief of General Staff and commands of the 1KK, 2KK, SRK, IBK, HK, DK, and Airforce and Air defense (RS). (no. 02/3-137), p.79, table 25.
\(^{744}\) Exhibit P2849: Information about the number of active duty personel financed from VJ budget serving in VRS and SV RSK. No. 640-1. numerical breakdown table, 1003 Officers, 1018 NCOs, 873 AVL.
\(^{745}\) See supra note 744, para 3, also note below numerical chart, and Testimony of Witness Starčević, T. 6865-6866.
\(^{746}\) Exhibit P1872: Documents regarding the regulation of the status of the VJ active military personnel (born on the territory of RH and RBiH) temporarily serving in the SVK and the VRS, with a tabular overview of the number of the said in the armies of the SVK and the VRS. No. 840-1.
Perišić's appointment, and within the timeframe of discussions at the SDC on the need for some kind of regulatory system, the number of active servicemen who were reassigned to the VRS was 2,593,\textsuperscript{747} a decrease since July 1993. At that point, there were 2,630 officers, whereas in May 1995 there were 2,276 officers in the VRS.

Whereas the Prosecution further asserted that the key positions of VRS commanding core were held by individuals whose status was regulated in the FRY,\textsuperscript{748} the trial record revealed that all the officers occupying the highest positions in the VRS, in the Main Staff as well as the highest command functions, were in service in the VRS prior to Perišić’s appointment as the VJ CGS in August 1993.\textsuperscript{749}

Thus, the Defence asserted that the connection between Perišić’s acts and conduct and the assignment of any officer to any high military duties within the VRS had not been proven beyond a reasonable doubt. The majority of those officers had been assigned to their respective duties in the VRS in the period before Perišić became the VJ CGS. Additionally, the trial record established that assignments to different posts /duties in the VRS were conducted by the VRS itself. There is no evidence that Perišić played any role in the assignments on duties in the VRS. The Trial Chamber itself recognized that Perišić had no involvement or participation in personnel policy of appointing of certain officers to highest and most responsible positions in the VRS.

All of the main officer corps, both in number and in position, were established prior to Perišić's appointment to position of VJ CGS. After Perišić's appointment, the number of personnel whose status rights were recognized in FRY was in constant decline. The creation and functioning of the 30\textsuperscript{th} PC did not change this situation in terms of increasing the number or quality of officer personnel. Thus, it is submitted that it was not established at trial that the assistance given to VRS during Perišić’s tenure in relation to the provision of the officer core of the VRS had a substantial effect on the commission of the crimes charged.

\textsuperscript{747} Testimony of Witness Stamenko Nikolić, T.10534.
\textsuperscript{749} Testimony of Witness Stojan Malčić, T.11207-T.11210.
6.2.2.4. Substantial Effect of Salaries on the Commission of Crimes

The financing and remuneration of the officer corps of the VRS, and the payment of their benefits formed one of the forms of assistance by the VJ. The Prosecution had to prove the salaries had a substantial effect on the commission of crimes. While the Trial Chamber found that the salaries enjoyed by members of the 30th PC were instrumental in assisting the VRS in pursuing its military operations, Judge Moloto in his Dissent held that “[i]t cannot be said that the only reasonable inference is that the payment of salaries had a substantial effect on the commission of such crimes.”

The evidence established that during the sanctions imposed by the FRY on the RS from August 1994 until February 1995, the payment of salaries provided to members of the 30th PC was completely suspended. Numerous witnesses testified that their salary was of little or no significance to them, and the evidence also showed that even during times of complete cessations in payment of salaries, no officers left the army and the VRS continued to function. The Trial Chamber recognized that during this period of suspension none of the 30th PC members left their positions in the VRS. Thus, if the suspension of their salaries did not cause high ranking VRS officials and other perpetrators of the crimes committed in Sarajevo and Srebrenica to leave their positions within the VRS, it cannot be claimed that salaries were instrumental for VRS in pursuing its military operations.

Further, the Trial Chamber concluded that members of the 30th PC did not leave their posts in the VRS due to the VRS denial of requests for transfer back to the VJ. This fact demonstrates that the VRS itself had a mechanism for sustaining its personnel independent from Perišić. The operative requirement of authorisation for leaving the VRS was consent by the VRS Commander. The Trial Chamber held that it has not been proven beyond a reasonable doubt that personnel...

---

750 Perišić Trial Judgment, para. 1623.
751 Perišić Trial Judgment, Judge Justice Moloto Dissenting Opinion, para. 23.
752 Perišić Trial Judgment, para. 867.
753 Ibidem, para. 1618. It should also be noted that 30th PC members were invited by the FRY leadership to cancel their obedience to the RS leadership and to return to FRY and VJ (25th SDC Session).
754 Ibidem, para. 1618.
serving in the VRS through the 30th PCs could be redeployed to VJ without approval from the VRS.\textsuperscript{755} Furthermore, General Milovanović, Chief of Staff of VRS, said:

> This is what happened, for six months we lived without salaries. We did not desert, as many people were hoping we would, we stayed behind and we would have stayed even if they never paid back what they did, and even that was short of the fighting allowance, short of all those things which go with a salary, but we are satisfied with how much we get, and we must be satisfied. I now can tell you that we must and should be satisfied because with a clear eye and a high forehead I stand before my soldiers. At the Bihać front, one says to me, general, I don't have a salary; son, I don't have one either; so he asks how do your wife and children live? Same as yours; but do not take this to mean that the officers should have their salaries abolished.\textsuperscript{756}

Additionally, salaries were not paid for all the VRS members. The number of those that actually received the benefits actually constituted a small portion of the total number of persons serving in the VRS.\textsuperscript{757} Namely, the VRS had 200,000 to 250,000 troops including military personnel.\textsuperscript{758} Various witnesses testified that the salaries of the majority of the VRS members were paid by the RS Ministry of Defence.\textsuperscript{759}

In August 1994, the Federal Government of the FRY decided to cut political and economic ties with the RS,\textsuperscript{760} and the SDC made a decision to stop all payments to the VRS due to RS leadership’s rejection of the Contact Group Plan.\textsuperscript{761} Payment of the VRS officers was interrupted for five months, from August 1994 to February 1995 in order to pressure the RS leadership into accepting the peace plan.\textsuperscript{762} While a dispatch from Mladić to VRS corps of 4 November 1994

\textsuperscript{755} *Ibidem*, para. 830.
\textsuperscript{756} Exhibit P312: Tape recording of the 50th Session of the BiH SDS Assembly, pp.191-192.
\textsuperscript{757} Witness Testimony of Stamenko Nikolić, T.10515.
\textsuperscript{758} *Ibidem*, T.10552.
\textsuperscript{759} Witness Testimony of Stojan Malčić,T. 11228; Witness Testimony of Petrović, T.13741-13743. Petrović’s job was to collect information about the needs for funding: the salaries for corps units and units attached to the staff. Those needs depended on the current numerical strength in the corps. He would prepare a request for funding which would be signed by the commander of the VRS Main Staff, and then forwarded to the MOD of Republika Srpska and also sometimes to the President of the government. Petrovic would collect the money at an appropriate payment transactions office, and on that same day he distributed the money for the corps and the staff, he followed and monitored the payment of salaries, and compiled the payroll signed by the members of the VRS who received the salaries.
\textsuperscript{760} Perišić Trial, Expert Testimony of Witness Treanor, T. 1219-1220;
\textsuperscript{761} Exhibit P756: Minutes from the 25th session of Supreme Defence Council held on 30-Aug-94; Testimony of Witness S. Nikolić, T.10558.
\textsuperscript{762} *Ibidem*.
indicates the difficulties faced by the VRS when the payment of salaries was stopped, very few officers went back to the FRY during this period, even though conclusion of the SDC minutes states that officers in the VRS who disagreed with the RS leadership would be welcomed back to the FRY. Defence witness Petrović also confirmed that, while he himself was indignant about losing his salary, nobody left the ranks of the VRS for that reason. Nor were there any disruptions in the activities of the VRS, and particularly not in those of the Main Staff.

In addition to periods of non-payment of salaries having no effect on the operations of the VRS, numerous witnesses confirm that during periods of hyperinflation, salaries had almost no worth at all. In spite of these conditions, none of these officers left the ranks of the VRS during these times. In light of this evidence, the premise that the payment of salaries substantially contributed to the commission of crimes by the VRS is not supported. The trial record fails to establish any connection between the commission of crimes and the payment of salaries to members of the VRS.

6.2.2.5. Decision to Pay Salaries taken at the Political Level

The evidence at trial established that the decision to pay salaries was made by the FRY government and that the power to suspend and reinstate payments of salaries was within the exclusive purview of the SDC. Specifically, the actual payment of salaries was within the remit of the FRY Ministry of Defence.

---

763 Exhibit P2817: Dispatch no.23/20-993 sent by the VRS Main Staff Sector for Organization, Mobilization and Personnel dated 4 November 1994; Testimony of Witness Simić, T.10392-10393.
764 Witness Nikolić was not aware of anyone returning. See Testimony of Witness Nikolić, T.10769; Škrbić said applications to leave the VRS increased slightly in this time. See Testimony of Witness Škrbić, T.11775.
765 Testimony of Witness Petrović, T.13772.
766 Ibidem, T.13792.
767 Testimony of Witness Orlić, T.5764: During the period of hyperinflation, if his wife managed to take out the salary on the same day that it was deposited on the account, she could perhaps have a counter-value of German marks. If she withdrew this money the following day, then the amount would be less, and it was very difficult to live on that; Testimony of Witness Stojan Malčić, T.11227: From summer 1992 to the end of 1993 there was hyperinflation in the RS. Money was devalued overnight; Testimony of Witness Novaković, T. 13246: During hyperinflation, by the time he would receive his salary, it would be almost worthless; Petrović, T.13746: During 1992 and 1993, when the rate of inflation was so exorbitant, that by the time they received the salaries from Belgrade, that money had completely lost its value. A bank note of 50 billion dinars was issued in late 1993, and according to Petrović, one couldn’t buy a sandwich for this note.
The payment of salaries to those VRS officers who were formerly JNA officers was initially made pursuant to decisions of the SFRY Presidency and later on by the FRY SDC. After the disintegration of the SFRY and the withdrawal of the JNA from the former republics, and prior to the establishment of the PC on 10 November 1993, the highest authorities of the FRY were looking for solutions to the status-related problems of the army. While organs of the VJ General Staff submitted various proposals on the resolution of these problems to the SDC, the ultimate decision on how to regulate these matters was made by the FRY SDC. In practical terms, the officers continued to receive their salaries as during the days of the JNA, “the cycle was never broken;” those officers had been receiving their salaries even before the establishment of the PC.

Compensation for salaries was granted to active duty servicemen, contract servicemen and civilians who had served with the JNA and remained with the VRS, and professional servicemen and civilians serving in the VJ who were born in BiH and went to serve in the VRS. They continued to receive their salaries through the post savings banks as they did before the PC was established. By mid 1993, prior to Perišić’s appointment as CGS of the VJ, status issues of former JNA members serving in the VRS remained unresolved. A VJ Budget Report from August 1993 contains a breakdown of the numbers of “officers”, “non-commissioned officers”, “contract soldiers” and “civilians” in the VJ and the VRS that are being paid by the FRY MOD in 1993. In July 1993 there were 64,994 persons financed from the budget of the VJ, out of

---


769 Testimony of Witness S. Nikolić, T. 10510.

770 Ibidem, T. 10503.

771 Exhibit P731, supra note 705; Exhibit: P744: Minutes from the 15th Supreme Defence Council session, item 2.4.

772 Testimony of Witness Nikolić, T.10520; Testimony of Witness Jevdjevic, T.11078-11083: Jevdjevic also confirms that for those who were paid by the FRY, payments continued to be made in the same manner as during the JNA period. Jevdjevic testified that he received his salary the same way all the time from the moment he joined the JNA: it was paid into his account with the post office bank in Serbia. Jevdjevic’s family went and picked up the money when it was deposited into his account. For further on the practicalities of how salaries were paid out, see Testimony of Witness Malcic, T. 11124-11127; Testimony of Witness Orlic, T.5764; Testimony of Witness Rašeta, T.5893-5894 regarding the system of payment into the Post Savings account in Belgrade. See also, Testimony of Witness Malcic, T.11226-11227 regarding distribution of salaries of VRS officers.

773 Exhibit P731, see supra note 705; Testimony of Witness Maleic, T.11329; Testimony of Witness Nikolić, T.10513. It is alleged in the Indictment that two RS Ministers for Defence received their pay and benefits from the 30th PC (Subotic and Kovačević. See Testimony of Witness Kovačević, T.12623).

774 Testimony of Witness Maleic, T.11329.

775 Testimony of Witness Starčević, T.6865-6866.
which 4,121 were VRS members. On 10 November 1993, the FRY President Lilić issued an order, based on conclusions reached by the SDC, which led to the establishment of the 30th PC, and authorised the continuation of the payment of salaries to persons serving in the VRS. Specifically, Lilić’s order sets out that “individuals shall retain all rights pertaining to their rank and qualification and retain the salary they had in the post before the current assignment, or they shall receive the salary envisaged for the new post, whichever is more favourable to the individual.”

While Perišić could make proposals to the SDC, the power to suspend and reinstate payments was one that was within the exclusive purview of the SDC. The SDC’s sole authority to initiate, suspend, and reinstate payments was illustrated by the first suspension of the payment of salaries in 1993. On 2 June 1993, the SDC on its 9th Session decided to stop payments from the military budget to personnel serving in the VRS, as a result of the RS leadership’s refusal to accept the Vance-Stoltenberg plan. A conclusion was adopted that the VJ CGS, General Panić (Perišić’s predecessor) should issue an order invalidating the decision under which the status of those persons was regulated at the time. Panić did as directed by the SDC. On 23 August 1993, the SDC decided to reinstate the payment of salaries to individuals serving in VRS after reviewing a proposal of General Panić. During Perišić’s tenure as the Chief of General Staff of the VJ, a similar situation arose in 1994 when SDC decided to stop all salaries and payments to the VRS due to a political leadership difference of opinion between the FRY leadership and the RS leadership. The FRY leadership endorsed the Contact Group Plan, while the RS leadership

---

776 Exhibit P2849, supra note 744.
777 Exhibit P731, supra note 705.
778 Exhibit P731, supra note 705, item3.
779 Testimony of Witness S. Nikolić, T.10556. As is evident from Exhibit P1870: Order issued by Zivota PANIC, Chief of the VJ General Staff pursuant to the decision of the Supreme Defence Council, strictly confidential no. 483-1 Item 2, members of the SVK who remained from the JNA or were transferred from the VJ would retain their status as long as the Vance plan for the RSK remained in force.
780 Exhibit P750: Minutes from the 9th session of Supreme Defence Council held on 02-Jun-93, conclusion 4; Exhibit P789: Stenographic transcript of the 9th session of the Supreme Defence Council, pp.20-30.
781 Exhibit P1870 is an order by Panic of 22 June 1993. Item 1 invalidates SSNO documents(Str. Conf. No. 01/48-1 of 6 May 1992 (P729) and Str. Conf. No. 01/48-87 of 17 May 1992)which had served as a transitional solution for affecting payments in order to maintain continuation. Testimony of Witness S.Nikolić, T.10556.
782 Exhibit P751: Minutes from the 12th session of Supreme Defence Council held on 23-Aug-93 and 25-Aug-93; Testimony of Witness S. Nikolić, T.10557.
rejected it. Salaries were eventually reinstated after five months, and while Perišić advocated for the reinstatement of payments due to the hardship endured by the families of those officers affected, the decision ultimately rested with the SDC.

6.2.2.6. Federal Control over the Defence Budget and the Salaries

Included in the salary components of the military budget were funds sufficient to pay the salaries of those persons who were administered through the 30th PC. These were paid through the accounting centre of the MoD, as approved in the federal budget. The General Staff identified the number of officers to be paid by category and calculated a total sum required to pay all officers and servicemen in the VJ. The ‘final calculation of the final sum’ was done by the Ministry of Defence. The federal government was responsible for determining the rate of the salaries of military personnel and civilians serving in the army. From 1993 onwards, salaries made up 60-65% of the total defence budget.

The trial record established that salaries were not paid by the VJ. Prior to 1992, in the SFRY, the JNA was a sector of the Secretariat for National Defence (SSNO) and the federal Ministry for National Defence was superior to the General Staff of the JNA. During the SFRY, the accounting centre was under the SSNO. They would issue the allocated salaries for the JNA, the Territorial Defence (TO) and for retired military personnel. From 1992 onwards the organizational structures of the VJ and the Federal Ministry of Defence (MOD) were separated. With these changes came a separation between command and administrative functions, and the MOD retained control over planning the budget and financing of the VJ. The Minister for

---

783 Exhibit P756: Minutes from the 25th session of Supreme Defence Council held on 30 August 1994; Testimony of Witness S. Nikolić, T.10559.
784 Exhibit P794: Stenographic transcript of the 31st session of the Supreme Defence Council, pp.44-45.
785 Exhibit P759, Minutes of 31st Session, indicating at that point there was no reason for the SDC to depart from its earlier decision on the status of officers of the 30th and 40th PCs.
786 Testimony of Witness Jovanić, T.11456.
787 Ibidem, T.11455,11440.
788 Ibidem, T.11440.
790 Testimony of Witness S.Nikolić, T.10410; Testimony of Witness Jovanić, T.11392.
791 Testimony of Witness Orlic, T.5763.
792 Testimony of Witness Ajdukovic; Testimony of Witness Nikolić, T.10411. The MOD is a federal organ subordinated to the federal government. Article 4 of the D240, the Rulebook on the competencies of the organizational units of the MOD, 21 Sep 1992, states that organizational units of the MOD will act within their remit based on federal laws, other laws governing the MOD’s work, and acts issued by the FRY President, Minister of Defence and Supreme Defence Council, see Testimony of Witness S. Nikolić, T.10415-10416.
Defence was responsible for the execution of the defence budget and decided on the resources to be allocated to the VJ.\textsuperscript{793}

It was within the competencies of the MOD to deal with status-related issues of the military personnel.\textsuperscript{794,795} The MOD administration for System and Status Issues was responsible for regulations governing salaries, and other remuneration in the army, in accordance with the Law on the VJ. This administration would complete the preparatory work for the regulations and the federal government would pass regulations as to the amount of salaries to be paid out, the salary scales, the titles of various allowances, and all other manner of remuneration paid in the army. The Minister for Defence was also entitled to issue more detailed rules governing allowances, reimbursements of expenses and other income in the army.\textsuperscript{796} The Finance and Budget administration of the MOD was responsible for drafting and implementing the defence budget, which was supposed to meet the needs of the ministry as a federal organ and the needs of the VJ.\textsuperscript{797}

With the formation of the MOD as a separate organ of the federal government, the MOD Finance and Budget Administration formed an accounting centre which took over the responsibilities of the JNA accounting centre.\textsuperscript{798} The accounting centre was an independent administration directly responsible to the MOD, and controlled by the Finance and Budget Administration.\textsuperscript{799} This centre collected all the data on all professional members of the army, calculated the salaries according to specific regulations, and issued those salaries. The final calculation of salaries at the MOD accounting centre was done by the material, financial and market inspection, a professional organ that oversaw the entire financial and material operations of all organizational units of the MOD and the VJ.\textsuperscript{800} The processing and payment of salaries was done by the MOD accounting centre alone.\textsuperscript{801}

\textsuperscript{793} Testimony of Witness Jovanić, T.11395.
\textsuperscript{794} Exhibit D240: Rulebook on the competencies of the organizational units of MoD.
\textsuperscript{795} Testimony of Witness S. Nikolić, T.10416.
\textsuperscript{796} \textit{Ibidem}, T.10418.
\textsuperscript{797} Testimony of Witness Jovanić, T.11400.
\textsuperscript{798} Testimony of Witness S. Nikolić, T.10423.
\textsuperscript{799} \textit{Ibidem}, T.10763; Testimony of Witness Ajdukovic, Exhibit D504, para.24.
\textsuperscript{800} Testimony of Witness S. Nikolić, T.10428; Exhibit D240, \textit{supra} note 794, Article 26.
\textsuperscript{801} \textit{Ibidem}, T.10426.
Under the Law on Finances of FRY, the Chief of General Staff of the VJ is not entitled to manage federal assets; rather he is entitled only to dispense the assets conferred to him by the Minister of Defence.\textsuperscript{802} Article 337 and Article 87 of the FRY Law on Finances demonstrate that the Chief of the General Staff is not involved in either the budget allocations, which are the responsibility of the MOD, or the salary determinations, which are the responsibility of the federal government.

FRY MOD control over salaries is further corroborated by a number of pronouncements made at SDC sessions. The conclusions adopted at the 25\textsuperscript{th} SDC Session held on 30 August 1994 state:

In order to maintain the requisite level of combat readiness of the Army of Yugoslavia, it is essential within the limitations of the funds approved by the federal budget, to secure a more regular and steady flow on funds for the army and an additional 35.5 million dinars. The salaries of members of the Yugoslav Army shall be regularly harmonized with those in other sectors of the society. [...] The federal ministry of defence shall regularly inform the Supreme Defence Council at its sessions about the implementation of this task.\textsuperscript{803}

It is clear that the FRY MOD was responsible for providing money for the salaries.\textsuperscript{804} The following conclusion adopted at the 36\textsuperscript{th} SDC Session held on 7 June 1995 clearly shows that the FRY government was the only authorized body to secure the necessary funds for the payment of salaries of the VJ:\textsuperscript{805}

"Secure a regular inflow of funds. The Federal Government shall take care of this matter not later than in the course of next week. As a part of this, secure funds for the payment of salaries to members of the Army of Yugoslavia."\textsuperscript{806}

### 6.2.2.7. Payment of Salaries does not Equate to Control

The Prosecution contended that personnel administered through the 30\textsuperscript{th} PC was subordinated to Perišić. Based on the evidence presented in trial, the Trial Chamber concluded that the members of the 30\textsuperscript{th} PC remained \textit{de jure} members of the VJ while serving in the VRS as they retained all

\textsuperscript{802} Testimony of Witness S. Nikolić, T.10458.

\textsuperscript{803} Exhibit P756, \textit{supra} note 783, item7; Testimony of Witness S. Nikolić, T.10766.

\textsuperscript{804} Testimony of Witness S. Nikolić, T.10767.

\textsuperscript{805} \textit{Ibidem}, T.10768.

\textsuperscript{806} \textit{Ibidem}, T.10767; Exhibit P749: Minutes from the 36th Session of the SDC held on 12 May 1995, item 5.
the rights of the VJ personnel, specifically salaries, pensions, verification of promotion in the service, compensation for unused annual leave, and other benefits.\textsuperscript{807}

According to the Trial Chamber the payment of some VRS officers by the FRY, both legally and factually, did not equate to subordination of those officers to Perišić, or the VJ. The Prosecution failed to prove that the payment of salaries (as well as the provision of any other status-related rights) translated into an actual ability on the part of Perišić nor FRY to effectively control, or even influence, the conduct and behaviour of members of the VRS receiving such compensation from the FRY. Instead, the evidence indicated that their salary was of little or no significance to them, such that even during periods of non-payment of salaries, the activities of the VRS were not affected. This is further corroborated by statements made by General Manojlo Milovanović, Chief of the Main Staff of the VRS, at the 50\textsuperscript{th} Session of the RS National Assembly in April 1995.

\begin{quote}
We did not regard these salaries as charity, \textit{nor did we accept them….in order to serve them}. We received them following an agreement which the RS Presidency made with the Presidency of Yugoslavia. We never accused you or rather the state, why don't you pay us. We know that with your signatures you made sure that we should be paid by Yugoslavia. When they introduced the sanctions, I personally issued the warning, I do not remember what were the circumstances causing me to be the one to say – gentlemen they are going to abolish our salaries…This is what happened, for six months we lived without salaries. We did not desert as many people were hoping we would, we stayed behind and we would have stayed even if they never paid back what they did, and even that was short of the fighting allowance, short of all those things which go with a salary, but we are satisfied with how much we get, and we must be satisfied.\textsuperscript{808}
\end{quote}

Thus, the evidence did not establish that that the provision of salaries translated into an actual ability to exercise authority over the VRS officers. The totality of the evidence shows no indication that provision of salaries had any effect to influence the behaviour of members of the VRS; it neither changed their perceptions of belonging to that army nor their allegiance to that army. The suggestion that these activities enabled Perišić to exert any authority or degree of control over them, as to make him a superior, resulted as unfounded. Rather, the trial record establishes that the members of the PC were re-subordinated to the VRS and therefore, acted

\textsuperscript{807} Perišić Trial Judgment, para 840.
\textsuperscript{808} Exhibit P312: Tape recording of the 50th Session of the BiH SDS Assembly, p.191-192[emphasis added].
solely within its chain of command. The fact that their salaries, as well as other benefits, were still paid by the VJ remains fully compatible with this notion of re-subordination. Consequently, once the PC members were re-subordinated to the VRS, Perišić could no longer exercise control over them.

6.2.3. Perišić’s Role in the Logistical Assistance Process

When the provider of assistance is a collective entity, the assessment of individual blameworthiness must also look to the significance of the individual accused’s role within the organizational effort. Indeed, Perišić was the most senior military official of the FRY who played instrumental role in the policies at issue. The Indictment alleged that Perišić aided and abetted crimes by providing substantial military assistance to the VRS which he knew was used in significant part in the commission of crimes. The assistance claimed to have been provided continued the practice of supplying large quantities of weapons, ammunition and other logistical materials necessary for the commission of crimes.\(^809\) The issue the Trial Chamber had to decide was not whether the VJ, pursuant to orders of the SDC, gave assistance to the VRS. It did and Perišić admitted so. Rather, the Trial Chamber had to decide whether Perišić in his position as CGS of the VJ aided and abetted the crimes charged.

Perišić acknowledged that, as the Chief of the General Staff in the VJ, he provided assistance to the VRS pursuant to the SDC’s orders.\(^810\) The Appeals Chamber’s review of evidence demonstrated 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.\(^811\)

6.2.3.1. Logistical and Technical Assistance to the VRS

The Prosecution alleged that the VJ provided considerable quantities of weaponry and military equipment, as well as training and technical assistance, to the VRS, which heavily depended on

---

\(^{809}\) Perišić Indictment, para. 8.
\(^{810}\) Perišić Trial Judgment, para. 1593, citing Perišić Defence Final Brief, paras. 607, 780.
\(^{811}\) Ibidem, para. 64.
this aid because of its limited reserves and resources. It posited that the VRS did not have to pay for the material it received from the VJ.

Perišić recognized that he and the VJ gave assistance to the VRS pursuant to the SDC’s orders. An official procurement procedure was devised pursuant to the agreement between the VRS Main Staff and the VJ General Staff. However, the review of the trial record attests that number of supplies were delivered by the VJ members to the VRS outside of the official procurement procedure devised by Perišić. In December 1993 Perišić ordered that all requests for logistical assistance be processed through the VJ General Staff with his approval and decided to institute disciplinary proceedings against VJ commanders who gave military supplies directly to the VRS without authorisation. Mladić ordered all VRS units to involve the VRS Main Staff in the official procurement of material from the VJ and stressed that violators would face disciplinary action.

The Trial Chamber concluded that a comprehensive logistical assistance system was in place and that the FRY-RS border was porous, thereby enabling logistical assistance to be regularly delivered without difficulty. The flow of military supplies from the VJ to the VRS continued after August 1994, notwithstanding the FRY’s decision to officially seal its border with RS except for medical equipment or other humanitarian supplies, as part of its sanctions on RS for having refused to accept a proposed peace plan. The FRY’s nominal prohibition on the delivery of military materiel to the VRS essentially lasted until the end of the armed conflict in BiH.

According to Michael Williams, who served as Director of Information for UNPROFOR from February 1994 until April 1995 and saw all classified reports in the UN’s possession, the overall military capabilities of the VRS increased in 1994 and 1995 due to FRY assistance.
Chamber was satisfied to conclude that even though the VRS’s situation was partly worsened by the FRY’s economic blockade on RS in 1994, the VJ largely maintained its regular delivery of military supplies to the VRS. In January 1995, the VRS Main Staff reported that “a great number of commands, units and certain numbers of the VJ have selflessly been offering us humanitarian aid and services which are extremely important for RS defence”.\footnote{822}{Exhibit P1211, Correspondence between the VRS Main Staff and the RS Prime Minister regarding the construction of a material gift for he VJ, 15 January 1995, p.1.}

The trial record further established that the VRS received ammunition from the VJ and the FRY special purpose industries. No evidence established that the VRS received ammunition from any other country than the FRY.\footnote{823}{Perišić Trial Judgment, para. 1068.} To the extend that the FRY provided assistance to the VRS independent of the VJ,\footnote{824}{See e.g. Ibidem, paras.1599, 1601, 1006, 1050, 1086-1089, 1133, 1167, 1171, 1185, 1199, 1220, 1291-1294, 1295-1302.} clearly such assistance cannot be considered in determining Perišić’s individual criminal responsibility. Additionally, while Perišić has acknowledged that the VJ provided assistance to the VRS,\footnote{825}{Ibidem, para.1593, citing Perišić Defence Final Brief, paras.607, 780.} such assistance should not be considered tantamount to Perišić’s individual criminal responsibility merely because he was the Chief of the General Staff in the VJ.

The Trial Chamber held that Perišić exercised his authority to provide a substantial amount of the weapons, ammunition and logistical support used by the VRS, which was used, in part, to perpetrate the crimes committed.

6.2.3.2. Final Decisions on Logistical Assistance Taken by the SDC

While the Trial Chamber recognized that the ultimate authority over the FRY defence policy rested with the SDC\footnote{826}{Ibidem, para. 199.} and that the decision to provide VJ assistance to the VRS had been adopted by the SDC before Perišić was appointed Chief of the VJ General Staff,\footnote{827}{Ibidem, paras. 761-763, 948, 1595.} and the SDC continued to support the policy of assistance during Perišić’s tenure,\footnote{828}{Ibidem, paras. 962-988, 1622.} it still held Perišić liable for the continuing provision of military aid to the VRS.

Logistical assistance to the VRS was regularly discussed and agreed upon at FRY SDC
meetings. While the SDC meetings were attended by many individuals, including Perišić, final decisions were taken by political leaders: Slobodan Milošević, President of Serbia, Zoran Lilić, President of the FRY, and Momir Bulatović, President of Montenegro. On 11 October 1993, Perišić briefed the SDC about the situation and acknowledged that the VJ’s aid to the VRS was affecting the VJ’s resources:

“Our reserves of wartime material which we are now spending [...] are bringing us into a situation where our combat capacities are declining, and we can’t even help these two republics [RS and RSK]. [...] Each day we are using up our reserves but we are not getting a normal inflow of funds; and, secondly we are helping the armies of the republics [RS and RSK].”

Yet, Perišić never suggested that the VJ discontinue its assistance to the VRS despite the problems with the VJ’s funding and resources. Rather, the SDC adopted measures to resolve problems concerning financing and securing funds for the transformation and financing of the VJ thus enabling the continuing flow of aid. On 10 January 1994, the SDC convened to discuss the VJ’s funding. Perišić cautioned the SDC that the financing of [RS] had not been taken into account at all. He noted:

“If the war there were to continue, we know that they need to be given certain assistance, beginning with weapons and ordnance and all other materiel”. 522 million dollars and 307 million dollars were respectively required for the needs of the VRSD and SVK. He pled: “We cannot abandon Ratko [Mladić] and others – they are asking for extremely expensive ammunition they use to fire on land targets. Why? Because it is very effective [...]”

6.2.3.3. SDC Granted Perišić Authority Over the Logistical Assistance Process

The Trial Chamber found that the evidence conclusively established that the SDC granted Perišić authority over the logistical assistance process.

On February 1994, at the 18th Session of the SDC, Perišić warned the SDC that the FRY Law on

---

829 Ibidem, paras. 198-200.
830 Exhibit P709, Stenographic Transcript of the 14th Session of the SDC, 11 October 1003, pp 5-6.
831 Ibidem, pp 5-8.
832 Exhibit P770, Minutes from the 14th Session of the SDC held on 11 October 1003, pp 1-2.
833 Exhibit P791, Stenographic Transcript of the 17th Session of the SDC, 10 January 1994, p. 4.
834 Ibidem.
835 Ibidem, p. 56.
Property does not give the Chief of General Staff any right to misappropriate any resource, especially in terms of assistance to the RS. Perišić noted that the assistance should now go through the Ministry of Defence and the FRY Government.\textsuperscript{836} Perišić told the SDC that it should either give him the authority to give logistical assistance to the VRS or allow the FRY Law on Property to regulate the logistical assistance process.\textsuperscript{837} Perišić advised the SDC to give him that authority because “if the two Krajinas are not defended, we will be significantly jeopardised. And they certainly can’t be defended without our assistance in weapons and military equipment”.\textsuperscript{838}

Eleven days later, Zoran Lilić, President of the FRY issued an order, directing that “in accordance with a decisions of the Supreme Defence Council”, the VJ “shall supply the 30\textsuperscript{th} PC [...] with weapons and military equipment”,\textsuperscript{839} whereby Lilić ordered that “[t]he Chief of General Staff of the VJ is hereby authorized to reconcile the requests of the 30\textsuperscript{th} […] PC with the means of the VJ and specifically regulate the method and procedures for providing the supplies”.\textsuperscript{840} The trial record contains Defence witness Starčević’s testimony, confirming that the SDC ordered Perišić to provide logistical assistance to the VRS within the limits of the VJ’s available resources.\textsuperscript{841}

6.2.3.4. Perišić Advocated for the Continued Provision of Logistical Assistance to the VRS

On 16 March 1994, the SDC again discussed the provision of weapons and military equipment to the VRS.\textsuperscript{842} On 7 June 1994, Perišić personally advised the SDC that logistical assistance to the VRS was necessary and must continue:

“If we stop helping them in the area of education, financing or educated personnel and material assistance for certain combat operations, they’ll start losing territories. […] This means we have to

\textsuperscript{836} Exhibit P782: Stenographic Transcript of the 18th Session of the SDC, 7 February 1994, p. 53.
\textsuperscript{837} Ibidem. See also Exhibit D114: Law on property of the FRY, 16 July 1993.
\textsuperscript{838} Exhibit P782: Stenographic Transcript of the 18th Session of the SDC, 7 February 1994, p. 53.
\textsuperscript{839} Exhibit P1009: Order of FRY President, 18 February 1994.
\textsuperscript{840} Ibidem.
\textsuperscript{841} Testimony of Witness Miodrag Starčević, T. 6857-6858 (private session).
\textsuperscript{842} Exhibit P710: Minutes of the 19\textsuperscript{th} Session of the SDC, 7 June 1994, p. 2.
help them somehow; and we can’t leave them to their own devices”.  

At the 19th session of the SDC held on 16 March 1994, Perišić recommended the SDC to approve the grant of ammunition and spare parts to the VRS. On 11 July 1994, Perišić and FRY Defence Minister Pavle Bulatović presented to the SDC the reasons for the materiel requests and personnel-related proposals of RS, whereupon the SDC decided that the delivery of weapons and military equipment to be used by RS shall only be conducted through the FRY Ministry of Defence and the VJ General Staff.

On 21 July 1994, Perišić equally told the SDC that it was necessary to consider “how much longer we can extend assistance to the VRS”. General Blagoje Kovačević, the Deputy Chief of the VJ General Staff, noted that, the VJ’s reserves were partially depleted “by giving large quantities of weapons, ammunitions, and explosives – 3,640 tonnes” to the VRS. Perišić later specified that the VJ’s stock of infantry rifle ammunition remained at 110 % but that its stock of 60mm and 82mm infantry shells was down to 37 %. Perišić did not propose discontinuing military assistance to the VRS and SVK, instead urging the SDC to increase the VJ’s budget:

“It 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. On the SDC meeting six months later on 24 January 1995 Milošević observed: “We are exhausted and have no reserves”, and stressed the need to end the war soon by reaching a peace agreement with favourable terms. Notably, Perišić urged the SDC to continue assisting the VRS in the meantime:

---

845 Exhibit P752: Minutes of the 22nd Session of the SDC held on 11 July 1994, p.2.
848 Ibidem, p.9.
849 Ibidem, p.15.
850 Ibidem, p.15.
On 7 June 1995, Perišić again encouraged the SDC to keep on authorising the VJ’s assistance to the VRS:

“Allow us, as has been the case so far, to offer certain help to the [RS], primarily with spare parts and whatever we can give that will not have an impact on FRY’s combat readiness”.  

On 29 July 1995, pursuant to another briefing by Perišić, the SDC decided to “[c]ontinue to extend certain assistance to the Army of [RS] 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 to the extent of VJ abilities”. The SDC also decided that it was necessary to “emphasise [in the mass media] the legitimate right of the FRY, as their mother-State, to help the survival of the Serbian people west of the Drina”.  

In sum, all the SDC records conclusively demonstrate that the SDC licensed military assistance to the VRS, and that it granted to Perišić and the VJ General Staff the authority to administer the provision of this assistance. Perišić also opted to refer certain requests to the SDC.

The Trial Chamber found that Perišić, as the Chief of the VJ General Staff, oversaw the administration of logistical assistance for the military needs of the VRS. Moreover, Perišić convinced the SDC to give him the legal authority to do so in an effect to comply with the FRY Law on Property. The Trial Chamber found that Perišić’s role went beyond administering the logistical assistance process. Perišić participated in the SDC’s deliberations on logistical assistance to the VRS, and recurrently encouraged the SDC to maintain this assistance, thereby helping craft the FRY’s policy to aid the other army, the VRS.

According to the Trial Chamber’s conclusions, Perišić’s role in coordinating the logistic process, his statements before the SDC, and his approval of extensive assistance to the VRS demonstrate that he intended on assisting the VRS. Perišić’s remarks before the VJ Collegium at the end of

---

853 Ibidem, p. 4.
854 Exhibit P786: Stenographic Transcript of 37th Session of the SDC, 7 June 1995, p. 43.
855 Exhibit P763: Minutes of the 39th Session of the SDC, 29 July 1995, p. 5.
856 Ibidem, p. 4.
the armed conflict are equally instructive:

“I would have retained all material reserves here [in the VJ] to the maximum, to give as little as possible material reserves away […]. We gave all we had always and I am not sorry for that, as we defended the people as much as we could”. 858

6.3. Military Aid Provided for Furtherance of Specific Criminal Activities

In general, decisions regarding the distribution of military support are quite particularized, involving judgments regarding the specific goals to be served by providing particular support to particular recipients. In cases where the provider knows that the recipient plans to use the assistance to commit international crimes, perhaps it makes sense to hold the provider to a more demanding standard of responsibility. However, viewing the issues in this way fails to capture what makes the “foreign assistance cases” so difficult. The central problem remains that in some situations the pursuit of legitimate and desirable goals demands the provision of assistance that will unavoidably contribute in some way to crime. Considerations of these cases requires a moral judgment that is not reducible to the simple assessment of whether or not the conduct in question consists of acts of practical assistance which have a substantial effect on the perpetration of the crime.

According to the Trial Chamber’s conclusions, Perišić’s role in coordinating the logistic process demonstrate that he intended to assist the VRS and supported the continuation of the SDC policy of assisting the VRS. 859 Such was not contested by Perišić during the trial. During the SDC meetings, Perišić argued both for sustaining the aid to the VRS and for adopting related legal and financial measures that facilitated such aid. 860 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, according to the Appeals Chamber, the Trial Chamber’s analysis of Perišić’s role in the SDC deliberations indicates that Perišić, while recurrently encouraging the SDC to maintain this assistance and thereby helping craft the FRY’s policy to aid the other army, nevertheless merely supported the continuation of assistance to the

858 Exhibit P 2203: Transcript of the Collegium of the Chief of the VJ General Staff, 6 November 1995.
859 Perišić Trial Judgment, paras. 962-988.
860 Ibidem, paras. 963-974.
VRS general war effort. As the above presentations before the SDC illustrate, Perišić advocated for the continuation of the provision of assistance to the VRS in order to “defend people over there”, “for certain [VRS] combat operations”, [or else] they’ll start losing territories”, for their defence since “if the two Krajinas are not defended, we [the FRY] will be significantly jeopardised” and “in order for the Serbian people to successfully defend itself and survive on its territory”.

6.3.1. Perišić Merely Implemented the FRY State policy Adopted Prior to his Tenure

Perišić admitted that the VJ, pursuant to orders of the SDC, provided assistance to the VRS. It is suggested that while advocating for the continuation of the provision of assistance to the VRS, Perišić merely continued the same line of state policy on assisting the VRS as had been in place prior to his tenure. The Appeals Chamber recognized that by providing large-scale military assistance, including equipment, logistics and training, to the VRS, the VJ had put into effect the policy of the SDC of the FRY.

Review of the Perišić trial record reveals that the FRY and the VJ had been providing military and other type of aid to the VRS/RS prior to the appointment of Perišić as the head of the VJ. Pursuant to the FRY Constitutions and Law on the Army, only the SDC had the authority to adopt decisions on the provision of aid and assistance to the VRS/RS. Perišić advocated for the continuation of the provision of aid to the VRS/RS and called for regulation of the provision of logistics to the VRS and regulation of status of the officers sent to the VRS. Moreover, Perišić implemented SDC decisions on the provision of assistance to the VRS and advocated that military assistance be provided solely pursuant to the SDC decisions and in accordance with the FRY legislation. The trial record did not establish that Perišić provided aid to the VRS outside of the established channels.

861 Ibidem, paras. 1007-1009.
862 See above excerpts from transcripts of the various SDC Sessions.
863 Ibidem.
865 Perišić Appeals Judgment, paras. 50–57.
866 The SDC stenographic transcripts and minutes are a record of “state secret” discussions. They represent a combination of the highest form of political speech and candid interchanges between and views of the participants during those sessions.
867 Perišić Appeals Judgment, para. 67.
In its analysis of the objective element of aiding and abetting, it considered Perišić’s role in shaping and implementing FRY’s policy of supporting the VRS and whether the FRY policy was specifically directed towards the commission of crimes by the VRS. While the Appeals Chamber recognized that the parameters of its inquiry were limited and focused solely on factors related to Perišić’s individual criminal responsibility, and not the potential responsibility of States over which the Tribunal has no pertinent jurisdiction, it was the state policy that was in the centre of its analysis. Particularly, the Appeals Chamber inquired whether the SDC endorsed a policy of assisting VRS crimes, suggesting that the VJ assistance was specifically directed towards the VRS crimes in Sarajevo and Srebrenica. Furthermore, the assessment of actus reus by both the Trial Chamber and the Appeals Chamber focused on evidence indicating SDC approval of measures to secure financing for the VJ’s assistance to the VRS and to increase the effectiveness of this assistance by systematising the secondment of VJ personnel and the transfer of equipment and supplies.

Accordingly, the Appeals Chamber’s analysis of individual criminal responsibility consisted of an inquiry over the state policy, i.e. the policy undertaken by the FRY SDC, particularly, whether the SDC had endorsed a policy of assisting VRS crimes. By finding that no basis existed for concluding that the highest State defence body pursued the policy of specifically directing aid towards VRS crimes, the Appeals Chamber reached a conclusion that Perišić’s provision of military and other type of aid could not quality as actus reus of aiding and abetting crimes committed by VRS in Sarajevo and Srebrenica. While the Appeals Chamber considered 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, it is evident that the crux of its analysis of the objective element of aiding and abetting liability significantly depended on examination of the state policy on assisting the neighbouring army.

6.3.2. Provision of Logistical Support Constituted a State Secret

---

868 Ibidem, para. 47.
869 Statute ICTY, Articles 6-7; Report of the Secretary-General Pursuant to Paragraph 2 of UN Security Council Resolution 808 (1993), UN 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”).
871 Perišić Appeals Judgment, para. 52.
872 Ibidem.
The trial record demonstrated that the VJ General Staff continued to covertly deliver significant quantities of weaponry to the VRS throughout the sanctions period, although this assistance was a FRY “state secret”.873

Overall, the FRY SDC continued to agree on logistical assistance to the VRS during the sanctions period,874 and Perišić himself urged the SDC to keep on authorizing the assistance.875 On 25 August 1995 a meeting of the FRY and RS leadership was convened, bringing together, FRY and RS military and political leadership,876 whereby President Milošević indicated that the Drina river blockade was merely a formality and that the aid flew daily.877

The logistical assistance system was not transparent. Namely, Slobodan Milošević admitted that logistical assistance “was not made public because it was a state secret, as was everything else that was provided for the VRS.”878 The SDC’s decisions on the matter were classified as “military secret”, “strictly confidential” or both.879 Partly the reason behind this state secrecy lay in political reality where FRY’s support to the VRS was exposed to constant condemnation by the international community. The UN Security Council issued multiple resolutions urging a ceasefire and a halt of all hostilities.880 It demanded that the FRY cease its involvement in the military conflict in Bosnia,881 condemned the FRY’s failure to do so and subjected it to sanctions.882 The UNSC further called upon the FRY to maintain the effective closure of the border with BiH in respect of all goods with exception to food, medical supplies and clothing for essential

873 Ibidem, para. 1056.
874 Exhibit P749, supra note 806, p. 5. Exhibit P720: Minutes from the 38th Session of the SDC held on 27 June 1995, p. 3.
877 Ibidem, p. 11.
878 Exhibit P322: Appeal by Slobodan Milošević to the Investigating Judge of the Belgrade District Vourt, 2 April 2001, p.2. A contract between the FRY and RS for he loan of 42,720 kilograms of TNT states that the provisions of the contract «are considered to be military secrets».
879 Perišić Trial Judgment, para. 1002.
humanitarian needs. In addition, as early as spring 1992, the UNSC discussed the sniping and shelling of Sarajevo civilians on a nearly daily basis and strongly condemned these actions.

FRY Ministry of Foreign Affairs precluded any export of military goods to RS in due compliance with UN Security Council resolutions. The Trial Chamber found it was presented with extensive evidence documenting the role of the VJ General Staff, Ministry of Defence and other FRY authorities in supplying significant amount of weaponry to the VRS regardless of UN Security Council resolutions.

The evidence at trial unequivocally showed that Perišić sought to provide assistance to the VRS and SVK regardless of the UN Security Council resolutions. Perišić specifically addressed the matter when he met with a delegation of leaders of the Serbian Orthodox Church. The record of the meeting indicates that the delegation asked Perišić about the conflict in Bosnia. In his responses, General Perišić said that despite the unfair sanctions imposed by the international community the FRY has been assisting RS 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 in his power to continue helping the Serbian people”.

The FRY’s provision of logistical assistance to the VRS and SVK was widely known despite its official state secrecy. UNPROFOR officials were aware that the VRS received significant military support from the FRY. General Branko Gajić, a senior VJ official and Defence witness, himself acknowledged that the FRY sent large quantities of military aid to RS and RSK, stating that the military assistance was a matter of “common knowledge [as] the public was aware of it, there were articles in the press about it, and as far as I can remember I think it

---

884 Testimony of Witness Muhamed Sacirbey, T. 7179-7181.
885 Note of the President of the UNSC, 7 January 1994.
886 Testimony of Witness Radojica Kadijević, T. 13552.
887 Perišić Trial Judgment, para. 982.
888 Exhibit P2743, Memo from Office of Chief of VJ General Staff, 11 August 1995, p. 2 (emphasis added).
889 Ibidem, p. 4.
890 Testimony of Witness Michael Williams, T. 6464; Exhibit P2372: Transcript of Michael Williams from Prosecutor v. S. Milošević, 24 June 2003, T. 22893-22894.
891 Testimony of Witness Branko Gajić, T. 10987-10988.
was discussed by the delegates in parliament it was well known even to military and political representatives accredited in Belgrade”. 892

In 2001 Slobodan Milošević admitted that the FRY had secretly provided significant military assistance to the VRS during the armed conflict in BiH.893 Milošević insisted that the State funds were used “for the survival of the country during a total embargo and war across the Drina river, in which we helped our people with all the resources we had at our disposal”.894 Milošević specifically mentioned the FRY’s logistical assistance to the VRS:

These expenditures constituted a state secret and because of state interests could not be indicated in the Law of the Budget, which is a public document. The same applies to the expenditures incurred by providing equipment, from a needle to an anchor, for the security forces and special anti-terrorist forces in particular, from light weapons and equipment to helicopters and other weapons which still remain where they are today, and this was not made public because it was a state secret, as was everything else that was provided for the Army of Republika Srpska.895

6.4. Substantial Effect Applied in Perišić

6.4.1. The Lack of Nexus Between the Acts of the Accused and the Crimes Committed

This section will examine the Perišić Trial Chamber’s generalised approach to substantial effect requirement and its reliance on the VRS’s dependence on the VJ. Throughout the Indictment and the trial, the Prosecution repeatedly applied “substantial” when discussing aiding and abetting. For example, the Prosecution alleged that Perišić exercised his authority to “provide a substantial amount of the weapons, ammunition and logistical support used by the VRS, which was used, in part, to perpetrate the crimes committed during the siege of Sarajevo.”896 A similar formulation is found with regard to Srebrenica.897 It is argued that the actus reus of aiding and abetting does not require a substantial amount of assistance, but that the assistance provided has a substantial effect on the perpetration of a crime.

892 Ibidem, T. 10991-10992.
895 Ibidem.
896 Perišić Indictment, para. 44(b).
897 Ibidem, para. 60(b).
The Trial Chamber held that “Perišić’s actions substantially facilitated the commission of these crimes because the VRS heavily depended on the VJ’s support to function as an army and conduct its operations, including besieging Sarajevo and taking over Srebrenica.”898 The Trial Chamber conceded that “the evidence does not establish that the specific weapons used in committing the charged crimes stemmed from the logistical assistance process overseen by Perišić.”899 However, the Majority, relying on the proposition that the acts of the aider and abettor need not be “specifically directed” to assist the crimes, found that Perišić’s support of the VRS served as a basis for his individual criminal responsibility under aiding and abetting.900

It is argued that the Trial Chamber improperly rejected the need for applying the “specific direction” standard in analysing this case. The assistance given was neutral on its face in terms of whether it contributed to criminal or non-criminal military action. Moreover, the Trial Chamber failed to articulate how any assistance by Perišić contributed to the charged crimes, except in the most generalised of senses. In doing so, the Trial Chamber lowered the threshold for aiding and abetting to such an extent that criminal responsibility was imposed on Perišić not because his involvement in the crimes committed by the VRS was proved but because he provided, as a general matter logistical and personnel assistance to the war waged by the VRS, a war which was not criminal of itself.901

In his dissent, Presiding Judge Moloto emphasized that Perišić was not charged with waging a war or participating in a JCE and accordingly stated:

    He is charged with aiding and abetting the crimes that were committed during the war and not for the war itself; therefore his conduct must be judged in relation to the commission of those crimes and not in relation to the waging of war or the dependence of the VRS as an army on the VJ.902

The point is crucial. Perišić’s conduct should have been judged in relation to the commission of the charged crimes, which requires proof that Perišić’s individual acts had a substantial effect on such crimes, not on the VRS’s war effort in general. The Trial Chamber agreed that “Perišić is

---

898 Perišić Trial Judgment, para. 1621.
899 Ibidem, para. 1624.
900 Ibidem, paras. 1621-1627.
901 Ibidem, paras. 1621-1622.
902 Perišić Trial Judgment, Judge Justice Moloto Dissenting Opinion, para. 6 [emphasis added].
not charged with helping the VRS wage war *per se*, which is not a crime under the [ICTY] Statute."903 However, it subsequently relied on the view that Perišić’s responsibility stemmed from the “dependence of the VRS as an army on the VJ” as the primary basis to find Perišić individually criminal responsible of aiding and abetting.

The Trial Chamber repeatedly and erroneously cited Perišić’s role in responding to the dependence of and fulfilling the military needs of the VRS as proof of guilt, stating:

> The foregoing evidence conclusively demonstrates that Momčilo Perišić, as Chief of the VJ General Staff, oversaw the administration of logistical assistance *for the military needs of the VRS* […]. That being noted, the Trial Chamber considers that the question of greater relevance is [...] the *actual* role that Perišić played in the logistical assistance process.904

Providing support to the VRS as a matter of policy does not give rise to individual criminal responsibility under the theory of aiding and abetting. Whether the VRS as an army received substantial assistance from the VJ cannot be the focus of the inquiry. If such were the case then the inquiry could end with the mere proof of the waging of war, dependence of the VRS on the VJ, and the commission of crimes during the armed conflict. Nonetheless, the Trial Chamber focused on this precise issue, reasoning for example:

> In assessing whether the VRS received substantial assistance from the VJ, it is necessary to consider the extent to which the VRS relied on logistics from separate sources.905

Continuing in the same vein, the Trial Chamber stated:

> Furthermore, numerous exhibits indicate that the *VRS heavily depended on supplies from the VJ*, thereby demonstrating that the VRS’s reserves were insufficient.906

“Dependence”, as pointed out by Judge Justice Moloto’s Dissenting Opinion, is the incorrect inquiry as it entirely fails to relate Perišić’s conduct to the commission of the crimes for which he is charged. The Trial Chamber improperly places emphasis on conduct which is neutral on its

903 Perišić Trial Judgment, para. 1588.
904 *Ibidem*, para.1007 [first emphasis added].
905 *Ibidem*, para.1155.
906 *Ibidem*, para.1193 [emphasis added].
face in terms of whether it contributed to criminal conduct or to non-criminal military action to establish that Perišić aided and abetted crimes in Sarajevo and Srebrenica.

In its conclusion regarding Logistical and Technical Assistance to the VRS,\(^\text{907}\) the Trial Chamber, rejecting the Defence assertion that the evidence produced was insufficient to determine the extent of assistance received by the VRS from the VJ, stated:

> The trial record, however, demonstrates that the logistical assistance that the VRS received from the VJ with Perišić’s approval was very important in comparison to other sources. In fact, the record clearly shows that the VRS *depended* on the VJ’s assistance regardless of its other sources of supply.\(^\text{908}\)

The Trial Chamber similarly found that:

> Momčilo Perišić, as Chief of VJ General Staff, *oversaw a system providing comprehensive military assistance to the VRS*, and participated in the SDC’s decision to license this aid. The VJ General Staff directly supplied considerable quantities of weaponry comprising a very large part of the VRS’s munition requirements.\(^\text{909}\)

The Trial Chamber concluded that:

> The VRS’s *general state of dependence* on VJ support was acknowledged by Perišić himself, as well as Slobodan Milošević, Radovan Karadžić and Ratko Mladić.\(^\text{910}\)

In sum, it is clear that the Trial Chamber impermissibly relied upon “the general dependence of the VRS on the VJ”, as the cornerstone for finding Perišić individually responsible for aiding and abetting. As will be shown in Part III, such a *general dependence test* proposed by the Perišić Trial Chamber for determination of individual complicity results to be strikingly similar to a *complete dependence test* for attribution of acts of non-state actor to a State under the state responsibility regime.\(^\text{911}\)

### 6.4.2. The Effect of Reliance on the VRS’s Dependence on the VJ – Strict Liability

---

908 *Ibidem*, para. 1233 [emphasis added].
909 *Ibidem*, para. 1234 [emphasis added].
910 *Ibidem*, para. 1236 [citations omitted] [emphasis added].
911 See *infra* Chapter 14.
It is argued that for imposition of Perišić’s individual criminal responsibility the relevant question was not whether the VRS substantially depended upon the VJ’s support to function as an army, but rather, whether military support provided by Perišić had a substantial effect on the perpetration of crimes. Dependence of one army on a foreign army alone does not automatically lead to the only reasonable conclusion that such assistance was specifically directed at providing those officers in those units, being the principal perpetrators of the crimes, with practical support which had a substantial effect on the perpetration of the crimes.912

Perišić provided logistical assistance to the VRS and the commanders in the VRS gave arms and ammunition to their soldiers and sent them to the theatre of war. The military aid provided by the FRY/VJ to the VRS was distributed by the VRS itself to its subordinate units. This step, according to Judge Moloto's view is a novus actus interviiniens that places Perišić in a remote position in relation to the crimes.913 While it is not necessary to establish that the logistical assistance provided by Perišić served as a conditio sine qua non to the commission of crimes, the presence of these intervening factors breaking the chain of events raises a reasonable doubt as to whether the logistical assistance provided by Perišić, in fact, had a substantial effect on the crimes committed in Srebrenica and Sarajevo. According to Moloto, the intervening factors present in the examined case supported an alternative inference which interrupts the natural flow of consequences from the provision of logistical assistance provided by Perišić to the VRS.914 It appears, therefore, that in cases of remoteness between the accused aider and abettor and the physical commission of crimes, Judge Moloto's characterisation of specific direction is a requirement that there be a clear chain of causation between the provision of assistance and the perpetration of the crimes.

If the notion of direction is implicit in finding substantial assistance, a linkage between the accomplice’s acts and the crimes must exist and needs to be proved. According to Judge Moloto and based on the evidence in the Perišić case, there was no clear connection between the assistance provided and the commission of crimes in Sarajevo and Srebrenica. While it is clear

912 Perišić Trial Judgment, Judge Justice Moloto Dissenting Opinion, para. 27.
913 Ibidem, para. 28.
914 Ibidem, para. 29.
that Perišić supported the conflict as a whole, no evidence suggested that such assistance supported the commission of the crimes committed in Sarajevo and Srebrenica.\textsuperscript{915}

\textit{Ad hoc} tribunals should not create a strict liability standard whereby any crime committed by any soldier would entail responsibility by top military officials due to provision of military support. While the Perišić Trial Chamber followed established jurisprudence by requiring proof that the defendant provided substantial assistance to the principal perpetrators despite knowing of their crimes, it overlooked was that not any assistance suffices; it is only the assistance that \textit{substantially contributes to the commission of the crime(s)}. That was the missing link in the Perišić Trial Judgment. The aid must have been influential; namely, the aid had to be provided for the commission of crimes, not for other (any) purposes.

In analysing the effect the assistance had on the crimes committed by the VRS, the Majority found that the VRS’s material reserves were significantly depleted as the armed conflict progressed.\textsuperscript{916} The Majority further found that:

\begin{quote}
The highest authorities in the VRS were clearly aware that \textit{their war depended on the assistance from the VJ}. 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.\textsuperscript{917}
\end{quote}

Again, the consistent thread in the Trial Chamber’s analysis focuses on the issue of \textit{dependence}; indeed its findings are replete with references to the \textit{dependence of the VRS}, e.g.:

\begin{quote}
In conclusion, the Majority finds that the \textit{VRS depended heavily on FRY and VJ assistance in order to function as an army and to wage war}. As shown below, \textit{this dependence was not limited to logistical assistance} but also encompassed all other forms of assistance provided by the VJ including personnel. The Majority recalls that the crimes charged in the Indictment were an integral part of the VRS’s war strategy. Hence, the evidence leads the Majority to the only reasonable conclusion that \textit{by providing vital logistical and technical assistance to the}
\end{quote}

\begin{itemize}
\item \textsuperscript{915} \textit{Ibidem}, para. 28.
\item \textsuperscript{916} Perišić Trial Judgment, para. 1597 [emphasis added].
\item \textsuperscript{917} \textit{Ibidem}, para. 1598 [citations omitted] [emphasis added].
\end{itemize}
The Trial Chamber found that Perišić repeatedly exercised his authority to assist the VRS in waging a war that encompassed systematic criminal actions against Bosnian Muslim civilians as a military strategy and objective. Accordingly, Perišić’s actions substantially facilitated the commission of these crimes because the VRS heavily depended on the VJ’s support to function as an army and conduct its operations, including besieging Sarajevo and taking over Srebrenica. It is argued that whether the VRS was dependent on the VJ for its war effort in whole or in part, such dependence does not prove that the assistance provided by Perišić had a substantial effect on the commission of crimes. This is particularly true where the Trial Chamber found that the Prosecution had failed to prove that certain instrumentalities used in the commission of crimes were provided to the VRS by the VJ pursuant to the logistical assistance process managed by Perišić.

6.4.3. The Trial Chamber’s Dependence Analysis Undermined by the Lack of Evidence

This Section will address the lack of evidence that specific weaponry or logistics used in committing the crimes stemmed from the logistical assistance process overseen by Perišić. The Trial Chamber rejected the Prosecution contention that the weaponry recovered from the crimes scenes stemmed from the logistical assistance overseen by Perišić, finding that the “trial record does not establish that the particular shells used in Sarajevo incidents were provided to the VRS pursuant to the logistical assistance process managed by Perišić.” Given the varied possible explanations for how this weaponry came into the possession of the VRS, this finding was correct under the principle of in dubio pro reo.

---

918 Ibidem, para. 1602 [emphasis added].
919 Ibidem, para. 1621 [emphasis added].
920 Ibidem, paras.1291-1294, 1302.
921 Ibidem, para.1294.
922 In the only two instances where evidence was recovered from alleged crime scenes in Sarajevo (for both shelling and sniping), the Trial Chamber determined that the shell remnants were manufactured by the Krušik factory in Valjevo, Serbia. In assessing whether these crimes could be attributed to Perišić because his acts of assistance had a “substantial effect” on the charged incidents, the Trial Chamber reasoned that there were three distinct equally plausible explanations for where the VRS obtained these shells which were used in the incidents charged, namely: (i) “it is possible that the shells fired on Sarajevo civilians were obtained by VRS units from VJ reserves with Perišić’s approval”; (ii) it “would also be possible to conclude that the VRS purchased these particular shells directly from Krušik” and that transaction would not necessarily have implicated Perišić; and (iii) “one cannot reasonably
However, alternative possibilities are improperly ignored in the Trial Chamber’s remaining analysis of Perišić’s responsibility for aiding and abetting crimes when similar evidence was not produced. The Trial Chamber properly found it could not draw an inference of guilt when presented with specific evidence of the instrumentalities or weaponry used. Drawing an inference of guilt in the absence of evidence of the specific instrumentalities or weaponry a fortiori had to have been based on speculation.

The Trial Chamber came to the same conclusion, for the same reasons, regarding evidence recovered from the Srebrenica area that was manufactured by the Prvi Partizan factory in Užice, Serbia in 1993 and 1994. It held:

The Trial Chamber finds that it is impossible to conclude beyond a reasonable doubt that these specific bullets were provided to the VRS pursuant to the logistical assistance process that Perišić oversaw. Overall, this evidence presents the same problems as the aforementioned shells recovered from Sarajevo. The trial record does not establish whether these specific bullets were delivered to the VRS pursuant to Perišić’s orders, purchased directly from Prvi Partizan or otherwise procured through unauthorised channels.

Similarly, the Trial Chamber found that 378 bullet casings out of the 3,644 recovered from the Srebrenica killing sites were manufactured by Prvi Partizan (Užice, FRY) in 1993 and that these bullets raise the same problems as previously discussed:

“Again, it is not possible to reasonably conclude that Perišić was involved in the provision of these specific bullets”.

The Chamber found that there were a number of possible objective scenarios explaining the provision of the weaponry in Sarajevo and the Srebrenica bullets, holding that the evidence was insufficient to prove that Perišić aided and abetted those crimes. The ultimate conclusion that Perišić’s logistical assistance had a substantial effect on the commission of crimes was made in the absence of any evidence as to the origin of the ammunition actually used. It was based on the
discount the possibility that the VRS obtained these particular shells through smuggling or donations of VJ personnel outside the official logistical assistance process.

923 *Perišić* Trial Judgment, para. 1295.
924 *Ibidem*, para. 1296.
925 *Ibidem*, para. 1301.
926 *Ibidem*, para. 1292.
generalised conclusion that providing logistical assistance to the VRS war effort automatically constituted aiding and abetting selected crimes committed by the VRS during the armed conflict.

While the Majority acknowledged that there was no evidence that specific weaponry or logistics used in committing the charged crimes stemmed from the logistical assistance process overseen by Perišić, it excused this absence of proof by relying on its finding that the acts of an aider and abettor need not have been “specifically directed” to assist crimes.

6.5. Aid Specifically Directed Towards the Commission of Crimes

6.5.1. Specific Direction in the Perišić Case

The normative framework adopted in Perišić does not require a purposeful contribution to crime. It allows conviction for aiding and abetting on the accomplice’s knowing contribution to the principal offender. However, it protects against over-incriminalization by demanding that the accomplice’s actus reus takes the form of assistance that is specifically directed toward the offense. This Section will focus on the relatively high legal standard for individual complicity of a top State official for facilitating atrocities from a remote location, as laid down in the appellate decision in Perišić. The novelty of the Perišić case in the context of the application of aiding and abetting should be underscored. Never before has a Commander and the Chief of Staff of General Staff of one army been criminally responsible as accomplice for the crimes committed by members of the armed forces of another State or entity. The Perišić case is also unique insofar as it is the first clear expression of a direct link between the FRY and the crimes committed in Srebrenica and Sarajevo. It is, however, imperative to recall a fundamental principle of national and international criminal law – namely that individual criminal responsibility is based on personal guilt, not on state responsibility.

The Appeals Chamber in Perišić concluded that assistance from one army to another army’s war efforts is insufficient in itself to trigger individual criminal responsibility for individual aid
providers absent of proof that the relevant assistance was specifically directed towards criminal activities. Judge Liu, dissenting, was of the opinion that the Appeals Chamber by insisting on specific direction had raised the threshold for aiding and abetting, and by doing so risked undermining its very purpose, as it was “allowing those responsible for knowingly facilitating the most grievous crimes to evade responsibility for their acts”.

The focal issue for the Trial Chamber in the Perišić case was not whether logistical assistance was provided, but rather whether Perišić’s acts were directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, and which had a substantial effect on the perpetration of that crime. The Appeals Chamber found that Perišić had indeed furthered the FRY’s policy of supporting the VRS war effort. There is, however, the question of how much the accomplice’s acts take the form of assistance tailored to the crime itself rather than generalized support. Thus, providing general assistance that could be used for lawful and unlawful activities did not by itself suffice to prove that the assistance was specifically directed towards the commission of crimes by the VRS perpetrators. In particular, the Appeals Chamber deemed that no “link” existed between Perišić’s actions and the VRS’s crimes since he had only provided general military assistance. Given the alleged absence of such a “link”, the Appeals Chamber implied that the Trial Chamber had adopted a strict liability standard whereby any assistance from one army to another would trigger individual criminal responsibility if the recipient army committed crimes. Accordingly, the Perišić Appeals Chamber underlined that the element of specific direction establishes a culpable link between assistance provided by the accused and the crimes of the principal perpetrators.

The Trial Chamber reasoned that a link existed between Perišić’s actions and the alleged crimes since the VRS heavily depended on operational support to commit its crimes. In its view, it was no defence for Perišić to argue that he merely provided general military assistance since warfare by the VRS encompassed grave crimes licensed by its leaders, including top officers on Serbia’s

---

934 Perišić Appeals Judgment, para. 72.
935 Perišić Appeals Judgment, Partially Dissenting Opinion of Judge Liu, para. 3.
936 Perišić Appeals Judgment, para. 58.
937 Ibidem, para. 72.
938 Ibidem, para. 72.
939 Ibidem, para 37.
payroll. However, the Trial Chamber found that the VRS was independent from the VJ and that the two armies were based in separate geographic regions. Furthermore, the Trial Chamber did not find that the VRS was de jure or de facto subordinated to the VJ. Rather, it found that the VRS had a separate command structure.

According to the Appeals Chamber, in circumstances where an accused was not physically present when relevant criminal acts were planned or committed, an explicit analysis of specific direction is required in order to establish the necessary link between the aid provided and the crimes. While specific direction may be an implicit element, the majority of the ICTY’s jurisprudence has expressly included the notion of “specific direction” as part of the actus reus standard for aiding and abetting. With this in mind, in cases where the conduct of the accused is remote in relation to the commission of the crimes, the requirement of specific direction as an explicit element of aiding and abetting is manifest. This was especially important in the Perišić case, as Perišić was not accused of providing assistance to the commission of crimes committed by the VJ. Rather, he was accused of facilitating the commission of crimes committed by the VRS, a separate and independent army. In cases involving such remote conduct as is evident in Perišić, the notion of “specific direction” should form an integral part of the actus reus for aiding and abetting. To hold otherwise, in a case such as Perišić, could lead to a conflation of state responsibility with individual criminal responsibility, which must be based on personal guilt.

As Judge Moloto properly noted,
If we are to accept the Majority’s conclusion based solely on the finding of dependence, as it is *in casu*, without requiring that such assistance be *specifically directed* to the assistance of crimes, then all military and political leaders, who on the basis of circumstantial evidence are found to provide logistical assistance to a foreign army dependent on such assistance, can meet the objective element of aiding and abetting. I respectfully hold that such an approach is manifestly inconsistent with the law.\textsuperscript{948}

Thus, for any military leader such as Perišić to be convicted on the basis of individual criminal responsibility, it has to be proven beyond a reasonable doubt that *his* acts were specifically directed to assisting the commission of the crimes perpetrated by the VRS as a separate army. This dissertation argues that the *Perišić*’s Trial Chamber failed to do that.

The Appeals Chamber stressed that “the Trial Chamber did not find that all VRS activities in Sarajevo in Srebrenica were criminal in nature” but that “only certain actions of the VRS in the context of the operations in Sarajevo and Srebrenica” were criminal.\textsuperscript{949} The Appeals Chamber’s analysis suggested that the siege of Sarajevo and the takeover of Srebrenica were side events that were not central to the VRS’s war plans and the conflict as a whole. By intent or design, such conclusions of the Appeals Chamber had profound implications. If one establishes that the crimes in question were perpetrated on a small scale and were only isolated crimes perpetrated by rogue soldiers acting independently, it becomes far more doubtful that Perišić could be responsible as an aider and abettor. However, when a war plan by military leadership encompass attacks on civilians and when crimes of a foreign army receiving military assistance are of an enormous magnitude, the aider and abettor could/should be held responsible.

The Appeals Chamber held that the type of aid provided by the VJ was not seen as being “incompatible with lawful military operations”, and although it may have considerably facilitated the commission of crimes “proving substantial contribution does not necessarily demonstrate specific direction”.\textsuperscript{950} The Appeals Chamber further noted that Perišić had provided “general assistance which could be used for both lawful and unlawful activities”\textsuperscript{951} and argued that the evidence against Perišić was therefore entirely “circumstantial.”\textsuperscript{952} Critics of the *Perišić* Appeals

\textsuperscript{948} Ibidem, para. 33 [emphasis added].
\textsuperscript{949} Perišić Appeals Judgment, para. 53.
\textsuperscript{950} Ibidem, para. 65.
\textsuperscript{951} Ibidem, para. 44.
\textsuperscript{952} Ibidem para. 47.
Judgment argue that even assuming that the case was wholly circumstantial, one may conclude that the only reasonable inference was the Perišić’s actions had a “substantial effect” on the VRS crimes. However, it is doubtful that an individual can heavily buttress a dependent and struggling army without having a “substantial effect” on its operations. If attacks on civilians are a major part of these operations, the person who orchestrated substantial operational support should be convicted of aiding and abetting these crimes if he was aware of them provided that he was also aware of the fact that his acts facilitate the commission of the crimes.

The above demonstrates that the Appeals Chamber effectively raised the legal standard to convict top officials of aiding and abetting atrocities by requiring proof that support was “specifically directed” to assist crimes, especially when the defendant provided support from a remote location.

6.5.1.1. Specific Direction as a mens rea element of aiding and abetting

Additional ambiguity about the meaning of specific direction is palpable in the Perišić appellate judgment. One option is that the specific direction standard is simply another way of describing the purposive approach to complicity. As a linguistic matter, the Tadić Appeals Chamber’s reference to assistance “directed” toward atrocities connotes intentionality, and this understanding comports with Judge Ramaroson’s concurring opinion in Perišić, stressing that “specific direction” has been miscategorised under actus reus and is best understood as a mens rea element. This would be an odd result given the ICTY’s consistent finding, including Perišić itself, that knowledge rather than purpose is the requisite mens rea. However, this apparent contradiction may find resolution in the conduct/result distinction: an accomplice who specifically directs assistance to the perpetrator’s murderous conduct may be held

---

953 Ibidem, para. 47.
954 Jouet, M., supra note 317, p. 1104.
955 Perišić Appeals Judgment, paras. 42, 73-74.
956 Perišić Appeals Judgment, Separate Opinion of Judge Arlette Ramaroson, para. 7.
957 Ibidem.
958 According to the conduct/result distinction: international complicity rests on a distinction between the perpetrator's criminal actions and the results of those actions. What is critical under this approach is that the accomplice purposefully assists the perpetrator's criminal conduct. So long as the accomplice does so, he may be held responsible for the completed crime even if he does not have as his conscious object the realization of any prohibited harm.
responsible even if the accomplice does not act with the conscious object of bringing about the death of any human being.

Although the Perišić plurality opinion treats specific direction as an actus reus requirement, it too emphasizes an important connection to mens rea by suggesting that specific direction can be established circumstantially by proof of a criminal purpose. Particularly, the Appeals Chamber did accept that “specific direction may involve considerations that are closely related to questions of mens rea”, and held that evidence relating to an accused’s state of mind could serve as circumstantial evidence of specific direction as an actus reus element. Judges Meron and Agius in their Joint Separate Opinion to the Perišić appellate decision asserted that “whether an individual commits acts directed at assisting the commission of a crime relates in certain ways to that individual’s state of mind”, and held that were they to set out the elements afresh, they would include specific direction as a mens rea element. Either way, they asserted, the key issue is “whether the link between assistance of an accused individual and actions of principal perpetrators is sufficient to justify holding the accused aider and abettor criminally responsible for relevant crimes”. Under this approach the accused’s criminal purpose will usually be sufficient, but not always necessary, to prove specific direction. In either event, to the extent that a purposive mens rea can establish specific direction – whether as a necessary or merely sufficient condition – then the interpretive questions relating to purpose will apply.

6.5.1.2. Conflating aiding and abetting with the JCE

This Section addresses the question whether a JCE offers a more appropriate mode of liability when it is established that military aid was provided to further a common plan or purpose based on the “strategic objectives” of the recipient armed force. It is crucial to underline that when the Appeals Chamber first articulated the standard for the actus reus of aiding and abetting in Tadić Appeals Judgment, it was done in the context of distinguishing individual criminal responsibility for aiding and abetting from participation in a JCE. The Tadić Appeals Judgment established that “the aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime” and which have a substantial effect on the
perpetration of the crime. \textsuperscript{963} In contrast, it explained that “acts that in some way are directed to the furthering of the common plan or purpose” are sufficient for the requisite participation in a JCE. \textsuperscript{964} This important distinction between these two modes of liability provides the foundation for the Appeals Chambers’ continued inclusion of the concept of “specific direction” as the required element of the actus reus of aiding and abetting. If the Tadić Appeals Judgment had not intended for specific direction to constitute a requisite element for aiding and abetting liability, there would have been no need to make such a distinction.

The Prosecution in the Taylor case contended that specific direction, as used in the Tadić Appeals Judgment, clarifies that the actus reus of aiding and abetting liability is more strict than the actus reus of joint criminal enterprise, since for aiding and abetting liability, it is not enough that you contribute to the enterprise. Rather, the accused’s acts and conduct have to contribute to the crime. \textsuperscript{965} It is submitted that this was the understanding expressed by the ICTY Appeals Chamber held in Blagojević and Jokić and Mrkšić and Šljivančanin. \textsuperscript{966} Had the Prosecution intended to hold Perišić accountable for his alleged assistance in furthering a common plan or purpose based on the “strategic objectives” of the Bosnian Serbs, it should have done so by charging him under the theory of JCE. \textsuperscript{967} If the Prosecution had done so, there would be no requirement that Perišić’s acts be specifically directed towards assisting the commission of the underlying crimes. However, the Prosecution chose to charge Perišić with aiding and abetting and thus was required to satisfy the “specific direction” element.

In this context, it must be emphasized that in reaching its conclusion on Perišić’s individual criminal responsibility for aiding and abetting, the Trial Chamber took into account the strategic objectives of the Bosnian Serbs. \textsuperscript{968} As Judge Moloto correctly stated in his dissenting opinion, such objectives “have no place in an analysis under aiding and abetting.” \textsuperscript{969} Therefore, by focusing on these objectives, rather than on whether Perišić’s conduct itself was specifically directed toward the commission of the crimes, the Majority erroneously conflated aiding and

\textsuperscript{963} Tadić Appeals Judgment, para.229 [emphasis added]. See also Vasiljević Appeals Judgment, para.102(i).
\textsuperscript{964} Ibidem.
\textsuperscript{965} Perišić Appeal Transcript of 22 January 2013, T. 49849-49851.
\textsuperscript{966} Ibidem, T. 49851.
\textsuperscript{967} Perišić Trial Judgment, Judge Justice Moloto Dissenting Opinion, para.6 & fn.1.
\textsuperscript{968} Perišić Trial Judgment, paras. 1588-1591, 1600.
\textsuperscript{969} Perišić Trial Judgment, Judge Justice Moloto Dissenting Opinion, para. 11.
abetting with JCE. As noted above, Perišić acknowledged that, as the Chief of the General Staff in the VJ, he provided assistance to the VRS pursuant to the SDC’s orders. However, such assistance was not directed, let alone specifically directed, to assisting the commission of the crimes perpetrated by the VRS. Rather, the evidence demonstrates that the assistance given was made in the context of supporting the general war effort. The Trial Chamber itself found that “the VRS depended heavily on FRY and VJ assistance in order to function as an army and to wage war.” There was no evidence presented supporting a finding that Perišić’s acts were specifically directed to assisting the perpetration of the VRS’s crimes.

There is a reason why the Trial Chamber avoided the requirement that the acts of an aider and abettor be specifically directed, namely the Trial Chamber recognize[d] that the evidence does not establish that the specific weapons used in committing the charged crimes stemmed from the logistical assistance process overseen by Perišić.

Moreover, where direct evidence of the instrumentalities used to commit crimes were provided to the Trial Chamber, it found that the evidence was insufficient to establish that the weaponry used to commit the crimes was supplied to the VRS pursuant to the logistical assistance process managed by Perišić. Similarly, as all but three individuals holding key positions within the VRS had held such positions prior to Perišić’s appointment as Chief of the General Staff in the VJ, the VJ’s overall personnel assistance, rendered through Perišić, cannot be said to have been specifically directed to the commission of the crimes of the VRS. Perišić provided the assistance at issue on behalf of the VJ to support the war effort alone, not the VRS’s

---

970 Ibidem, para. 5.
971 Perišić Trial Judgment, para. 1593, citing Perišić Defence Final Brief, paras. 607, 780.
972 Ibidem, para. 1602.
973 Ibidem, para. 1624.
974 Ibidem, paras. 1294, 1296, 1302.
975 Ibidem, paras. 1605, 1609; Dissent, para. 22.
976 See Stenographic Transcript of the 14th Session of the SDC, 11 October 1993, pp. 5-6: (“...we are helping the armies of the republics of Serbian Krajina”); Stenographic Transcript of the 17th Session of the SDC, 10 January 1994, p.4: (If the war there were to continue”[ . . . ] “we know that they need to be given certain assistance, beginning with weapons and ordnance and all other materiel”); pp. 59-60: (medical supplies for the wounded); Stenographic Transcript of the 21st Session of the SDC, 7 June 1994, p.38 (Perišić stated that “if we stop helping them in the area of education, financing of educated personnel and material assistance for certain combat operations, they’ll start losing territories”), p. 39 (Perišić recommends that the SDC approve the grant of ammunition and spare parts to the VRS and SVK); Minutes from the 58th Session of the SDC held on 21 November 1996, p.3; Stenographic Transcript of the 58th Session of the SDC, 21 November 1996, pp.5-6; Minutes from the 43rd Session of SDC held on 29 August 1995, 30 August 1995, pp.1-2; Minutes from the 44th Session of the SDC held on 6 September 1995, pp.1-2 (decision to stop assisting the SVK since the army no longer existed); Stenographic Transcript of the 18th Session of
commission of crimes. As the Trial Chamber correctly noted, “Perišić was not charged with helping the VRS to wage war *per se*, which is not a crime under the Statute.”

6.5.2. Can the Requisite Link be Satisfied by the Substantial Effect Requirement?

Even prior to *Perišić*, international tribunal case law had established that aiders and abettors must make a substantial contribution to crime. This dissertation argues that the best understanding of this substantiality requirement already includes considerations concerning the specificity and directionality of assistance. For those tribunals that have rejected both purpose and specific direction as elements of aiding and abetting, the primary protection against over-incriminalization is the requirement of a substantial or significant contribution. Regrettably, as argued above, the concept of substantial contribution, remains rather vague. The case law has consistently distinguished the concept from that of causation. In *Furundžija*, for instance, the Trial Chamber rejected the proposition that “the acts of the accomplice need bear a causal relationship to, or be a *condition sine qua non* for, those of the principal.” This view accords with the prominent view of aiding and abetting outlined by Stanford Kadish, according to which a causation requirement attaches to principals but not accomplices. At the international level, the requirement of substantial contribution fails to provide a bright-line distinction between guilt and innocence, and the case law has provided relatively little guidance on the application of this standard. Many judgments fail to elucidate it at all, whereas others have emphasized generally that the accomplice’s contribution must increase the likelihood or ease of the crime. Thus, as Noto has observed, this approach leaves it to individual adjudicators to “decide on a

---

977 *Perišić* Trial Judgment, para. 1588.
978 See supra Section 5.2.1.1.
979 Ibidem.
980 *Furundžija* Trial Judgment, para. 233.
981 This point is uncontroversial. See, e.g., Kadish, S. H., *supra* note 397. See also *supra* Chapter 4.1.
982 See supra Section 5.2.1.1.
983 See Howarth, K., *International Criminal Law – Accessory Liability – Special Court of Sierra Leone Rejects »Specific Direction« Requirement for Aiding and Abetting Violations of International Law*, 127 Harvard Law Review 1847, 1853, note 65 (2014), observing that »[m]any chambers have declined to define the term altogether«.
984 See, Noto, F., *supra* note 413, pp. 94-96; *Orić* Trial Judgment, para. 282; *Popović et al.* Trial Judgment, para. 1019 (stating that an offense must have been »substantially less likely« absent contribution).
case-by-case basis whether in the particular circumstances the assistance should or should not properly be regarded as criminal.”

This Chapter demonstrates that the Perišić Trial Chamber incorrectly applied the substantial effect standard and its finding 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. The Trial Chamber held that the acts of the accused must amount to “practical assistance [...] which has a substantial effect on the perpetration of the crime.” It found that Perišić’s acts ‘contributed’, ‘facilitated’, and ‘assisted’ the commission of crimes. Such does not support its conclusion that “Perišić’s logistical assistance and personnel assistance, individually and cumulatively, had a substantial effect on the crimes perpetrated by the VRS”. The question whether a given act has a substantial effect on the perpetration of the crime requires a fact-based inquiry. While it is established that there is no requirement for the acts of assistance to serve as a condition precedent for the commission of the crime, it is manifest that the contribution of the aider and abettor must have a substantial effect upon the perpetration of the crime.

Both the practical assistance provided by the aider and abettor and whether this practical assistance directly and substantially affects the commission of the offence must be assessed. The practical assistance provided need not necessarily be substantial in itself. For example, while guarding detainees and helping to control access to them is not substantial in itself, such practical assistance might have a substantial effect on the crimes committed if it ensures the further detention of the detainees and allowed their murders to take place. As for the effect on the crime of the practical assistance provided, it must be substantial, which implies: “assistance which facilitates the commission of a crime in some significant way” or acts which “make a

---

985 Noto, F., supra note 413, p. 97.  
986 See, in particular, supra Sections 6.2.2.3. and 6.2.2.4.  
987 Perišić Trial Judgment, para.1627.  
988 Ibidem, para.126 [emphasis added].  
989 Ibidem, para.1627.  
990 Blagojević Appeals Judgment, paras.134,128.  
991 Blaskić Appeals Judgment, para.48.  
992 Furundžija Trial Judgment, para.226.  
993 Blagojević Appeals Judgment, para. 132.  
994 Tadić Trial Judgment, para. 688 [emphasis added].
significant difference to the commission of the criminal act by the principal." Consequently, acts which facilitate the commission of a crime fall short of the ‘substantial effect’ requirement.

The Trial Chamber’s findings when considering the practical assistance provided by Perišić referred to terms such as ‘facilitate’, ‘contribute’ and ‘assist’, all of which do not support its conclusion that: “Perišić’s logistical assistance and personal assistance, individually and cumulatively, had a substantial effect on the crimes perpetrated by the VRS.” For example, the Trial Chamber’s finding that: “by providing vital logistical and technical assistance to the VRS during the war, including to the specific units that perpetrated the crimes, Perišić facilitated the commission of those crimes” failed to meet the substantial effect threshold.

The Trial Chamber also found that Perišić facilitated the commission of crimes in Sarajevo and Srebrenica on the basis that he provided the VRS with personnel and sustained the officers already serving in the VRS before the establishment of the 30th PC, thereby creating the conditions for senior officers of the VRS to wage a war that encompassed systematic criminals actions without impediment. This finding also falls short of the substantial effect standard.

Furthermore, addressing Perišić’s direct participation in the determination of the funds within the federal budget for the payment of the salaries of VJ military personnel, including 30th PC members, as well as his involvement in the provision of other benefits, the Trial Chamber found that this type of assistance contributed to the commission of the crimes. While the Trial Chamber held that Perišić’s assistance was at the very least significant, this finding describes Perišić’s contribution in itself. It fails to address whether Perišić’s contribution had a substantial effect on the commission of the crimes. As argued in Section 11.3.3, the actus reus of aiding and abetting does not require a substantial amount of assistance, but that the assistance provided has a substantial effect on the perpetration of a crime.

Notwithstanding the above findings, the Trial Chamber went on to hold that “Perišić’s actions substantially facilitated the commission of these crimes because the VRS heavily depended on

995 Furundžija Trial Judgment, para. 233 [emphasis added].
996 Perišić Trial Judgment, para. 1627 [emphasis added].
997 Ibidem, para. 1602 [emphasis added].
998 Ibidem, para. 1613.
999 Ibidem, para. 1619.
1000 Ibidem.
the VJ’s support to function as an army and conduct its operations” as it had limited weaponry, qualified personnel, and financial resources.\(^{1001}\) The Trial Chamber’s holding rests solely on its findings that: (i) “the VRS heavily depended on the VJ’s support to function as an army and conduct its operations, including besieging Sarajevo and taking over Srebrenica”;\(^ {1002}\) and that (ii) “Perišić repeatedly exercised his authority to assist the VRS in waging a war that encompassed systematic criminal actions against Bosnian Muslim civilians as a military strategy and objectives.” The Trial Chamber’s finding of dependence\(^ {1003}\) neither provides sufficient information for determining whether the support provided by the VJ had a \textit{substantial effect on the commission of the crimes} nor makes it possible to establish the necessary link between the assistance given and the commission of the crimes.\(^ {1004}\)

An example of findings made by other Trial Chambers having correctly applied the standard and found that the acts of the accused had a \textit{substantial effect on the perpetration of the crimes} is demonstrated by \textit{Milutinović} Trial Chamber. Namely, it found that “through his acts and omissions, Ojdanić provided practical assistance, [...] to the VJ forces engaging in the forcible displacement of Kosovo Albanians in coordinated action with the MUP”;\(^ {1005}\) and that “these contributions had a \textit{substantial effect on the commission of the crimes}, because they provided assistance in terms of soldiers on the ground to carry out the acts, the VJ weaponry to assist these acts, and encouragement and moral support by granting authorization within the VJ chain of command for the VJ to continue to operate in Kosovo, despite the occurrence of these crimes.”\(^ {1006}\)

Consequently, the Trial Chamber’s analysis should not had be saved by any type of broad interpretation of its findings of facilitation, contribution and practical assistance.

\textbf{6.6. Application of \textit{mens rea} of Aiding and Abetting in the Perišić Case}

The Prosecution asserted that Perišić had actual knowledge that the personnel and logistical assistance he provided to the VRS was being used, in significant part, to perpetrate crimes in

\(^{1001}\) \textit{Ibidem}, para.1621 [emphasis added], paras 11597-1602, 1621.

\(^{1002}\) \textit{Ibidem}, para.1621.

\(^{1003}\) \textit{Ibidem}, paras.1193, 1233, 1263, 1286, 1597, 1602, 1621, 1750, 1751, 1753, 1777.

\(^{1004}\) \textit{Perišić} Trial Judgment, Judge Justice Moloto Dissenting Opinion, para.11.

\(^{1005}\) \textit{Milutinović} Trial Judgment, Vol.3, para.626.

\(^{1006}\) \textit{Ibidem}. [emphasis added]. \textit{See also}, para.628.
Sarajevo and Srebrenica. The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator. The mens rea for aiding and abetting required the Prosecution to prove, first, that Perišić intentionally performed an act with the knowledge that such act would lend practical assistance, encouragement, or moral support to the commission of a crime, and second, that Perišić was aware of the essential elements of the crime for which he was charged with, including the mental state of the physical perpetrator or intermediary perpetrator.

The Prosecution alleged that Perišić provided assistance “covertly and in contravention of UN Security Council Resolutions that were issued, in part, because such assistance was being used in the commission of crimes.” It is noteworthy that none of the UN Resolutions issued during Perišić’s tenure described criminal behaviour by members of the VRS. Earlier resolutions had mentioned wrongful conduct by the Bosnian Serb paramilitaries. The exception was UN Security Council Resolution 859, which mentioned war crimes “by whomsoever committed, Bosnian Serbs or other individuals.” Resolution 859, however, failed to specify what crimes are being referred to, where they are being committed, or what Bosnian Serbs are being referred to. Perišić was not charged with providing assistance to Bosnian Serb paramilitaries, but to the VRS. Perišić did not dispute that he periodically received situation reports from the VRS or that he had direct communications with VRS officers, including Mladić. The Prosecution failed to present any evidence, however, that these reports or communications contained any information about criminal behaviour by the VRS officers. Similarly, Perišić admitted that VRS intelligence organs sent intelligence reports to VJ General Staff but no evidence was presented that any of these

\[1007\] Perišić Indictment, para. 32.
\[1008\] Seromba Appeals Judgment, para. 56; Blagojević and Jokić Appeals Judgment, para. 127; Simić Appeals Judgment, para. 86; Blaškić Appeals Judgment, paras 45-46; Vasiljević Appeals Judgment, para. 102.
\[1009\] Haradinaj Appeals Judgment, para.58; Simić Appeals Judgment, para. 86; Brdanin Appeals Judgment, para. 487; Blagojević Appeals Judgment, para. 127, 221; Krstić Appeals Judgment, paras. 140-141; Orlić Appeals Judgment, para 43. Milutinović Trial Judgment, para. [1/93].
\[1010\] Perišić Indictment, para. 9.
\[1013\] Perišić Indictment, para. 32.
\[1014\] Ibidem.
\[1015\] Ibidem, para. 33.
reports contained information on criminal behaviour by members of the VRS in Sarajevo or Srebrenica.

Furthermore, Perišić did not dispute that FRY government officials had regular contact with the Bosnian Serb leaders;\(^{1016}\) rather he disputed that any of these contacts resulted in the transmission of information about the commission of crimes. The Prosecution also alleged that the charged crimes received widespread attention from intergovernmental organizations, international negotiators, and non-governmental organizations but failed to present evidence of any international representative, negotiator, military officer, or NGO representative speaking directly to Perišić or at a meeting attended by Perišić of alleged criminal behaviour by the VRS in Sarajevo or Srebrenica.\(^{1017}\) The Prosecution evidence demonstrated that members of the international community had access to Perišić and contacted him on numerous occasions to resolve certain issues.\(^{1018}\) The same members of the international community could have protested to Perišić about the behaviour of the Bosnian Serbs in Sarajevo and elsewhere.\(^{1019}\)

However, the trial record does not contain any evidence of such conversations taking place. The Prosecution submitted a series of reports created by the UN Commission on Human Rights on alleged abuses in Bosnia.\(^{1020}\) Witness Sacirbey stated that unnamed “FRY representatives” read the reports as they “were discussed in Security Council and other UN meetings” and the “FRY” made responses to the reports.\(^{1021}\) The only information presented regarding the reports being read or analysed was a statement by the FRY government rejecting the reports in their entirety as

\(^{1016}\) Ibidem, para. 33(b).
\(^{1017}\) UNPROFOR did make such protests to Mladic, Karadzic, Tolimir, and others.
\(^{1018}\) Witness MP-433 testified to meeting Perišić three times to discuss issues such as the NordBat Battalion, UNPROFOR’s use of the Pancevo Barracks, and NATO use of FRY airspace. T.2113-2119, 2134; See also, Exhibit D517: Note on the reception on 24 September 1993 of the United Nations Peacekeeping Forces Commander in the Former Yugoslavia by the Chief of the Yugoslav Army GS; No. br. 19-20; Exhibit D651: UNPROFOR Press Release. The Defence contests that MP-433 met with Perišić in July 1993, as Perišić had not yet taken office and there is no proof as to his whereabouts.
\(^{1019}\) For example, MP-433 testified that he met with Perišić, Mladić, and Novaković in a series of meetings in Belgrade in September 1993. MP-433 met with each of the men individually. During the meeting with Mladic, MP-433 discussed the “siege of Sarajevo” and the need for freedom of movement of humanitarian convoys. Nothing of the sort was discussed with Perišić during his meeting with MP-433. See Testimony of Witness MP-433: T.2115-2119.
\(^{1020}\) Exhibits P2439: Reports on the situation of human rights in the territory of the former Yugoslavia, submitted by Mr. Tadeusz MAZOWIECKI, Special Rapporteur of the Commission on Human Rights, E/CN.4/1992/S-1/9, - P2450, P2881. The Prosecution confirmed that these reports were tendered solely for purposes of notice. T.7199-7214.
\(^{1021}\) Testimony of Witness Sacirbey, T. 7221-7223.
not objective and based on unchecked information. The trial record contains no evidence that Perišić read or had any knowledge of the reports. Comments made by “FRY representatives” or the “FRY” in general cannot be imputed to knowledge by Perišić.

6.6.1. Perišić Purposefully Assisted in the Commission of Crimes

In Perišić case, no evidence was presented that Perišić’s purpose in overseeing the administration of logistical assistance for the military needs of the VRS and SVK was to assist in the commission of crimes. To the contrary, the trial record is filled with statements and indications of what his purpose was, namely to keep the territory of FRY secure, pursuant to the political decisions of the SDC. The Trial Chamber based its determination of guilt on the inference that the lower standard of knowledge of the commission of crimes had been met. While the Trial Chamber stated the correct legal standard for the mens rea for aiding and abetting, its conclusion that Perišić possessed the applicable mens rea rests solely on its finding that Perišić was aware of the VRS’s propensity to commit crimes, that crimes were being committed, and that other similar crimes would probably be committed. The Trial Chamber did not consider whether Perišić knew that his acts assisted the commission of crimes.

6.6.2. Determination by the Trial Chamber Concerning Perišić’s mens rea

The applicable mens rea for aiding and abetting is “knowledge that the acts performed [by the aider and abettor] assist the commission of the specific crime of the principal [perpetrator].” The Trial Chamber stated that “to establish the required mental element for aiding and abetting, it must be proved beyond a reasonable doubt that Perišić knew that his actions provided practical assistance to the crimes and that he was aware of the essential elements of the crimes, including the mental state of the perpetrators.” Thus, the mens rea for aiding and abetting comprises two components: the aider and abettor knew that one of a number of crimes would probably be

---


1023 Perišić Trial Judgment, paras.129-130, 1629.

1024 Vasiljević Appeals Judgment, para. 102.

1025 Perišić Trial Judgment, para.1629. See also, paras.129-130.
committed; and the aider and abettor knew that his acts or conduct assist the commission of these present or future crimes.

The Mrkšić case provides an important example of the correct application of the requisite mens rea standard for aiding and abetting. Mrkšić was found guilty of aiding and abetting the murder of prisoners of war because he issued an order to withdraw the members of the Military Police who were protecting prisoners from members of the Territorial Defence (“TO”) and paramilitaries likely to commit one of a series of crimes against these prisoners. Mrkšić Appeals Chamber held that the Trial Chamber did not commit an error of law concerning the mens rea for aiding and abetting when it concluded that “when Mrkšić ordered the withdrawal of the military police, he knew that this left the TOs and paramilitaries with unrestrained access to the prisoners of war and that by enabling this access, he was assisting in the commission of their murder.” In doing so, Mrkšić Trial Chamber correctly applied the second element of the mens rea standard with respect to the determination that Mrkšić knew that his acts (i.e. issuing the order) assisted the commission of the crimes.

Similarly, Nahimana Appeals Chamber upheld Ngeze’s conviction for aiding and abetting genocide on the basis that he “set up, manned and supervised roadblocks in Gisenyi in 1994 that identified targeted Tutsi civilians who were subsequently taken to and killed at the Commune Rouge.” In light of this evidence, Nahimana Appeals Chamber concluded that “there is no doubt that the appellant was aware that his acts were contributing to the commission of genocide by others.” Hence, the requisite mens rea was proved, in that Ngeze had knowledge that crimes were being committed and would continue to be committed at the Commune Rouge, and he knew that by his acts – identifying Tutsi civilians who were then killed at the Commune Rouge – he assisted the commission of genocide by others.

The Ntagerura case further underscores the necessity of establishing that an alleged aider and abettor knew that his acts assisted the commission of the crime in finding that he possessed the requisite mens rea. In upholding Bagambiki’s acquittal for aiding and abetting the killing of 16

1026 Haradinaj Appeals Judgment, para.58.
1027 Blagojević Appeals Judgment, para.127.
1028 Mrkšić Trial Judgment, paras.621-622.
1029 Mrkšić Appeals Judgment, para.333.
1031 Ibidem, para.672 [emphasis added].
refugees, the *Ntagerura* Appeals Chamber correctly considered whether the evidence supported “the conclusion that Bagambiki knew that his participation in the selection of the refugees would lead to their death”\(^{1032}\) and held that a reasonable trier of fact could conclude that this had not been proved beyond a reasonable doubt.\(^{1033}\)

The required determination of whether an accused knew that his acts assisted the commission of a crime is especially important in a case such as *Perišić*, where the alleged aider and abettor is physically removed from the location of the crimes, let alone occupying the post of Chief of General Staff of a different army, in another State. Whereas a military officer present at the crime scene and/or directly involved in the actions which lead to the commission of a crime is likely to know that his conduct assists the commission of that crime, a military officer who is located far from the crime scene and is not involved in, nor exercising any control over the events which led to the crime – is less likely to know his conduct assists the commission of that crime. Hence, in the latter situation it is particularly important that the trier of fact fully analyses and explains its reasoning in finding that the alleged aider and abettor possessed the requisite *mens rea*, which includes determining whether he knew that *his acts* assisted the commission of the crime(s).

This is precisely what the Trial Chamber in *Perišić* failed to do. The Trial Chamber found that Perišić had the required *mens rea* for aiding and abetting the crimes committed by the VRS in Sarajevo\(^{1034}\) and Srebrenica,\(^{1035}\) but it neither analysed nor explained whether Perišić knew that *his acts* assisted the perpetration of these crimes. The Trial Chamber failed to provide any reasoning in support of its conclusion that Perišić knew that his actions assisted the commission of these crimes.\(^{1036}\) Rather, as mentioned above, it found that Perišić possessed the requisite *mens rea* based solely on its determination that he knew of the VRS’s propensity to commit crimes, that the VRS had committed crimes in Sarajevo and Srebrenica and that these crimes would probably be followed by the commission of more crimes.\(^{1037}\)

\(^{1032}\) *Ntagerura* Appeals Judgment, para.327 [emphasis added].
\(^{1033}\) *Ibidem*, para.327.
\(^{1034}\) *Perišić* Trial Judgment, para. 1632.
\(^{1035}\) *Ibidem*, para. 1637.
\(^{1036}\) *Ibidem*, paras. 1636, 1638.
\(^{1037}\) *Ibidem*, paras.1628-1650, 1438-1579.
6.6.3. Perišić’s Knowledge that his Conduct Assisted the Crimes Committed in Sarajevo

The Trial Chamber held that notwithstanding Perišić’s knowledge, he continued to “provide significant assistance” to the VRS until the end of the siege of Sarajevo.1038 The appropriate standard is whether Perišić knew that any assistance provided would assist the commission of the specific crime of the principal perpetrator.1039

The trial record contains no evidence demonstrating how the logistical assistance provided was distributed from the VRS depots to corps or from corps to individual units. The VRS was a large army with six corps, spread out over the entirety of BiH, and with logistical depots serving the entire army.1040 How and when any logistical assistance would be used was unknown. It cannot be presumed that Perišić knew the logistical assistance provided would be used in the commission of crimes. Perišić recognized that the law does not require specific perpetrators of crimes to be identified for responsibility to arise under aiding and abetting.1041 Greater specificity is required, however, than the “VRS” as a whole, to which the Trial Chamber referred.1042 While the specific individuals do not have to be named, more specificity is required than simply naming an entire army, especially under such unique circumstances where the aider and abettor is physically removed from the location of the crimes, and where the direct perpetrators operate in another State and belong to another (separate, independent) army.

In fact, the Trial Chamber failed to make any findings that would objectively demonstrate Perišić’s knowledge that the military aid he provided assisted the commission of the crimes charged. The law does require contemporaneous actus reus and mens rea for aiding and abetting.1043 The Trial Chamber failed to make any findings that Perišić knew at the time he provided assistance that it would facilitate the commission of crimes. No correlation in this regard at all was made by the Trial Chamber. In the absence of any evidence regarding what

1038 *Ibidem*, para. 1632.
1039 *Ibidem*, para.129; citing Seromba Appeals Judgment, para.56; Blagojević Appeals Judgment, para.127; Ntagura Appeals Judgment, para.370; Simić Appeals Judgment, para.86; Blaškić Appeals Judgment, paras.45-46; Vasiljević- Appeals Judgment, para.102.
1040 Exhibit P75: Transcript of interview with Dorde Djukić, p.3.
1042 Perišić Trial Judgment, para. 1632.
1043 Blagojević Trial Judgment, para. 728; Blagojević Trial Judgment, para. 295.
specific assistance Perišić actually provided, there cannot be a finding that Perišić knew such assistance would facilitate the commission of crimes. As conceded by the Trial Chamber, there was no evidence that any of the bullets, shells, or mortars recovered from the crime scenes or specific weapons used to commit the crimes in Sarajevo originated from the “logistical assistance process” overseen by Perišić.1044

6.6.4. Perišić’s Knowledge that his Conduct Assisted the Crimes Committed in Srebrenica

The law requires the actus reus and mens rea of aiding and abetting to be contemporaneous.1045 The Trial Chamber failed to specify what “substantial assistance” Perišić provided “prior to and during the period crimes were committed in Srebrenica.”1046 Its analysis of Srebrenica is devoid of a discussion of any details regarding Perišić’s assistance, the recipients of any assistance, when the assistance was provided or received, how the assistance was distributed, or how Perišić was supposed to know that any assistance would be used for crimes in Srebrenica. Its findings are generic to the VRS and not specific to Srebrenica.1047 This is particularly important as the Trial Chamber had noted that there was no evidence that any of the bullets recovered from the Srebrenica crime scenes came from Perišić or that any of the specific weapons used to commit the crimes in Srebrenica originated from the “logistical assistance process” overseen by Perišić.1048 It is argued that in the absence of any evidence regarding what assistance Perišić actually provided, there cannot be a finding that Perišić was aware that such assistance would facilitate the commission of crimes. Instead, the Trial Chamber made generalized finding that Perišić provided assistance to the VRS prior to and during the time crimes were committed in Srebrenica1049 without any specificity.

6.7. Charles Taylor’s Case of Aiding and Abetting by Way of Provision of Military Aid

Due to its similarities in time, docket and jurisdiction with Perišić, the Taylor case represents a unique and unparalleled contribution to the debate on specific direction. Seven months after the

1044 Perišić Trial Judgment, para. 1624.
1045 Blagojević Trial Judgment, para. 728; Blagojević Appeals Judgment, para. 295.
1046 Perišić Trial Judgment, para. 1637; see also, paras. 1638, 1648.
1047 Ibidem, paras. 1595, 1602.
1048 Ibidem, para. 1624.
1049 Perišić Trial Judgment, para. 1637.
Appeals Judgment in the Perišić case was rendered, the SCSL Appeals Chamber in the Charles Taylor case reached a completely contrasting decision and upheld the conviction of former Liberian President Charles Taylor for aiding and abetting crimes committed by the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) in Sierra Leone. In one of the most high-profile international prosecutions to date, the Appeals Chamber of the SCSL expressly rejected the Perišić specific direction standard. Much of the case against Charles Taylor rested upon finding him criminally responsible for the military assistance he provided, including various quantities of arms and ammunition, to the rebel groups fighting and committing war crimes in the civil war in Sierra Leone. Thus, the conviction rested on a similar theory to the prosecution’s case in Perišić – Taylor had provided critical support to these forces in the form of weapons, supplies, and operational support. The Trial Chamber considered that this aid amounted to practical assistance to the commission of crimes, being indispensable to military offensives in certain instances, and having an overall substantial effect on the commission of the crimes charged. The Taylor Appeals Judgment went farther than the ICTY case law in maintaining that, in the absence of proof that the accused had intentionally or knowingly assisted a crime, aiding and abetting could be established based on a form of recklessness.

The Taylor case is another illustration of the concept of responsibility for atrocities committed by armed forces whom one has supported by furnishing weapons and other military assistance. In particularly, the indictment charged Taylor with individual criminal responsibility for aiding and abetting crimes against humanity, war crimes, and other serious violations of international humanitarian law committed in Sierra Leone by the RUF and allied forces. His responsibility was based in part on his role in providing “financial support, military training, personnel, arms, ammunition and other support and encouragement” to the rebel forces.

1051 Ibidem, paras. 6907-6953.
1052 Ibidem, paras. 6912-6914.
1053 Ibidem, para. 438 (holding dolus eventualis – the civil analogue to recklessness- satisfies the mental requirements for aiding and abetting). On dolus eventualis, see Dubber, M. D., supra note 634, pp. 992-993, 2007 (noting that dolus eventualis has a “subjective aspect which requires indifference toward, or perhaps even acceptance of, the chance that a proscribed result might occur, and an objective aspect…which requires the creation of a risk not rising to the level of virtual certainty”, and concluding that “[n]o matter how one looks at dolus eventualis, it is clear that it is not knowledge, or dolus indirectus, even though it may not quite be recklessness either”).
With an almost identical factual basis to the one examined in the *Perišić* case\(^{1054}\), the case of Charles Taylor enables a direct comparison of decisions reached by two different international judicial institutions.\(^{1055}\) There is little qualitative difference between the types of assistance given by Taylor and by Perišić. The Trial Chamber in *Taylor* considered that the military aid provided amounted to practical assistance to the commission of crimes, being indispensable to military offensives in certain instances, and having an overall substantial effect on the commission of the crimes charged.\(^{1056}\) The Appeals Chamber emphasized that the essential requirement for aiding and abetting is that the acts of an accused have “a substantial effect on the commission of the crime charged”, and it agreed with the ICTY that it was not necessary to establish that an accused “had any power to control those who committed offences”.\(^{1057}\) The need for a causal link would ensure that persons would not be unjustly held responsible for the acts of others, even if they had only provided the means for those crimes.\(^{1058}\) Regarding the mental element of aiding and abetting, the *Taylor* Trial Chamber found that an accused must know or be aware of the “substantial likelihood” that his or her acts would assist the commission of crimes.\(^{1059}\)

Upon its review of the post-Second World War jurisprudence\(^{1060}\) and examination of the ILC Draft Code of Crimes and state practice\(^{1061}\) the SCSL was not convinced that specific direction was required under customary international law, and considered that the absence of any

---

\(^{1054}\) The Trial Chamber found Taylor individually criminally responsible for aiding and abetting the commission of crimes, committed between 30 November 1996 and 18 January 2002 in the Districts of Bombali, Kailahun, Kenema, Kono, Port Loko and Freetown and the Western Area. What was critical to the conviction for aiding and abetting were the Trial Chamber’s findings that (i) Taylor’s assistance supported, sustained and enhanced the RUF/AFRC’s capacity to undertake its Operational Strategy involving the commission of crimes; (ii) his assistance was critical in enabling the RUF/AFRC’s Operational Strategy; and that (iii) Taylor knew that his support to the RUF/AFRC would assist the commission of crimes in the implementation of the RUF/AFRC’s Operational Strategy. Furthermore, the Trial Chamber found that “without the contributions of Charles Taylor to the AFRC/RUF alliance, the crimes charged in the indictment would not have occurred”. See *Taylor* Trial Judgment, paras. 4262, 6936, 5835, 5842, 6914, 6949.

\(^{1055}\) The Appeal Chamber in *Taylor* emphasized that while in applying the Statute and customary international law, it is guided by the decisions of the ICTY and ICTR Appeals Chamber, the Appeals Chamber remains the final arbiter of the law for this Court, and the decisions of other courts are only persuasive, not binding, authority. The Appeals Chamber recognizes and respects that the ICTY Appeals Chamber is the final arbiter of the law for that Court. See *Taylor* Appeals Judgment, para. 472.

\(^{1056}\) *Taylor* Trial Judgment, paras. 6912–6914.

\(^{1057}\) *Taylor* Appeals Judgment, paras. 368–370.

\(^{1058}\) *Ibidem*, para. 391.

\(^{1059}\) *Ibidem*, para. 415.


\(^{1061}\) *Taylor* Appeals Judgment, paras. 474, 390-392.
A discussion of custom by the ICTY Appeals Chamber in the Perišić case meant that the latter was “only identifying and applying internally binding precedent”. Where in applying the Statute and customary international law, the Appeals Chamber is guided by the decisions of the ICTY and ICTR Appeals Chamber and looks as well to the decisions of the Appeals Chamber of the ECCC and STL and other sources of authority, the Appeals Chamber, however, is the final arbiter of the law, and the decisions of other courts are only persuasive, not binding, authority.

Another fundamental question was raised by the Taylor Appeals Judgment, namely whether, as suggested by the Appeals Chamber, individual criminal responsibility can be established in isolation from state responsibility. Taylor’s Defence argued that the fact that international law would not recognise state responsibility for the alleged crimes pleaded for a narrow construction of individual criminal responsibility. It argued that the standard applied by the Trial Chamber (and upheld by the Appeals Chamber) was ‘so broad that it would in fact encompass actions that are today carried out by a great many States in relation to their assistance to rebel groups or to governments that are well known to be engaging in crimes of varying degrees of frequency…’. Such assistance, the Defense argued, ‘is going on in many other countries that are supported in some cases by the very sponsors of this Court’. The above argument was arguably rejected by the Taylor Appeals Chamber, leaving it to ‘those bodies and tribunals which properly have authority over States to interpret the law on state responsibility.’ However, while the development of a customary principle of individual criminal responsibility is based on its own practice, it is suggested that the articulation of the law on aiding and abetting in Taylor is inconsistent with and contradicted by state practice, as it criminalizes provision of military assistance by political or military leader, while the same activities are considered lawful for States and within their sovereign rights. If States have the right to supply materiel to parties to an armed conflict even if there is evidence that those parties are engaged in the regular commission

---

1063 SCSL Statute, Article 20(3).
1065 Taylor Appeals Judgment, para 457.
1067 Taylor Appeals Judgment, para. 436.
of crimes, the law as articulated in *Taylor* would cause inconsistency between the two responsibility regimes.

6.7.1. Specific Direction Disregarded in the *Charles Taylor* Case

The SCSL recently convicted Charles Taylor for aiding and abetting war crimes committed in Sierra Leone. The case is important to the analysis here because it both signals the SCSL’s understanding that it shares a space under customary international law with the ICTY, and underscores specific direction’s novelty and potential affront to retributive goals.\(^{1068}\) SCSL in *Taylor* rejected the notion that geographic proximity has any bearing on *actus reus*, and invoked *Perišić* merely by finding no “cogent reasons to depart from its holding that the *actus reus* of aiding and abetting liability is that the accused’s acts and conduct...had a substantial effect on the commission of each charged crime...”\(^{1069}\) Moreover, it concluded its analysis by holding “that specific direction is not an element of the *actus reus* of aiding and abetting liability under Article 6(1) of the Statue or customary international law.”\(^{1070}\)

Inconsistency with the law of peer tribunals is noteworthy and at most problematic, giving similarities in time, docket and jurisdiction.\(^{1071}\) Further irreconcilability of specific direction with ICTR case law is also noteworthy; ICTR cases concerning remote assistance to principal perpetrators are seemingly irreconcilable with the jurisprudence underlying *Perišić*.\(^{1072}\)

The *Taylor* Appeals Chamber expressed alarm at the ICTY’s novel formulation of aiding and abetting, rebutting it with the language of the Rome Statute: \(^{1073}\) “the *actus reus* of aiding and abetting liability under Article 6(1) and customary international law is that the accused’s acts and conduct of assistance, encouragement, and/or moral support had a substantial effect on the

\(^{1068}\) Note that the SCSL Statute differs somewhat form the others' in that it directs the Appeals Chamber, when not interpreting Sierra Leonean law, to »be guided by the decisions of the Appeals Chamber of the ICTY and ICTR.« SCSL Statute, article 20(3). This makes the Taylor court's rejection of *Perišić* even more notable.

\(^{1069}\) *Taylor* Appeals Judgment, para 481.

\(^{1070}\) *Ibidem*, para 481.


\(^{1072}\) Prosecutor v. Barayagwiza, Case No. ICTR 99-52-T, Trial Chamber I (Dec 3, 2003) holding a radio station liable for inciting genocide; Musema v. Prosecutor, Case No. ICTR 96-13-A, Appeals Chamber (Nov 16, 2001) (extending accomplice responsibility to a corporate director of a tea factory for his role in Rwandan genocide and attendant crimes against humanity).

\(^{1073}\) Rome Statute, Article 17.
commission of each charged crime for which he is to be held responsible.””

According to the Appeals Chamber in *Taylor*, this requirement ensures that there is a sufficient causal, a ‘culpable’, link between the accused and the commission of the crime before an accused’s acts and conduct may be adjudged criminal. The SCSL subsequently held that the controversial *Perišić* precedent did not comport with customary international law, and therefore affirmed the conviction of Charles Taylor for knowingly assisting atrocities by rebel forces during the Sierra Leone Civil War.

While the Appeals Chamber in *Perišić* emphasized that its ruling “should in no way be interpreted as enabling military leaders to deflect criminal liability by subcontracting the commission of criminal acts” had the Appeals Chamber in *Taylor* followed its specific direction requirement, Taylor’s convictions would most likely have been overruled. Indeed, under the *Perišić* standard, it would be very hard to convict a high-ranking military or political official of knowingly facilitating mass atrocities from a remote location. However, the Appeals Chamber in *Perišić* emphasized that if a presumably independent military group is proved to be under the control of officers of another military group, the latter can still be held responsible for the crimes committed by their puppet forces. One could argue that the aforesaid Appeals Chamber’s disclaimer rings hollow in light of the fact that not even the vast amount of support that the FRY gave to the Bosnian Serbs was enough to establish such a level of control.

While recognizing that there is no perfect match between the basis of individual criminal responsibility and the basis of state responsibility, the *Taylor* judgment exposes an important gap in this regard. Namely, the political/military leader may be individually responsible under international law, while the same act is not necessarily wrongful under the rules of state

---

1074 *Taylor* Appeals Judgment, paras. 362-385, 390-392, 481.
1075 *Contra Perišić* Appeals Judgment, para. 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.), para. 38 (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 the principal perpetrators, will be self-evident.).
1076 *Taylor* Appeals Judgment, paras. 390-392.
1077 *Perišić* Appeals Judgment, para. 72.
1079 *Perišić* Appeals Judgment, para. 72. Relevant forms of liability, in addition to aiding and abetting, could include JCE and superior responsibility.
1080 See *infra* Part III, Chapter 14.
responsibility. A State then may provide military aid to other States or non-state actors who engage in commission of international law, without the responsibility of that State being engaged. Indeed, there appears to be substantial practice were such support has actually been given, without this having led to claims of responsibility.

7. Conclusion

The aiding and abetting liability has challenged and presented international criminal tribunals with some of the most difficult questions concerning the scope of criminal responsibility. The “foreign assistance cases” pose not only legal, but also moral dilemmas that have predictably divided the courts and commentators. Part II has argued that individual complicity by way of provision of military aid is characterized by a collective dimension which necessarily implies an involvement at the State level. The assessment of the general criminal context in the Perišić case largely corresponds to a finding of an international responsibility of a State for complicity in the commission of an internationally wrongful act by another State.1081 As the analysis showed, State involvement in the criminal context has been explicitly taken into account in the determination of Perišić’s individual criminal responsibility. This particular approach does not lead to an identity in the establishment of individual criminal responsibility and state responsibility (in the sense that it is not required to establish state responsibility first in order to ascribe thereafter individual criminal responsibility), however, it nonetheless marks a significant point of contact between the two regimes given that the same criminal context is relevant to establish both kinds of international responsibility.

In essence, the Perišić Trial Chamber’s analysis was based on the following argument: the aid given by the FRY as a State and Perišić as an individual to the VRS was instrumental for their war effort, was given in full knowledge that the VRS forces were committing crimes and that the aid given will assist the commission of the crimes, thereby satisfying the required level of mens rea. Therefore, Perišić was considered an aider and abettor. By contrast, Judge Moloto found that the approach of the majority failed to distinguish between an aid to the commission of specific crimes and an aid to the war effort generally. The latter is not inherently criminal for the purposes of the ICTY’s Statute, particularly bearing in mind the general nature of the aid given.

1081 See infra Part III, Chapters 13 and 14.
in terms of logistics and personnel and Perišić’s lack of proximity to the crimes themselves. Judge Moloto’s approach is the one ultimately followed by the Appeals Chamber.

The Perišić Trial Chamber effectively concluded that providing assistance to the VRS in its war effort amounted to aiding and abetting the crimes committed during the armed conflict. The logical consequence of the standard adopted by the Trial Chamber is that a military assistance given to a party of a conflict with the knowledge that crimes are likely to be committed by that party will inevitably result in a finding of responsibility even in cases of humanitarian intent and irrespective of the impact of that assistance.1082 The absence of an element requiring specific direction, or even a lesser ‘purpose of facilitating’1083 standard, creates a threshold approaching that of a strict liability. Convicting the likes of Perišić could disrupt international relations by casting too wide of a net for aiding and abetting the crimes of another State’s army. However, the Perišić Appeals Chamber underlined that no “link” existed between General Perišić’s actions and the crimes he was accused of assisting and that “assistance from one army to another army’s war efforts is insufficient, in itself, to trigger individual criminal responsibility”.1084

Regrettably, warfare is not a crime per se under international criminal law. Various scholars rightfully argue that to elevate an accused’s remote geographic location to an effective defence to a charge of aiding and abetting, without meeting a higher standard of proof, would undoubtedly undermine efforts to prosecute military or political leaders for knowingly facilitating mass atrocities.1085 However, as argued in Part II, an in-depth reading of the Appeals Chamber’s reasoning in Perišić coupled with a detailed examination of the totality of the factual evidence presented in the trial reveals that it is not due to Perišić’s remoteness (i.e. himself being situated in Belgrade whereas the crimes were committed in another State by another army) that the proof of specific direction is required. Rather, the sole evidence of military aid provided to another army which in the course of a legitimate warfare commits international crimes proves just that: the fact that the aid was provided. What is lacking is the requisite “nexus” between the acts of the accused and the crimes. As argued in Section 11.3., the Perišić Appeals Chamber opted for this standard in search of the requisite “nexus” or “link” between the acts or conduct of the

1082 This characterization does not concede that Perišić had the requisite “knowledge” in this case.
1083 As required by Article 25(3)(c) of the Rome Statute.
1084 Perišić Appeals Judgment, para. 70-72.
1085 Jouet, M., supra note 317, p. 1113.
accused and the crimes. Even omitting the “specific direction” standard, the accomplice’s acts require the necessary connection to the crimes in order to satisfy the requisite element of *actus reus* of aiding and abetting. Therefore, it is argued, the Perišić Appeals Chamber’s reasoning of the “specific direction” element is merely the fulfilment of the indisputably requisite element of a substantial effect on the crime.

Accordingly, the Perišić Appeals Chamber’s characterisation of specific direction did not amount to the introduction of any novel elements in the realm of the imposition of individual criminal responsibility. In particular, the Appeals Chamber merely asserted that for the act or conduct of the accused to have a substantial effect on the crime, the nexus or link is required. It was solely by reason of the failure on the side of the Prosecution to establish the “link” or “nexus”, that the Appeals Chamber felt obliged to further detail the requisite elements of *actus reus* in cases where such a link or nexus was not self-evident. The aid provided has to substantially affect the commission of the crimes charged. It is insufficient to simply prove the flow of aid on the one side and the fact that crimes were committed on the other. That was not even contested by the Defence during trial. The linkage was the missing element. To overlook that the establishment of a link (any link for that matter) between the conduct and the commission of the crimes is necessary for conviction of an accomplice is to overlook the essential element of accomplice liability. The nexus was the missing element and the missing criticism of the prosecutorial work in Perišić trial among all the legal scholars interpreting the Perišić’s judgment is striking.

Regrettably, the Perišić Trial Chamber did not rely on specific evidence of assistance which had a substantial effect on the commission of crimes, but rather determined criminal responsibility on the basis of circumstantial evidence and inferences drawn from the general dependence of the VRS on the VJ for its war effort and Perišić’s knowledge of the criminal objectives of the VRS. In short, any assistance by the VJ to the VRS in their conduct of hostilities, was to be regarded as aiding and abetting their criminal acts.1086 The argument is, that the standard adopted essentially amounts to a form of strict liability and is contrary to the established jurisprudence of *ad hoc* tribunals. Unfortunately it also ignores the practical reality of contemporary armed conflicts.

1086 Perišić Trial Judgment, the Majority's approach designates the VRS as a manifestly illegal organization.
By analogy and considering the recent situation in Syria, where a number of foreign governments (such as the US and the United Kingdom) were providing various types of military aid to either the Syrian regime or (more likely) the opposition, knowing that both sides were engaged in international crimes and that the aid provided was contributing or was likely to contribute to the commission of these crimes, these foreign leaders are, according to the reasoning of the Perišić Trial Judgment, culpable as aiders and abettors. As argued above, the Perišić Appeals Chamber is certainly correct that there should be a difference between contributions to the war effort as such and to the commission of specific crimes. Admittedly, drawing the line between the two seems rather challenging by using a specific direction standard. It could be argued that Perišić had every reason to know that the aid that he was providing to the VRS would (also) be used in the commission of international crimes. The commission of such crimes was perhaps not an intrinsic feature of their war effort, yet these crimes were not being committed by some random soldiers, but as part of a deliberate, systematic state policy. In such circumstances it could be argued that it is profoundly unsatisfactory to say that Perišić was not guilty at all under any pertinent theory of criminal responsibility. It is submitted that had the Prosecution chosen another mode of liability (e.g. JCE), his role in provision of military aid would probably be sufficient for establishing criminal responsibility.

Recognizing Perišić case to be factually distinct from any of the cases that have come before the ICTY, or any other international court for that matter, it is necessary to acknowledge the political implications for military generals or political leaders, if the standards as articulated in the Perišić Trial Judgment were to be applied in similar scenarios around the world. However, if one holds that the applicable actus reus standard needs to be that the aid was “specifically directed” to the commission of the crime, then the “specifically directed” standard is, coincidentally, almost identical to the standard for attribution in the Articles on State Responsibility. Moreover, the Perišić case is noteworthy for yet another reason: the actions which were central to the charges against Perišić crossed State boundaries and encompassed assistance to an army of which Perišić was not a member. The impact of the Perišić Trial Chamber’s determination is specific to individuals in positions of high command in national armed forces who are frequently supplying logistic and personnel assistance to the armed forces of another State or a non-state actor.

1087 See infra Part III, Chapters 13 and 14.
operating in another State. Unfortunately, such transactions are an unavoidable reality of contemporary armed conflicts.\textsuperscript{1088}

The jurisprudence of the ICTY is rich with instances of judicial creativity, which have been directly responsible for the progressive development of core elements of substantive international criminal and humanitarian law.\textsuperscript{1089} In so doing, there has been an implicit acknowledgement from Perišić’s Trial Chamber that the law cannot remain static and must respond to the challenges of contemporary armed conflict.\textsuperscript{1090} With the establishment of the ICTY, the Secretary-General Boutros Boutros-Ghali mandated a “Golden Rule” to be followed in the judicial interpretation and application of the Statute, namely, fidelity to the principle of legality and customary international law.\textsuperscript{1091} In Perišić, the Trial Chamber has broken this rule on both counts. If the principle of legality is to be taken seriously with respect to aiding and abetting crimes, then foreseeability and interpretative certainty must attach to the understanding to be given to “substantial effect” which takes into account the centrality of a “specific direction” criterion. The Perišić Trial Chamber failed to square its interpretation of the requisite objective and subjective standards for aiding and abetting international crimes with any observable customary standard.\textsuperscript{1092} In this regard, it took no heed of the guidance to be derived from Article 25(3)(c) of the Rome Statute which includes a “[f]or the purpose of facilitating the commission of such crime” element.\textsuperscript{1093} The result is not only uncertainty as to the customary standard, but another instance of inconsistent and divergent standards in international criminal law.

International criminal law should, by definition, seek to prosecute those who bear the greatest responsibility, including those who sponsor the perpetrators of international crimes. The safeguards within the traditional elements of aiding and abetting liability, as reiterated by the

\textsuperscript{1088} See also, Perišić Trial Judgment, Judge Moloto Dissent, para. 33. “If we are to accept the Majority’s conclusion based solely on the finding of dependence, as it is in casu, without requiring that such assistance be specifically directed to the assistance of crimes, then all military and political leaders, who on the basis of circumstantial evidence are found to provide logistical assistance to a foreign army dependent on such assistance, can meet the objective element of aiding and abetting. I respectfully hold that such an approach is manifestly inconsistent with the law”. See also, para. 32.

\textsuperscript{1089} See generally, Darcy, S. and Powderly, J., Judicial Creativity at the International Criminal Tribunals, Oxford: Oxford University Press, 2011; Shahabudeen, M., supra note 345.

\textsuperscript{1090} See generally, Tadić Trial Judgment.


\textsuperscript{1092} See e.g. Tadić Trial Judgment, paras. 661-692.

\textsuperscript{1093} Rome Statute, Article 25(3)(c).
Appeals Chambers in *Taylor*, Šainović, Popović *et. al* and Stanišić are insufficient to ensure that in any “foreign assistance cases” only those who have committed culpable acts will be held responsible. As the *Taylor* Appeals Chamber importantly held, the substantial effect requirement should be “sufficient to ensure that the innocent are not unjustly held liable for the acts of others”.\(^{1094}\) However, a finding of substantial effect where the nexus between the acts of the accomplice and the crimes of the principal offender(s) is missing, is necessarily flawed. Those political and military leaders who provide military assistance to a conflict situation but are otherwise external to it, should not automatically be convicted if crimes are committed by way of the aid provided. Rather, only if such leaders act with the knowledge that their assistance will facilitate crimes and, in fact, their actions substantially assist the commission of crimes, can they be held accountable.

Furthermore, the substantial contribution analysis may well identify factors that are morally relevant to the determination of guilt. However, there is a difference between moral relevance and a criminal legal standard that provides the type of notice and predictability necessary to safeguard the liberty of the accused in a manner consistent with the principle of legality. The unique challenges of international criminal law enforcement demand clarity of those rules and standards that seek to limit complicit liability. Definite rules of law further the principle of legality by constraining discretion. Highlighting this point, Flavio Noto has expressed concern that the substantial contribution requirement invites an arbitrary determination, one reached only “after the blameworthiness of [a defendant’s] conduct has been decided on”.\(^{1095}\) While this risk may be most obvious in the context of substantial contribution, it also complicates the other competing approaches to aiding and abetting. In the foreign assistance context, there is special need for certainty with respect to the boundaries between legitimate and criminal efforts, given that a vague standard could unduly deter valuable foreign aid programs that pursue important foreign policy goals by reason of a concern that some of the aid would unavoidably fall into the wrong hands. While judicial discretion is often accepted in domestic law where the adjudication of criminal law standards proceeds in the context of a mature political or legal system that lends legitimacy to the domestic criminal proceedings, the enforcement of international criminal law through international courts lacks such a strong legitimizing foundation.

\(^{1094}\) *Taylor* Appeals Judgment, para. 480.

\(^{1095}\) Noto, F., *supra* note 413, p. 98.
Some uncertainty is indeed endemic to criminal law. Thus, culpability for aiding and abetting will inevitably involve some indeterminacy. The more pertinent issue is whether the law can manage that indeterminacy in a way that renders the assignment of criminal responsibility sufficiently predictable whilst also maintaining a normatively meaningful distinction between guilt and innocence. The specific direction requirement indicates an important way of managing such indeterminacy: by providing that aiding and abetting requires the assistance be directed/aimed towards the crimes, the specific direction requirement seeks to avoid the imposition of criminal responsibility in close cases, reserving punishment only for situations that are well past the line of what could be considered reasonable. The international criminal law should promote the foreseeability of punishment by clearly distinguishing those actors who pursue legitimate policy objectives by taking affirmative precautions to prevent the use of their support for criminal purposes, from those who do not. Where such precautions are pursued in good faith, the law should not demand a risk-free environment. Accordingly, knowledge that some aid will inevitably, despite all reasonable precautions, find itself directed to criminal purposes is not the kind of knowing contribution the law should target. Thus, the resolution of the foreign assistance cases requires a moral judgment that is not reducible to the recitation of elements debated by international tribunals. The result is indeterminacy. Part II has demonstrated the current state of the law does not define complicity with sufficient particularity and the competing approaches to aiding and abetting all provide for variation of interpretation and application, producing the greatest indeterminacy.

The ultimate resolution as to whether specific direction is a requirement for aiding and abetting liability is likely to have a huge impact not only on the determination of individual criminal responsibility but will influence the behaviour of States as well. Part II has examined provision of military aid within the framework of individual criminal responsibility. In determining actus reus of individual criminal responsibility for complicity, the international court analysed state policy on provision of military aid, rather than the conduct of an individual, thereby blurring the boundaries between the two separate regimes of international responsibility. This proposition is further examined in Part III dealing with provision of military aid within the framework of state responsibility.
Individual complicity can be applied to hold political and military leaders accountable for provision of military aid to a party committing international crimes. Part III explores whether this particular mode of liability shares some parallels with standards developed in the domain of state complicity for the same act (conduct) of provision of military aid. Part II has illustrated that the establishment of an individual case of complicity for provision of military aid provides for an additional point of contact between state and individual criminal responsibility in international crimes. By focusing on the same conduct, these two forms of international responsibility grow closer, and an increasing need to guarantee consistency in the way each evolves arises.
PART III: STATE COMPPLICITY IN INTERNATIONAL LAW

8. Introduction
Historically, international law failed to adequately regulate state complicity in the wrongdoing of other States. Only since the World War II a norm has emerged to hold a State responsible for aiding another State in committing an internationally wrongful act. The norm represents an international corollary to domestic norms that hold responsible in tort and criminal law one who aids another in committing a wrongful act. State complicity was not mentioned by the writers on state responsibility until the ILC drafted a complicity provision in the 1970s. International law traditionally contained no general prohibition on state complicity in the internationally wrongful act of another State – there was no international analogue to common domestic doctrines of accomplice or accessorial liability. Short of joint participation, as a general rule, participants in another State’s commission of an internationally wrongful act were not implicated by international law’s assignment of responsibility. In his Hague Lectures of 1939, Ago argued that:

[I]t appears inconceivable in international law to have any form of complicity, participation, or incitement to a delict. The law of nations, in its current structure, does not allow for such forms of a consideration shared by several subjects with respect to a single delict; these constructs are characteristic of the nature and development of domestic criminal law.

Further, historically, international law was addressed to States, and indeed States remain the primary bearers of rights and obligations in international law. The absence of regulation of the conduct of non-state actors simply denied the possibility of state complicity in relation to that conduct, for there was no wrong to which the State might be linked by the complicity rule. As international law has come to recognize conduct other than State’s conduct as internationally wrongful, the conceptual possibilities for complicity have expanded.

Part III examines the status of the complicity norm in international law of state responsibility. It argues that such a norm has become a customary law. By examining the normative framework of

---

1096 Quigley, J., supra note 356, p. 77.
1099 See infra Chapter 13.
complicity in the international law of state responsibility, Part III argues that a particularly exacting standard must be met for a State to be responsible under international law for providing or facilitating assistance to those engaging in international crimes, notwithstanding some judicial disagreement as to how stringent that standard should be. International law envisages different standards for when a State is implicated in violations committed by an individual or a group (a non-state actor), compared to when those are perpetrated by another State. Part III contends that a State providing military aid to another State is responsible for complicity in internationally wrongful acts committed by the receiving State utilizing contributed resources, where the assisting State intends the contributed resources to be so used. It demonstrates that state practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful act of another State through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. However, a State providing military aid to a non-state actor is not responsible for complicity in internationally wrongful acts committed by a non-state actor if it is not proven that such groups were instructed, directed or controlled by the aiding State in relation to a specific conduct.

The rule reflected in Article 16 ARSIWA should be understood to entrench a general complicity rule in the law of state responsibility, at least with respect to State participation in wrongdoing committed by other States. Article 16 prohibits general forms of complicity – aid or assistance – in the commission of any international wrong by the recipient State, so long as the act committed by the principal State would be wrongful also if committed by the accomplice State. The general rules on complicity embodied in the ARSIWA need to be seen as part of a larger network of rules on complicity. Other rules may be found in primary norms which directly establish responsibility on complicity. With respect to the use of force in international relations, both the jus ad bellum and the jus in bello prescribe additional rules which provide for more demanding criteria that States need to respect to avoid responsibility for complicity. Where there exist special rules on complicity in international law, Article 16 ARSIWA continues to provide a

1100 For example, in 1984 Iran protested against the supply of financial and military aid to Iraq by the UK, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq. The British government denied both the allegation that it had chemical weapons and that it had supplied them to Iraq. See New York Times, 6 March 1984, p.A1, col. 1; In 1998, a similar allegation surfaced that Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraq technicians for steps in production of nerve gas. The allegation was denied by Iraq’s representative to the United Nations. See New York Times, 26 August 1998, p. A8, col. 3.

1101 Article 16 ARSIWA.
matrix for interpretation thereof. These special rules allow for an attribution of responsibility in situations where States are supporting other violations of international law under different conditions as would be the case of responsibility for complicity under Article 16.

Part III demonstrates that the provisions on complicity pertaining to States find scarce application in practice. This is by reason of States being bound by a variety of primary rules of conduct that serve to limit or prevent them from contributing to international wrongs. 1102

Finally, Part III illustrates that the general standard for a State to be responsible under international law for providing or facilitating assistance to those engaging in international crimes has some similarities to that applied to individuals under international criminal law, even though States themselves are not criminally liable or subject to criminal sanctions under international law. 1103

8.1. The Notion of State Complicity

The category of military aid is broad. Granting military support to another State or a non-state actor may comprise different levels of State involvement. It can consist of security assistance in the sense that a State has decided to furnish military supplies or services to another State free of charge. It can also involve the furnishing of supplies in exchange for other goods or money. Finally, mention has to be made of private arms sales and supplies of military goods and services, which, in vast majority of States, need to be licensed by the home State’s government. Moreover, through permitting the use of its territory by another State to carry out an armed attack against a third State an assisting State may also breach the obligation not to use force. Further, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the UN Security Council or provides material aid to a State that uses the aid to commit violations of international law. 1104 In this respect, the UN General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to States found to be committing serious human right violations. 1105 Supplying military aid to another State or a non-state actor which uses it to violate international law could

1102 See infra Chapters 11 and 15.
1104 ILC Report on State Responsibility, Commentary on Article 16, para. 9.
potentially lead to responsibility of the complicit State in whichever form this support takes. These different degrees of State involvement would arguably play a role in an ultimate determination as to whether or not a given State incurs responsibility for complicity. From many forms of complicity, this dissertation focuses merely on military aid provided by States to other States or non-state actors in armed conflicts.

Complicity is not a term of art in international law, although it is frequently employed to describe situations in which one State furnishes aid or assistance to another State’s wrongful conduct. It was once used by the ILC in its deliberations on supportive States, but was discharged in favour of the more neutral sounding concept of ‘aid and assistance’ which now appears in Article 16 of the ARSIWA. In public international law the term ‘complicity’ is mostly used as a reference to Articles 16 and 41 of the ARSIWA on ‘aid and assistance’ and assistance in serious breaches of peremptory norms, and the paragraphs on ‘complicity’ in the Genocide Convention and the Torture Convention. According to the Articles on State Responsibility, complicity liability arises where a State facilitates the commission of an internationally wrongful act by another State. An internationally wrongful act is one that violates an international obligation of a State. The ILC has stated that a State is liable as an accessory ‘whether the principal wrongful act is committed against a State or a particular group of States, a subject of international law other than a State, or international community as a whole’.

Complicity is a particular way of contributing to a wrongdoing. Accomplices are held responsible for their own contribution to the principal’s wrong. The wrong of the principal should not be imputed or attributed to the accomplice. This is how the rule in Article 16...

---

1106 Genocide case, para. 419.
1109 UN GA Res 56/83 (12 December 2001).
1110 Article III (e) of the Genocide Convention; Article 4(1) of the Torture Convention.
1112 ARSIWA, Article 3 (b). The act must actually be committed; ILC Report on State Responsibility, pp. 255-6.
1114 Jackson, M., supra note 348, p. 167.
ARSIWA is structured. Although at some point complicity crosses over into joint commission,\textsuperscript{1115} the position under Article 16 is made clear in the Commentary:

In accordance with Article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State.\textsuperscript{1116}

8.2. Interaction Between Primary and Secondary Rules in Prohibiting State Complicity

International law prohibits state complicity by providing for different layers of responsibility. The issue of state complicity involves a complex interplay between primary (substantive) and secondary (framework) rules of international law. The responsibility of complicit States based on primary rules can be engaged in two ways: either a complicit State is responsible for the violation of a primary rule to which it is bound itself, or it incurs derivative responsibility for its assistance to the internationally wrongful act of another State. Furthermore, complicity may also be discussed in the context of secondary rules of international law, attributing the grave wrong itself to the State (i.e. the attribution rules).

8.2.1. Primary rules

Primary rules are independent obligations of conduct, which do not lead to the attribution of the grave wrong itself to the State. When pertaining to complicit conduct, responsibility under a primary rule can take two shapes: responsibility under the norm that covers the grave wrong and that of responsibility under a norm different from that of the grave wrong. The first form results when provisions on the commission of acts are interpreted as inherently containing duties not to assist in that commission. Provisions such as Common Article 1 of the 1949 Geneva Conventions or the ‘complicity’ clause in the Genocide Convention create responsibility under a norm different from the grave wrong to which its complicit conduct pertains.\textsuperscript{1117} Complicity rules of a primary nature exist both in customary and in treaty law.

8.2.1.1. Primary rules of Complicity in Customary International Law

\textsuperscript{1116} ILC Report on State Responsibility, Commentary on Article 16 (10).
\textsuperscript{1117} Nicaragua case, para. 192; Genocide case, para. 419.
The ICJ held that a State may be responsible under customary international law for the rendering of unlawful ‘aid and assistance’.\textsuperscript{1118} The ILC sought to codify such responsibility through its Articles 16 and 41, which do not lead to the attribution of the grave wrong itself to the assisting State. In the words of the relevant Commentary:

\begin{quote}
The situation of aid or assistance must be distinguished from that of co-perpetrators or co-participants in an internationally wrongful act. Under Article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State.\textsuperscript{1119}
\end{quote}

Accordingly, Article 16 established derivative state responsibility for violation of a negative obligation. One way in which the term complicity might be used is in determining derivative state responsibility; that is, when one State is derivatively responsible for assisting another State in the commission of an internationally wrongful act. This type of complicity is analytically distinct to attribution as the rules of attribution concern the attribution of conduct to a subject of international law (i.e. a State); they are distinct from the question of responsibility. Rules of derivative responsibility focus on the relationship between a principal and an accomplice. Thus, derivative responsibility is generally predicated on the internationally wrongful act of a principal State. As such, it is distinct from the question of attributing the conduct of the agents of one State to another State, which, in itself, says nothing about whether an internationally wrongful act has been committed or whether any State’s international responsibility arises.

This form of responsibility is derivative of the principal State’s responsibility. As such, where the principal is not violating a particular obligation, the assisting State cannot bear derivative responsibility for the violation of that obligation. For example, if the assisting State is a party to the European Convention on Human Rights, but the principal State is not, then the assisting State cannot be said to bear derivative responsibility for violating the European Convention.\textsuperscript{1120}

\begin{footnotes}
\item[1118] Genocide case, para. 420.
\item[1119] ILC Report on State Responsibility, Commentary on Article 16, para. 1. See also Commentary on Article 41, para 11.
\item[1120] The issue of extraterritoriality may also be relevant here. If the principal state is not bound by certain of its human rights obligations while acting outside of its territory, its responsibility cannot arise under those obligations in these circumstances. Thus, ironically, the assisting, territorial state could not bear derivative responsibility, notwithstanding the fact that the human rights violations are occurring on its territory. However, if the conduct of the perpetrators is attributable to the assisting, territorial state, its responsibility would arise if the relevant human rights norms entailed positive obligations.
\end{footnotes}
Derivative state responsibility arising from complicit conduct is governed by the rule set forth in Article 16 of ARSIWA. That Article, titled “Aid or assistance in the commission of an internationally wrongful act”, provides:

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.”

Thus, Article 16 prohibits general form of complicity – aid or assistance – in the commission of any international wrong by the recipient State, so long as the act committed by the principal State would be wrongful if committed by the accomplice State. As further argued in Chapter 15, the rule reflected in Article 16 has been accepted as one of customary international law. As derivative responsibility is a lesser form of responsibility, it seems that the legal threshold for derivative responsibility could not be the same as that for state responsibility (it should be somewhat lower than that for principal responsibility). Thus, it would be absurd to have the same level of involvement that gives rise to derivative responsibility also make the conduct of the perpetrators attributable to the assisting State. In the light of the Commentary to the Articles, as well as state practice, it is clear that derivative responsibility requires more than acquiescence. Thus, the standard for attribution must necessarily be higher.

8.2.1.2. Primary rules of Complicity in Treaty Law

Treaties that aim to prevent the commission of grave wrongs employ the following types of provisions: duties of prevention (e.g. prevention to cooperate with other States, implement legislation of exercise due care), duties not to specifically assist, and duties to prevent and punish commission by individuals, when that duty is read as inherently banning State participation. One of the examples where ideas of complicity and its related forms of responsibility played a role is

---

1123 Article 16 ARSIWA.
1124 Considering Serbia’s potential complicity in the genocide in Srebrenica under Article III (e) of the Genocide Convention, the ICJ declared that Article 16 reflects a rule of customary international law. See *Genocide* case, para 420.
the law of neutrality. Neutrality regulates the relationship between neutral States and belligerents through the core principles of non-participation and non-discrimination. The principle of non-participation gives rise to a number of duties that are related to forms of complicity. Particularly, Article 6 of the Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War provides that ‘[t]he supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden’. The law of neutrality was inevitably affected by the rise of the Charter system of collective security and the prohibition on the use of force in international law. Interestingly, the Charter system sets out a rule much closer in rationale to that of a prohibition on complicity. Article 2(5) of the Charter requires that ‘[A]ll Members…refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action’. The decision of the Security Council to take preventive or enforcement action triggers Member States’ obligations of non-assistance.

In common Article I to the 1949 Geneva Conventions and Article 2, paragraph 5, of the UN Charter the State parties have agreed that they will not render aid that might facilitate certain wrongful acts of other States. In common Article I they agree to do nothing, whether by material aid or political act or otherwise, to promote violations of the humanitarian rules by other States parties. In these instances the prohibition against complicity is assumed as a treaty obligation. These anti-complicity provisions contribute to the body of state practice, especially since breach of the treaty obligation may also be a breach of an obligation under general international law.

A prohibition on participation may also be construed from general principles of international law, such as the principle that a State cannot do through another what it cannot do itself. A ban on aid and assistance in grave wrongs may originate from the concept of obligation erga

---

1126 Aust, H. P., supra note 1121, p. 15-23.
1130 Legality of the Threat of Use of Nuclear Weapons (Advisory Opinion), 1996, ICJ Reports 226 (89); Dinstein, Y., supra note 1127, p. 176-80.
1132 Dinstein, Y., supra note 1127, p. 176; Aust, H.P., supra note 1121, pp. 158-62 for discussion of UN resolutions relating to non-assistance.
1133 See ILC Report on State Responsibility, Commentary on Article 16 ARSIWA, para. 6.
omnes, as suggested by the ICJ in its Wall case. Judges Burgenthal, Kooijmans and Higgins disapproved such a suggestion and founded the ban on the argument that once the ICJ or the Security Council determines a situation of unlawful activity exists, States are under a duty not to assist that activity. The legal basis for that duty is found in Article 24 of the UN Charter or the Court’s role as the UN’s principal judicial organ, depending on the organ that made the determination.

The complicity rules that find the most application in practice are those derived from treaties such as the Genocide Convention and human rights conventions, as well as ad hoc obligations imposed by the Security Council. Most potentially complicit conduct will be barred by domestic law and rules related to the use of force, friendly relations, neutrality and non-intervention. However, these are not international rules seeking to ban influence over an internationally wrongful act; accordingly, they do not establish complicity. Similarly, European law bans the export of weapons that could endanger the receiving State’s compliance with IHL, human rights and international stability.

---

1134 The ICJ in its Advisory Opinion in the Wall case determined that erga omnes character of certain obligations violated by Israel triggers the obligation for all States not to render aid or assistance in maintaining the situation created by such construction. See Advisory Opinion in the Wall case, p. 6.
1135 Article 24 of the UN Charter determines the Functions and Powers of the Security Council (in order to ensure effective action by the UN, its Members confer on the Security Council primary responsibility for maintenance of international peace and security).
1136 Article 25 of the UN Charter states that the Members of the UN agree to accept and carry out the decisions of the Security Council.
1137 Separate Opinion of Judge Higgins in the Wall case, para. 38.
1138 US law prohibits its government from selling arms or otherwise providing aid to state that are involved in gross human rights abuses. The Arms Export Control Act limits the use of U.S. weapons given or sold to a foreign country to 'internal security' and 'legitimate self-defense' and prevents their use against civilians (22 U.S.C. para. 2754). The Foreign Assistance Act states that 'No assistance may be provided under this part of the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights' (22 U.S.C. para. 2151n(a)). The Constitution of the Netherlands entails an obligation to 'promote the international legal order', whilst that of Germany imposes a duty to penalize acts capable disturbing the peaceful coexistence between peoples'. Articles 91 and 26, respectively. The Leahy Law in the United States prohibits funding to governments and foreign military units if they are engaged in a consistent pattern of gross violations of internationally recognized human rights or have committed a gross violation of human rights, unless all necessary corrective steps have been taken. (Foreign Operations, Export Financing, and Related Programs Appropriations, 2001, Section 563 of Pub.L. No. 106–429, 114 Stat. 1900A-17, (2000); Department of Defence Appropriations Act, 2001, Pub.L. No. 106–259, para. 8092, 114 Stat. 656, 2000.) The European Union Common Position on Exports of Military Technology and Equipment provides that Member States shall deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law. See EU Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, art. 2(2)(c).]
International law furthermore contains rules prohibiting a State from rendering any aid to rebel groups who conduct an illegal war or when neutrality has been declared. All aid that is not purely humanitarian will be illegal under these rules, even when it is not or only remotely connected to the commission of grave wrongs. This is illustrated, *inter alia*, by the ICJ’s judgment in the *Nicaragua* case, where the grave breaches complained of were not attributed to the assisting State and taken only as evidence of damage caused by violations of the principle of the non-use of force, non-intervention and humanity. Similarly, duties imposed by the Security Council when it pursues international stability may *de facto* mitigate the risk that grave wrongs occur.

The possibility for an external organ to impose *ad hoc* measures guarding against complicity supplements the above body of permanent primary and secondary rules. For example, recent events in Libya led the Security Council to impose an arms embargo to minimize the likelihood of violence against the domestic population.\(^{1140}\) Acting under Chapter VII and taking measures under Article 41 of the UN Charter, the Security Council imposed an arms embargo and indicated that all Member States should ‘prevent the direct or indirect supply, sale or transfer to [Libya]…of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment’ and other items.\(^{1141}\) It is clear from the resolution that this action was taken based on concerns that Libya would use these items to engage in violent acts against civilians and civilian objects within its sovereign territory.\(^{1142}\) Thus, the Security Council directed Member States to abstain from the shipment of weapons and related military aid to Libya in order to prevent them from engaging in complicity.

### 8.2.1.3. State Responsibility for failure to fulfil a positive obligation

Another way in which the concept of complicity is employed is in the context of a failure to fulfil a positive obligation; e.g., where a State has a duty to prevent certain conduct. Complicity, even by mere acquiescence, by State officials in the carrying out of such conduct would constitute a violation of that State’s positive obligation.

---


\(^{1141}\) *Ibidem*, para. 9.

\(^{1142}\) *Ibidem*, para. 2(a).
It is well-established that an omission can constitute an internationally wrongful act giving rise to state responsibility whenever a State is under a duty to act.\textsuperscript{1143} The scope of positive obligations – obligations imposing a duty to act – is determined by primary rules. The primary rules set forth in each of the principal human rights treaties entail positive obligations.\textsuperscript{1144}

While the scope of positive obligation varies in accordance with the primary rules,\textsuperscript{1145} the primary rules of the principal “bill of rights” type treaties\textsuperscript{1146} were formulated in similar terms, and have been interpreted by their respective judicial and quasi-judicial institutions to impose comparable obligations. These institutions, drawing upon the Law of State Responsibility for Injury to Aliens, have generally settled upon a standard of “due diligence”, while recognizing that the level of conduct actually required by this standard will vary depending upon the right in question, as well as the circumstances of the particular case.\textsuperscript{1147}

Knowledge that violations are being perpetrated – once the State is on notice of human rights violations being committed on its territory, the conduct required of States is certainly increased – the State must do more; the obligation remains formally the same, but what is required to satisfy the obligation increases.

The standard for failure to fulfil a positive obligation must be lower than that for attribution of the conduct of the perpetrators to the State, and presumably also lower than for derivative responsibility for violation of a negative obligation.\textsuperscript{1148}

As demonstrated above, different legal issues to which complicity may be applied introduce a degree of incoherence into the law of state responsibility. The term complicity may be understood to encompass a broad spectrum of conduct, with varying degrees of participation in the principal violation. These different degrees of participation may engage different modes of


\textsuperscript{1145} For example, the scope of positive obligations under the ICCPR is different from the scope of positive obligations under the Convention Against Torture. See ICCPR and the Torture Convention.


\textsuperscript{1147} See, e.g., Velasquez-Rodriguez Case, 1988 Inter-American Court of human Rights, No. 4., at 153 (July 29, 1988), see also Genocide case, para 430.

responsibility, both direct responsibility (of a principal) and derivative responsibility (of an accomplice).

8.2.2. Secondary rules – The Attribution rules

Complicity may also be discussed in the context of attribution. The issue of attribution arises in the context of the so-called secondary or “framework” rules of international law, as reflected in the ILC’s Articles on State Responsibility. Secondary rules attribute the grave wrong itself to the State. Examples of these are found in Articles 8, 17 and 18 ARSIWA, covering direction, control and coercion. The application leads to the State becoming responsible for the grave wrong itself, requiring that it take steps to terminate that wrong, and obligates it to remedy its circumstances. This sets the Articles apart from primary rules discussed above. The concept of attribution is an important component in the determination of an internationally wrongful act. Since States can only act through individuals, there needs to be a way to connect the conduct of actors to States. This is achieved by examining the relationship between a State and the individual perpetrators of a given act to see if there is a strong enough link to attribute the perpetrators’ conduct to that State.

Where the link between perpetrators and the assisting State is strong enough to attribute the conduct of the perpetrators to the assisting State, the assisting State becomes a perpetrating State, giving rise to its international responsibility as such. This participating State bears independent or joint responsibility for breaching the negative obligation to refrain from violating human rights.

The standards for attribution are set forth in Part I, Chapter 2 of the Articles on State responsibility. In situations where the actor is, or can be assimilated to, an organ of the State, the conduct of de jure organs, lent organs, or de facto organs is attributable to the State. These

---

1149 ILC Report on State Responsibility, Part One, Chapter II, Articles 4-11.
1150 ARSIWA, Articles 2, 3, 28, 30, 31, 34-9.
1151 Although the term »conduct« can refer to both acts and omissions, in the case of omissions the issue of attribution does not directly arise. »As omission is a lack of action, an actor is not required. Hence, the state is essentially in a constant default of state of omission. However, in order for an omission to constitute a basis of responsibility, there must be a duty to act. The question of establishing a duty to act will turn on the content of the relevant primary rule. Thus, in these circumstances, the issue of attribution collapses into the content of the primary rule.« See Cerone, J., supra note 1143, pp. 1447, 1464 (2006).
would apply only if the perpetrators were under the exclusive control\textsuperscript{1153} or in a situation of complete dependence\textsuperscript{1154} upon, the assisting State, which clearly would be more than an assisting State if this were the case.

The next set of attribution rules apply in situations where the actor is not an organ of the State, but is in fact acting on behalf of the State in particular circumstances. These rules focus on the particular conduct of the actor in the particular circumstances to determine whether the actor was, in fact, acting on behalf of the State during the relevant period. The conduct of this type of actor (referred to as a “non-state actor”) may be attributed to a State when the actor “is in fact acting on the instructions of, or under the direction or control of, a State in carrying out the conduct.”\textsuperscript{1155} In the absence of specific instructions, a fairly high degree of control has been required to attribute the conduct to the State. According to the Commentary on the Articles:

“such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of formed an integral part of that operation. The principle does not extent to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control”.\textsuperscript{1156}

In the absence of direction or control, the conduct of a non-state actor may be attributed to a State when the actor is “exercising elements of the governmental authority in the absence or default of the official authorities”;\textsuperscript{1157} when the conduct is subsequently adopted by a State;\textsuperscript{1158} or when the conduct is that “of an insurrectional movement that becomes the new government of a State.”\textsuperscript{1159}

These standards establish a fairly high threshold of State involvement or, alternatively, \textit{de facto} State action by non-state actors accompanied by State authorization or disengagement. Instances of lesser participation by State organs in the conduct of a non-state actors are not sufficient to

\textsuperscript{1153} Ibidem, pp. 43-44.
\textsuperscript{1154} Genocide case, para. 393.
\textsuperscript{1155} ILC Report on State Responsibility, p. 47.
\textsuperscript{1156} Ibidem, p. 47.
\textsuperscript{1157} Ibidem, p. 49.
\textsuperscript{1158} Ibidem, p. 53.
\textsuperscript{1159} Ibidem, p. 50.
render such conduct attributable to the State under the traditional rules of attribution.\textsuperscript{1160} Chapters 13 and 14 further analyse the role of state complicity in international crimes committed by non-state actors.

While the term complicity could be used to describe situations encompassed by the above rules, the term usually connotes a lesser degree of involvement. The common sense understanding of complicity is that the complicant party is merely assisting and is not the directly responsible party, as it would be pursuant to a finding of attribution. However, the regional human rights institutions have gone further, stating that lesser degree of involvement, even mere acquiescence, would be sufficient to find the perpetrator’s conduct attributable to the complicit State. The International Covenant on Civil and Political Rights requires State parties to “respect” and to “ensure” the rights contained therein, reflecting both negative and positive obligations.\textsuperscript{1161} The European Convention on Human Rights and Fundamental Freedoms, in contrast, employs only the phrase to “secure” rights, perhaps encouraging a conflation (combination) of positive and negative obligations.\textsuperscript{1162} However, the European Court of Human Rights has expressly delineated the positive and negative dimensions of the obligation to “secure” rights. Indeed, there are cases in which the respective human rights bodies make clear that they are analysing complicity under the rubric of attribution and not the failure to fulfil a positive obligation.\textsuperscript{1163} The ICJ has resisted this trend toward a lower threshold for attribution.\textsuperscript{1164} Chapter 14 provides for a further analysis on this issue.

\section*{9. State Complicity in State Wrongdoing}

\subsection*{9.1. ILC’s Definition of State Complicity}

The ILC has included a provision on complicity in its Articles on State Responsibility.\textsuperscript{1165} Chapter IV of the Articles regulates ‘Responsibility of a state in connection with the act of

\textsuperscript{1160} See, e.g. Military and Paramilitary Activities (Nicaragua v. U.S.) 1986 I.C.J. 14, 66 (June 27) (holding that provision of training, resources and logistical support was insufficient for the conduct of the contras to be attributable to the United States).

\textsuperscript{1161} ICCPR, Article 2.

\textsuperscript{1162} ECHR, Article 1.

\textsuperscript{1163} Cerone, J., supra note 1148.

\textsuperscript{1164} See \textit{Genocide} case, paras. 402-406 where the ICJ rejects the Appeals Chamber of the ICTY’s lower standard for attribution.

\textsuperscript{1165} For Draft Articles 1-27, see ILC Report on State Responsibility, pp. 187-96 (1978 Yearbook of the ILC, pp. 78-80). Though it commenced its work on state responsibility in 1953, the ILC initially focused almost exclusively on
another state’, namely Article 16 deals with cases where one State provides aid or assistance to another State with a view to assist in the commission of a wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct, which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, while the assisting State has only a supporting role. Hence the use of the term “by the latter” in the chapeau to Article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act.\footnote{ILC Report on State Responsibility, Commentary on Article 16, para. 1.} The assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.\footnote{Ibidem.}

In its Commentary, the ILC has held that ‘State practice supports assigning international responsibility to a state which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance.’\footnote{Ibidem, para. 7.} States are entitled to assert complicity in the wrongful conduct of another State.\footnote{Ibidem, para. 11.}

\textbf{9.2. The Evolution of the Article on Complicity in the ILC}

The provision which eventually turned into Article 16 ARSIWA underwent a number of changes over the twenty-five years of its gestation. It is therefore necessary briefly to present its various emanations as the comments of States on this provision necessarily relate to a specific version of the provision.
The first draft of the provision was presented by the Special Rapporteur Roberto Ago in his Seventh Report on State Responsibility in 1978. It read:

“Article 25- Complicity of a State in the internationally wrongful act of another State:

The fact that a State renders assistance to another State by its conduct in order to enable or help that State to commit an international offence against a third State constitutes an internationally wrongful act of a State, which thus becomes an accessory to the commission of the offence and incurs international responsibility thereby, even if the conduct in question would not otherwise be internationally wrongful.”}

In the ILC’s 1978 draft, the terms ‘complicity’ and ‘accessory’ are omitted. Following the discussion in the Commission, the Drafting Committee made a number of changes. Under the chairmanship of Stephen M. Schwebel, the Committee proposed the following title and text of what would turn into Draft Article 27:

“Aid or assistance by a State to another State for the commission of an internationally wrongful act: Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.”

The ILC apparently intended responsibility to be found only where the ‘principal’ State actually carries out the wrongful act. Brazilian ILC member Jose Sette Camara found such a requirement in the phrase ‘carried out by the latter’.

Schwebel explained that it had been the aim of the Drafting Committee to retain the ‘essence of the original text in terms as simple and balanced as possible, while removing any source of


\[^{1171}\] The terms 'complicity' and 'accessory' were apparently dropped because the article does not prohibit certain acts commonly included as complicity in domestic law, namely, moral aid and incitement. Referring to the cases covered by Draft Article 27, the ILC stated: ‘Cases such as this can be defined as instances of “complicity”, but obviously in the particular sense this term may possess in international aw, where it is far from having the same meaning as is attributed to it in the different internal legal orders of States’: ILC Report on State Responsibility, at p. 250 (1978 Yearbook of the ILC p. 102). In the Sixth Committee the Nigerian delegation 'endorsed the Commission's decision to discard the concepts of »complicity« and »accessory« as concepts pertaining to the field of municipal law: General Assembly Official Records, 33rd Session, Sixth Committee, 42nd meeting, at p. 12, para. 41, UN Doc. A/C.6/33/SR.42 (1978) (hereinafter: GAOR 33rd Session).


\[^{1173}\] GAOR 33rd Session, 27\textsuperscript{th} meeting, at pp. 20-1, para 66, UN DOC. A/C.6/33/SR.27 (1978).
ambiguity or misunderstanding.'¹¹⁷⁴ To achieve this, the Commission had discarded terms such as ‘complicity’, ‘accessory’ and ‘international offence’ as well as the criticized reference to a third State against whom the internationally wrongful act would have been committed.¹¹⁷⁵ The Chairman of the Committee also made it clear that it was the opinion of its members that the crucial element of intent should be brought out more clearly in the provision. This was accordingly meant to be secured through the wording ‘if it is established that it is rendered for the commission’.¹¹⁷⁶ As there was no disapproval voiced among the members of the Commission, the title and text were therefore agreed upon by the Commission.¹¹⁷⁷ This was the provision as it stood for almost twenty years, and which formed part of the Draft Articles adopted on First Reading in 1996. When Special Rapporteur James Crawford reviewed the Articles in the course of the Second Reading, he made several changes to the referred Article, in particular to accommodate the provision to criticism, which was voiced by the states in the Sixth Committee of the UN General Assembly and directed at the ILC. The Draft Article then read:

“Article 27 Assistance or direction to another State to commit an internationally wrongful act:

A state which aids or assists, or direct or controls, another State in the commission of an internationally wrongful act is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.”¹¹⁷⁸

The major change reflected in the new Article was paragraph (b). This requirement was included to ensure that States would only incur responsibility for aid and assistance when they were also bound by the obligation the main actor was violating. Another change in the Article was the inclusion of the element of direction or control. The Commission finally adopted the following provision:

“Article 16 Aid or Assistance in the commission of an internationally wrongful act:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

¹¹⁷⁵ Ibidem.
¹¹⁷⁶ Ibidem.
¹¹⁷⁷ Ibidem, para. 6.
(b) The act would be internationally wrongful if committed by that State."  

Thus, there were only minor changes from Draft Article 27 to Article 16. The ‘direction or control’ element was removed and inserted into Article 17. In addition, it was set out more clearly that it would need to have been an internationally wrongful act of the assisted State to which the support was rendered and that is was the support for which responsibility would thus be incurred.

In spite of its inclusion in the ARSIWA, Article 16 embodies a primary rule of international law. It is the rule that defines the scope of acceptable conduct for States. It defines the boundaries of acceptable State conduct in respect of all other primary rules. This follows from the ARSIWA’s internal logic. Article 2 ARSIWA provides:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and  
(b) constitutes a breach of an international obligation of the State.

Considering any matter between States in which Article 16 forms the basis of the claim, attribution – part (a) – will be assessed in the ordinary matter, while part (b) will be founded on Article 16. Thus, Article 16 is the specified international obligation of the State. On this basis, Article 16 is clearly a primary rule.

---

1179 Aust, H.P., supra note 1121, p. 102.  
1180 Article 17 ARSIWA: Direction and control exercised over the commission of an internationally wrongful act; A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:  
(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and  
(b) the act would be internationally wrongful if committed by that State.  
1183 Article 2 ARSIWA.  
9.3. The Elements of State Complicity

9.3.1. The Objective Element (The Conduct Element): The Scope of Aid and Assistance

The conduct element of complicity under Article 16 is broad. Article 16 prohibits States from giving aid and assistance that facilitates another State’s commission of internationally wrongful act.

The ILC has not explicitly defined what constitutes relevant “aid and assistance”. It is theoretically conceivable that “aid or assistance” comprises every act (or omission) which facilitates the commission of an internationally wrongful act by another State.\(^\text{1185}\) However, it is implausible that Article 16 should cover ‘aid or assistance’ which is only remotely or ‘indirectly’ related to an internationally wrongful act.\(^\text{1186}\) There should rather be some special nexus between the aid and the wrongful act.

A first approach in determining what constitutes aid or assistance within the meaning of Article 16 ARSIWA is to look at instances of international practice. Granting of over-flight and landing rights for the unlawful use of force or for the commission of human rights violations, allowing the use of territory by another State which assembles its troops and then conducts its attack from the first State’s territory, furnishing logistic support to the unlawful conduct of another State, provision of valuable intelligence, furnishing weapons, military technology or other kinds of military assistance to oppressive regimes; support which allows a State to circumvent the requirements of binding UN Security Council resolutions – all these could qualify as aid or assistance.\(^\text{1187}\) The compiling of a list of typical forms of aid or assistance will, however, not lead to satisfactory results. The nature of Article 16 ARSIWA as a general rule speaks against the authoritativeness of a list thus assembled.

In the ILC’s conception, the rule reflected in Article 16 comprises different forms of physical assistance. As examples of actions that fulfil the conduct element of the test, the Commentary lists financing, the provision of an essential facility, the provision of means for the closing of an

\(^{1185}\) Omissions are particularly difficult to deal with. The ICJ has now ruled out the possibility of complicity by omission in its *Genocide case*, para 432.


\(^{1187}\) ILC Report on State Responsibility, Commentary on Article 16.
international waterway, facilitating the abduction of persons on foreign soil, and assisting in the
destruction of property belonging to third State nationals.\footnote{ILC Report on State Responsibility, Commentary on Article 16, para. 1, p. 66.} In light of this, it is necessary to
determine whether Article 16 is contingent on the provision of a certain kind of aid.\footnote{Lowe, V., \textit{supra} note 1115, p. 5.} It is
argued that all kinds of aid and assistance fall within the rule.\footnote{Crawford, J., \textit{supra} note 1115, p. 402.} Moreover, the ILC has made it
clear that no particular kind of aid or assistance is necessary in order for this responsibility to
arise.\footnote{Talmon, S., \textit{A Plurality of Responsible Actors?} in Shiner, P. and Williams, A. (eds), The Iraq War and
Lowe argues that it may include technical or financial assistance, the non-application of
mandatory sanctions, and even the provision by States of credit or investment guarantees that
facilitate investments by their companies in other States.\footnote{Lowe, V., \textit{supra} note 1115, pp. 5-6.} This is certainly correct. There is no
principled reason for limiting the kind of aid or assistance that might implicate Article 16. The
Commentary does not do so.

Lowe has maintained that States should normally be entitled to presume that other States will act
lawfully\footnote{\textit{Ibidem}, p. 10.} and that to attribute the same risk of unlawfulness to the main actor and to the helper
would mean to treat the assisting State as if it were acting jointly with the main actor.\footnote{\textit{Ibidem}.} Some
scholars argue that while such a strict rule on the responsibility for ‘aid and assistance’ appears
to be beneficial for the international rule of law (as it would claim to force States to be their
‘brother’s keeper’ and to steer far away from the risk of being implied in illegal activity) it would
at the same time discourage may typical and usually beneficil forms of international co-
operation.\footnote{Nolte, G., and Aust, H.P., \textit{supra} note 357, p. 12.}

Assuming that most States prefer an interpretation of the rule on the responsibility for ‘aid and assistance’ which leaves room for such typical forms of cooperation as long as the implication in
illegal activity is not sufficiently clear. International law provides a confirmation for this
conclusion in a somewhat related context: It does not hold a State responsible for ‘instigating’ another State to commit an internationally wrongful act.\footnote{ILC Report on State Responsibility, Introduction to Part One, Chapter IV, para 9; Nolte, G., and Aust, H.P., supra note 357, p. 13: In this situation, it is the factual uncertainty whether the instigated state will eventually act upon the instigation (as well as the normative assumption that states typically carefully weight their options and are not easily 'instigated' by other states), which justifies the attribution of responsibility solely to the acting state (See Ago, R., Seventh Report on State Responsibility, p. 30, para 55.}

In fact, this interpretation of Article 16 is indirectly corroborated by the initial thoughts of Roberto Ago on complicity in the ILC. When Ago presented his Seventh Report on State Responsibility in 1978, the situations falling under the envisaged provision on complicity were described by him as follows:

(There)…are the cases in which the existence of an internationally wrongful act unquestionably committed by a State, attributable to it as such and without the slightest doubt involving its international responsibility, is accompanied by the existence of participation by another State (…).\footnote{Ago, R., Seventh Report on State Responsibility, para 52.}

There are two outstanding issues concerning the forms of complicity prohibited by the rule in Article 16. First, the commentary on Article 16 focuses on the provision of assistance as the sole mode of complicity – the various ways that a State may help another State in its commission of an internationally wrongful act.\footnote{Kadish, S. H., supra note 397, p. 342.} Also, in its consideration of Article 16 in the \textit{Genocide} case, the ICJ referred specifically to the ‘provision of means to enable or facilitate the commission of the crime…’.\footnote{Genocide case, para. 419.} These statements reflect the long-standing assumption in international law that excludes classic forms of complicity based on influencing the principal – inducing, instigation, abetting – from state responsibility for complicity in the wrongs of other States.\footnote{See ILC Report on State Responsibility, General Commentary on Chapter IV (9); Crawford, J., supra note 1178.} As a result, in the absence of a specific treaty regime, forms of complicity that are clearly established in international criminal law – such as instigating and abetting – probably do not apply to States.\footnote{See ILC Report on State Responsibility, General Commentary on Chapter IV (9).}

State complicity does not include moral encouragement or incitement by a State to another State to engage in an internationally wrongful act, although both acts would constitute complicity in domestic law.\footnote{ILC Report on State Responsibility, pp. 244-6 (1978 Yearbook of the ILC, pp. 100-1). Incitement may, however, be prohibited by treaty. See, e.g. a duty to prevent encouragement of \textit{apartheid} in Article 4(a) of the International
wrongful act of the State encouraged or incited.\textsuperscript{1203} The ILC notes that protests have been filed charging incitement but reports no such claim at juridical level.\textsuperscript{1204} Complicity does not include coercion by one State of another to commit an internationally wrongful act. Here both the coercing State and perhaps also the coerced State (if it did not object to the coercion) are liable as principals.\textsuperscript{1205} Further, a State is not responsible for the acts of another State committed within or from the territory of the former, in the absence of fault on the part of the host State.\textsuperscript{1206}

The second issue regarding the forms of complicity prohibited by Article 16 concerns omissions. In the \textit{Genocide} case, in interpreting the primary rule prohibiting complicity in genocide, the ICJ held that ‘complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators…’.\textsuperscript{1207} Crawford argues that the exclusion of complicit omissions from complicity in genocide applies, in the ICJ’s own understanding, to the rule in Article 16.\textsuperscript{1208}

This position is supported by the prior holding of the Court that it ‘sees no reason to make any

\textsuperscript{1203} ILC Report on State Responsibility, pp. 244-6 (1978 Yearbook of the ILC, pp. 100-1). The only authors who assert that conspiracy and incitement are acts entailing international legal responsibility of a State are Graefrath, Oeser and Steiniger. They write: ‘If a State, either through another or together with it, causes, whether directly or indirectly, the violation of an international legal obligation, the former in this way brings on its own sovereign fault and international legal responsibility. In this sense is Ago in agreement when he states that ‘any form of conspiracy, or complicity, or of incitement’ to a violation of an international legal obligation is incompatible with international law’ (citing Ago, R., \textit{Le Delit international}, Recueil des cours, 68 (1939-II), pp. 416, 523). The authors give no State practice or other evidence to back their assertion that conspiracy and incitement entail state responsibility. Moreover, their reference to Ago is inaccurate, since in the quoted 1939 Article Ago states that conspiracy, complicity and incitement do not entail international legal responsibility. The full sentence from which the quoted Ago sentence is taken reads: ‘What appears inconceivable in international law is any form of conspiracy, or complicity, or of incitement’ to a violation of an international legal obligation.’

\textsuperscript{1204} ILC Report on State Responsibility, pp. 245 (1978 Yearbook of the ILC, pp. 100).

\textsuperscript{1205} ILC Report on State Responsibility, pp. 248-9 (1978 Yearbook of the ILC, pp. 101-2)

\textsuperscript{1206} Summary Records of the 1312th meeting, Yearbook of the ILC, 1975, VOL. I, P. 42, Article 12, paras. 1, 4, UN Doc. A/CN.4/SER.A/1975. Para I provides: ‘The conduct of an organ of another State or of an international organization acting in that capacity in the territory of a State, shall not be considered as an act of that State under international law.’

\textsuperscript{1207} \textit{Genocide} case, para. 432.

\textsuperscript{1208} Crawford, J., \textit{supra} note 1115, pp. 403-5.
distinction of substance between “complicity in genocide”… and the “aid and assistance” of a State in the commission of a wrongful act by another State…’. Following the *Genocide* case, this appears to be the prevailing position in international law.\textsuperscript{1210}

9.3.2. The Nexus Element

The second element of any complicity rule concerns the relationship between the aid provided and the wrongful act committed. Given the range of actions that might satisfy the conduct element of complicity, a substantiality criterion should apply. On first glance, this is the approach of the ILC in respect of Article 16. The ILC has explained in its Commentary that no particular kind or level of assistance is needed as long as the aid or assistance materially facilitates or contributes significantly to the performance of the wrongful act.\textsuperscript{1211} Thus, there is no requirement that the aid or assistance should have been essential to the performance of the wrongful act; it is sufficient if it contributed significantly to that act.\textsuperscript{1212} This standard excludes assistance that is indirectly or remotely related to that act.\textsuperscript{1213} However, in discussing the nature of responsibility under Article 16, the commentary appears to assume that assistance that ‘may have been only an incidental factor in the commission of the primary act’ might fall within its scope.\textsuperscript{1214} This clearly suggests a different standard from one of significant contribution or material facilitation.

The standard of material facilitation appears within the paragraphs of the Commentary defining the scope of the test. As a matter of textual interpretation, therefore, material facilitation seems to be the standards preferred by the ILC.\textsuperscript{1215} Additionally, the instances in which States have condemned other States’ complicity inevitably involve something more than incidental contributions. Finally, as to an evaluation of the requisite standard, the potential breadth of the rule of Article 16 should be noted. As a primary rule of international law, Article 16 defines the acceptable scope of State conduct in cooperating with other States. Given than no limitation is imposed on the kinds of aid included within the first limb of the test, it serves the interests of international cooperation to require a nexus beyond incidental contribution to give rise to

\textsuperscript{1209} *Genocide* case, para. 420.
\textsuperscript{1210} Crawford, J., *supra* note 1115, p. 403.
\textsuperscript{1211} ILC Report on State Responsibility, Commentary on Article 16, para.5.
\textsuperscript{1212} Ibidem.
\textsuperscript{1213} Nolte, G., and Aust, H.P., *supra* note 357, p. 10.
\textsuperscript{1214} ILC Report on State Responsibility, Commentary on Article 16, para. 10.
\textsuperscript{1215} Crawford, J., *supra* note 1115, pp. 402-3.
Incidental contribution sweeps too widely. Material facilitation is a standard that catches conduct with a sufficient link to another State’s wrongdoing while excluding the incidental relationships that arise from virtually every State interaction. It is noteworthy that this standard of significant contribution is similar to that imposed by international criminal law – the accomplice’s assistance must have a substantial effect on the commission of the crime.

The standard of “material facilitation” implies a notion of causality which is examined below. It can be noted that a close nexus between the support and the eventual wrongful act of the main actor is required. This is owing to comparative analysis of special rules on complicity which do not allow one to speak of assistance in the case of mere association. In other words, more than cooperation alone is required in order to bring about responsibility for complicity. Although the ILC requires some form of causality between the support rendered and the commission of the wrongful act, caution needs to be applied in this regard. Notions of causality are not easily applicable with respect to complicity as too demanding criteria in this regard would effectively mean treating joint main actors as accomplices. Nevertheless, as noted above, a substantial effect of the aid or assistance upon the commission of the wrongful act is required. This can be understood to mean that the aid or assistance must have made a difference for the main actor, rendering it materially easier to commit the wrongful act.

Furthermore, the Commentary makes it plain that on the one hand some form of causality is required, as the assisting State will only be held responsible to the extent that its assistance caused and/or contributed to the internationally wrongful act. On the other hand, the Commission is also quite clear that the support need not have been an essential contribution to the commission of the wrongful act. Rather, it would be enough for the aid or assistance to

---

1217 According to Becker, the ILC Commentary makes it plain that on the one hand some form of causality is required, as the assisting State will only be held responsible to the extent that its assistance caused and/or contributed to the internationally wrongful act. On the other hand, the Commission is also quite clear that the support need not have been an essential contribution to the commission of the wrongful act. Rather, it would be enough for the aid or assistance to contribute significantly to it. See Becker, T., *Terrorism and the State: Rethinking the Rules of State Responsibility*, Hart Publishing, Oxford, 2006, p. 326.
1218 See, e.g. Simić Appeals Judgment, para. 85; Vasiljević Appeals Judgment, para. 45; Krstić Appeals Judgment, para. 238; Krnojelac Appeals Judgment, para. 51; Blaškić Appeals Judgment, para. 48; Tadić Appeals Judgment, para. 229.
1219 Aust, H. P., *supra* note 1121, p. 419.
contribute significantly to it. This approach suggests that the ILC finds itself in line with considerations of general legal theory, namely, that, in the case of assistance to a wrongful act, the participant would neither cause the principal to act nor would the latter act in consequence of this assistance.\textsuperscript{1221} It is thus clear that the relationship between complicity and causality cannot be found in any form of ‘but for’ test or of a \textit{conditio sine qua non} test.\textsuperscript{1222} Both tests assume that, in the absence of a cause, the result of the action would not have been a conceivable outcome. It is apparent that this would be too strict of a test for complicity.\textsuperscript{1223}

In considering the causal impact of the complicit State’s action, one necessarily has to take into account the legal evaluation of the position of the main actor: requiring too much causal impact of the complicit State might eventually absolve the main actor from part of its responsibility. If the support was a \textit{sine qua non} for the commission of the wrongful act, there might not be conceivable to hold the main actor responsible for its conduct. The \textit{sine que non} test generally lacks the potential to distinguish between significant and less significant causes.\textsuperscript{1224} Given the scarcity of available international practice on the issue of causality with respect to complicit States, it is to be expected that a highly casuistic approach will be resorted to if a court or tribunal is to deal with the matter. It is apparent that only very few if any legal systems and legal theorists are willing to entirely discard the requirements of some form of causality when considering the issues of complicity.\textsuperscript{1225} The somewhat unclear and unsatisfying state of the law with respect to the requirement of causality in Article 16 ARSIWA may thus reflect the intermediate state of development of the international legal system.

Considering the significance of the aid in facilitating a wrongful act of another State, a certain level of assistance is necessitated by the requirement that the aid facilitate commission of the wrongful act. While it is difficult to define the necessary level, responsibility seems clear when a State provides such substantial aid that virtually any expenditure made by the recipient State depends on continued assistance from the providing State. In this situation, withdrawal of aid would constitute a substantial detriment to the recipient State, and the threat of withdrawal would constitute a substantial incentive to terminate a wrongful act. Lower levels of aid, however, will

\textsuperscript{1222} Kadish, S. H., \textit{supra} note 397, p. 367.  
\textsuperscript{1224} Becker, T., \textit{supra} note 1217, p. 292.  
suffice if it materially facilitates the allocation of resources by the recipient State towards its wrongful act.\textsuperscript{1226}

A State that gives aid to another ‘for the commission’ of a wrongful act should be responsible, even if the recipient State could have carried out the wrongful act without the aid. It is sufficient that the aid increased the possibility that the illegal conduct would be accomplished. Responsibility is not negated where the principal could have completed the crime without the assistance of the alleged accomplice, or where the principal could have obtained the assistance from somewhere else.\textsuperscript{1227}

9.3.3. The Subjective Element

The question of intent is closely linked to the previous one concerning the material element. Although there is disagreement over its precise scope and content, there is near unanimity in the literature that responsibility under Article 16 ARSIWA requires some subjective relationship between the assisting State and the commission of the wrongful act by the main actor.\textsuperscript{1228} It is a longstanding debate in the field of state responsibility whether some form of wrongful intent or fault is required for a State to be responsible for a given conduct. Traditional theory (inspired by Hugo Grotius) was of the opinion that fault was an indispensable element of responsibility. This view prevailed until the 1920s.\textsuperscript{1229} Since then, one can broadly distinguish between three possible views on the general character of the rules of state responsibility. First, they could require some form of subjective element.\textsuperscript{1230} Secondly, they could rest on an objective basis.\textsuperscript{1231} A third possibility would be a further enhanced notion of objective responsibility which is then labelled \textit{absolute} objective responsibility. There are variants to these theories, for instance the view which distinguishes between internal acts of States – legislative, executive or judicial – for which the standard of responsibility is objective and external acts of States where there is supposed to exist a due diligence obligation which is in this case conceived of as being

\begin{footnotes}
\textsuperscript{1226} Quigley, J., \textit{supra} note 356.
\textsuperscript{1227} Ibidem, p. 122.
\textsuperscript{1229} See Weil, P., \textit{Le droit international en quete de son identite}, Cours general de droit international public, pp. 9-370, at p. 347.
\textsuperscript{1231} Brownlie, I., \textit{supra} note 90, p. 38.
\end{footnotes}
subjective in character.\textsuperscript{1232} Over the course of time, most authors seem to have adopted the position that responsibility is generally objective with possible exceptions.\textsuperscript{1233}

The ILC has opted for a pragmatic conception of international responsibility.\textsuperscript{1234} It has not excluded the issue of fault from the Articles altogether. Rather, it has emphasized that different primary rules of international law impose different standards ranging from due diligence to strict liability. This will also be the case of Article 16 ARSIWA: due to its generality it covers aid or assistance furnished to violations of the most divers kind of rules. It can therefore not be expected that a clear-cut general rule on ‘the’ intent standard with respect to complicity in international law will be inferred.

The Commentary details that the relevant State organ providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful.\textsuperscript{1235} A State providing material or financial assistance or aid to another State does not normally assume the risk that its aid or assistance may be used to carry out an internationally wrongful act. If the assisting State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.\textsuperscript{1236}

The standard of fault\textsuperscript{1237} required by Article 16 was a controversial issue during the drafting process.\textsuperscript{1238} Strict liability was never an option.\textsuperscript{1239} This builds on the general principle that States may presume that recipient States will use their aid lawfully.\textsuperscript{1240} The final set of comments from governments on the draft text reveals the United States and United Kingdom’s concern that the fault standard be construed narrowly. The US’s position was that the ‘assisting State must be both aware that its assistance will be used for an unlawful purpose and so intend its assistance to be used’.\textsuperscript{1241} The UK suggested that it ‘be made clear that the “assisting” State must be aware

\begin{thebibliography}{99}
\bibitem{1233} Aust, H.P., \textit{supra} note 1121, p. 231.
\bibitem{1234} Crawford, J., \textit{supra} note 58, pp. 12 \textit{et seq}.
\bibitem{1235} ILC Report on State Responsibility, Commentary on Article 16, para.4.
\bibitem{1236} \textit{Ibidem}.
\bibitem{1237} The Commentary of Article 2 ARSIWA, in considering the necessary elements of an internationally wrongful act of a State, uses the term “fault”. The same terminology is used in literature on the respective subject.
\bibitem{1238} Quigley, J., \textit{supra} note 356, pp. 108-20.
\bibitem{1240} ILC Report on State Responsibility, Commentary on Article 16 (4), p. 66; Lowe, V., \textit{supra} note 1115, p. 10.
\bibitem{1241} International Law Commission, \textit{State Responsibility – Comments and Observations Received From Governments’} (2001) UN DOc A./CN.4/515 52.
\end{thebibliography}
that the act in question is planned and must further intend to facilitate the commission of that act by its assistance’.

The standard of fault for the specific primary rule prohibiting state complicity is not clear. The text of Article 16 uses the term ‘awareness of the circumstances’, a threshold substantially raised by the Commentary’s assertion that this involves an ‘intention, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct’.

This is consistent with the Commentary to the 1978 draft Article: The very idea of “aid and assistance” to another State for the commission of an internationally wrongful act necessarily presupposes an intent to collaborate in the execution of an act of this kind and hence, in the case considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them. Thus, some scholars argue that the textual knowledge standard is subsumed by one of wrongful intent.

Accordingly, no responsibility arises unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct.

The Commentary narrows the textual meaning of Article 16 and goes against the general thrust of the ILC Articles which, in general, presuppose no distinct or separate requirement of fault or wrongful intent for an internationally wrongful act. However, a requirement of fault or wrongful intent may be found in specific articles of the Draft or may be derived from primary norms which impose different standards of responsibility. Accordingly, it appears that the ILC intended Article 16 to be interpreted narrowly so that the “knowledge” element turns into a requirement of wrongful intent.

Likewise, the ICJ has, mutatis mutandis, adopted this

---

1242 Ibidem.
1243 ILC Report on State Responsibility, Commentary on Article 16, para. 5, p. 66.
1244 1978 YILC Vol II (Part Two), at 103, para 14. Complicity under the Genocide Convention requires ‘full knowledge’ of the relevant facts (including the physical perpetrator’s dolus specialis to commit genocide); See Genocide case, para 421 and 423.
1246 ILC Report on State Responsibility, Commentary on Article 16, p. 66
approach in the *Genocide case*.\textsuperscript{1250} Inquiring whether FRY was responsible for complicity in genocide, the Court pointed out that:

“[T]here is not doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.”\textsuperscript{1251}

If the analogy to Article 16 is supposed to be meaningful, this entails that knowledge of the circumstances of the wrongful act is required *at the least* (as the Court has put it) also with respect to Article 16. The words “at the least” suggest that, as a general rule, more than mere knowledge is required.

It is argued that in most situations where a State provides assistance to another State with the actual knowledge that the aid will be used to commit a wrongful act, the State’s intent that its aid facilitates that act may be inferred.\textsuperscript{1252} As Lowe argues, as ‘a matter of general legal principle States must be supposed to intend the foreseeable consequences of their acts’.\textsuperscript{1253}

Even if a standard of knowledge does become entrenched in international practice, much will still turn on how the requirement is interpreted.\textsuperscript{1254} In the final round of comments from governments on the Draft Article, the Netherlands proposed that Article 16 be changed to read: ‘That State does so when it knows or should have known the circumstances of the internationally wrongful act.’\textsuperscript{1255} The ILC did not take up this proposal.

In practice, the standard of knowing participation means awareness with something approaching practical certainty as to the circumstances of the principal wrongful act.\textsuperscript{1256} Dilution from that standard – the slide into reckless assistance – starts to become inconsistent with the essential derivative nature of complicity and may indeed undermine valuable international cooperation.\textsuperscript{1257}

\textsuperscript{1250} *Genocide case*, paras. 420-424.
\textsuperscript{1251} Ibidem, para. 421.
\textsuperscript{1252} Talmon, S., *supra* note 1191, pp. 218-19; Crawford, J., *supra* note 1115, p. 408.
\textsuperscript{1253} Lowe, V., *supra* note 1115, p. 8.
\textsuperscript{1254} Jackson, M., *supra* note 348, p. 161.
\textsuperscript{1256} Jackson, M., *supra* note 348, p. 161.
\textsuperscript{1257} Aust, H. P., *supra* note 1121, 240.
Somewhere around the line between knowing and reckless participation is the idea of wilful blindness. Lowe argues that an international tribunal would not allow a State to evade responsibility by deliberately failing to inquire into the circumstances of an assisted act where there are clear indications that its assistance would be employed unlawfully. This is true as a matter of law and in principle – wilful blindness, narrowly interpreted, is a justified extension to the category of legal knowledge. Beyond that, international law does not yet recognize a general due diligence obligation conditioning the provision of aid and assistance to another State.

Several governments have wondered about the meaning of the knowledge element of Article 16. Ultimately, the same reasons which point in favour of a requirement of certainty for what should be considered relevant ‘aid or assistance’ also speak in favour of a narrow interpretation of the knowledge element of Article 16 in the sense of “wrongful intent”. Nevertheless, the requirement of wrongful intent should not allow States to deny their responsibility for complicity in situations where internationally wrongful acts are manifestly being committed. In a situation where it is obvious that a recipient State is systematically violating human rights with the help of the received material, the assisting State should not be allowed to hide behind the position that it did not wish to support the commission of such wrongful acts. One can think of a due diligence obligation of supporting States to assure that their support is not used for wrongful ends. Such an approach is supported by state practice and could be based on an analogy with obligation of neutral States to control the export of weapons to belligerents. A number of States have passed legislation on the international sale of weapons according to which these weapons may

---

1258 Lowe, V., supra note 1115, p. 10.
1259 Jackson, M., supra note 348, see Section 2.5.4.4.
1260 Talmon, S., supra note 1191, 218-19; Lowe, V., supra note 1115, p. 10.
1261 See the comments of the governments of Denmark (also on behalf of Finland, Iceland, Norway, Sweden), Republic of Korea and the US, UN Doc. A/CN.4/515, 27.
1262 It has been questioned whether the intent requirement is hindering the effective application of the complicity provision, see Graefrath, B., supra note 1181, p. 375; Nahapetian, K., Confronting State Complicity in International Law, (2002) 7 UCLA Journal of International Law and Foreign Affairs, 106, Quigley, J., supra note 356, p. 109: since it would be difficult to prove the intent of a State to assist the internationally wrongful act of another state. However, the criteria for establishing responsibility and the standards of evidence are two different issues. The possibility of inferring intent and/or knowledge on the side of the complicit state from factual circumstances is not to be underestimated. See Nolte, G. and Aust, H.P., supra note 357, p. 15.
1263 Talmon, S., supra note 1191, p. 32. – holds the view that such a standard might develop in the future,
subsequently only be used for purposes in accordance with international law. In some cases therefore, a lack of intent can be offset by sufficient knowledge.

As previously argued, neither the ILC formulation in its 1978 Draft Article 27 that the aid be given ‘for the commission of an internationally wrongful act’ nor the accompanying commentary makes clear precisely what state of mind is required. If the assisting State desires that a recipient State carry out unlawful acts using resources contributed by the assisting State, then the assisting State is complicit in those unlawful acts under the ILC formulation. Considerable attention was given by ILC to the issue whether the assisting State is complicit as well where it does not wish the unlawful acts to occur but contributes resources aware that the contribution will facilitate the unlawful acts.

Furthermore, a formulation that did not make precisely what state of mind was meant appeared in a General Assembly resolution on the Middle East that called upon all States ‘to put an end to the flow to Israel of any military, economic and financial aid…aimed at encouraging it to pursue its aggressive policies against the Arab countries and the Palestinian people’.

Drawing from the evolution of Article 16, it is interesting to note that Article 25 of the 1977 ILC Draft required the aid to be given ‘in order to enable or help the recipient State to commit an international offence against a third State’. Article 27 of the 1978 draft requires that the aid be ‘rendered for the commission of an internationally wrongful act’. Neither draft requires the assisting State to intend that the violation be committed. A State can provide aid ‘in order to enable or help’ even when it does not desire the particular end, but knowing it will be used to that end. Similarly, a State can give aid ‘for the commission’ of an act without desiring the act.

---

1264 Nolte, G., and Aust, H.P., supra note 357.
1265 Objecting to Draft Article 27’s imprecision on the intent issue, the Australian delegate to the Sixth Committee said: ‘…article 27 was much too sweeping, and the issue of intent would have to be taken into consideration. As worded, the article meant that the purpose of the act would alone be decisive, but it would also be necessary to ask how and by what means that purpose could be established’: GAOR, 33rd Session, Sixth Committee, 37th meeting, at p. 2, para 3, UN Doc. A/C.6/33/SR.37 (1978).
1267 The statement that the offence must be ‘against a third State’ is incorrect, as the ILC clearly intends that the offense by the assisted State may involve violation of any internationally protected right. In ILC Report on State Responsibility, p. 257 (1978 Yearbook of the ILC, p. 105).
1268 Quigley, J., supra note 356, p. 110.
The purpose of Article 16 could be defeated if too stringent fault requirement is imposed. This is so for two reasons. Firstly, it is often difficult to determine the state of mind of a State. The assisting State may not advertise its purpose in giving aid, particularly if it is concerned about international repercussions over the use of its aid for a particular wrongful purpose. Additionally, it can be difficult to determine a State’s state of mind because the State is represented by a variety of officials who may make conflicting statements about the purpose of the aid. 1269 Secondly, in most situations when a recipient State commits an international violation, the assisting State does not in fact desire the illegal result. The assisting State typically acts out of some other motivation. 1270

Ago’s view on the intent issue should be read in light of these considerations. He writes:

To supply another State, for example, with raw materials, means of transportation and even arms, where this is not prohibited by a specific international obligation, is not in itself internationally wrongful in any way. What concerns us, however, in the present context, is not to know whether the conduct as such does or does not constitute a breach of an international obligation but whether or not the conduct adopted by the State was intended to enable another State to commit an international offence or to make it easier for it to do so. The very idea of ‘complicity’ in the internationally wrongful act of another necessarily presupposes intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them. Without this condition, there can be no question of complicity. 1271

Ago does not require a desire for the unlawful act on the part of the assisting State. By requiring an ‘intent to collaborate’ he means either a desire for the wrongful act or knowledge of it. In the latter sense Germany intended to collaborate in the sending of US airplanes to Lebanon (even though it may not have desired intervention in Lebanon), as it gave assistance knowing that US intervention in Lebanon would result.

1269 *Ibidem*, p. 111.
1270 An example is provided by the ILC: Germany’s provision of air bases to the US in 1958 to send US airplanes to Lebanon for military intervention there. The Rapporteur, Judge Ago, considered this situation to fall within the complicity rule, yet it is unlikely that Germany desired US intervention in Lebanon. Germany probably rendered this assistance to the US because of the close relationship between the two States. Ago noted that the responsibility of the State [Germany] was ‘based on passive conduct or toleration on the part of their organs’ in Summary Records of the 1313th meeting, *Yearbook of the ILC*, 1975, vol. I, p. 42, para 4, UN Doc. A/CN.4/SER.A/1975.
In the 1978 Draft, The ILC explained the culpability requirement of Article 27 as follows:

As the Article states, the aid and assistance in question must be rendered ‘for the commission of an internationally wrongful act’, i.e. with the specific object of facilitating the commission of the principal internationally wrongful act in question. Accordingly, it is not sufficient for it to be possible for aid or assistance provided without such intention to be used by the recipient State for unlawful purposes, or for the State providing aid or assistance to be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act.\textsuperscript{1272}

By stating that the aid must be given ‘with the specific object of facilitating’ the wrongful act, the ILC at first appears to require a purpose on the part of the assisting State to bring about the wrongful act of the assisted State. But then it states that ‘it is not sufficient…for the State providing aid or assistance to be aware of the eventual possibility of such use’. The latter statement implies that the assisting State is liable if it is aware that it is certain or practically certain that the aid will be put to a wrongful use, even in the absence of a purpose that it be so used. Such interpretation is strengthened by the final sentence, which indicates that the aid must be rendered ‘with a view to its use’ in a wrongful act. A State providing aid with knowledge of intended wrongful use would be rendering the aid ‘with a view to its use’ in a wrongful act.\textsuperscript{1273}

The UK delegate to the Sixth Committee feared that Article 27’s formulation ‘for the commission’ might be construed to permit too low a culpability standard:

The granting State must know that the aid or assistance being given was being used or would be used by the receiving State to commit an internationally wrongful act, and the granting State must intend to facilitate that act by giving the aid or assistance. Although the Commission apparently acknowledged the need for those two key elements, the wording of Article 27 did not seem to his delegation to give enough emphasis to them. The phase ‘rendered for the commission of an internationally wrongful act’ was too imprecise and could lend itself to varying interpretations in concrete cases. Accordingly his delegation believed that Article 27 was too sweeping in its formulation.\textsuperscript{1274}

\textsuperscript{1273} Graefrath and Oeser in their discussion of the culpability standard in Draft Article 27 describe it only as ‘intent' and do not distinguish between purpose and knowledge: Graefrath, B., Oeser, E., and Steiniger, P.A.B., \textit{Teilnahmeformen bei der volkerrechtlichen Verantwortlichkeit}, Staat und Recht, 29 (1980), pp. 446-8.
\textsuperscript{1274} GAOR, 33rd Session, Sixth Committee, 37th meeting at p. 7, para 18, UN Doc. A/C.6/33/SR.37 (1978).
While the ILC explanation is not entirely clear, it seems to conclude that a State rendering aid with knowledge of intended unlawful use is liable for complicity.\textsuperscript{1275}

An example from an ongoing aid programme is US aid to Israel and Israel’s construction of civilian settlements in occupied Arab territory. The US was not only aware of an eventual possibility that its aid to Israel will facilitate construction of settlement. Given that Israel has declared plans to build settlements and has done so in the past, the US gives the money aware of the practical certainty that Israel will expend funds on settlements. A knowledge standard is found in the 1980 UN Security Council resolution on aid to Israel. The Council called on States ‘not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories’.\textsuperscript{1276} That language prohibits not only the giving of aid out of desire that it be used for settlements, but as well giving of aid that is to be used for settlements. It would certainly encompass the giving of aid with knowledge it would be so used and might go a step further to include the giving of aid without regard for whether it might be so used (recklessness or negligence).

The UN Charter Article 2 (5) does not impose strict liability standard for aiding aggression; rather, it contains no culpability standard. It requires States members to ‘refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action’. The absence of a culpability standard here does not mean that responsibility is imposed on a State that provides assistance without awareness that the assistance would be used to oppose the UN or at least awareness that there was a possibility that it might be so used. That much is implied by the wording of Article 2 paragraph 5. The phrasing suggests that the provider of the aid is aware of the recipient’s intent to use the assistance to oppose the UN action. It would be counterproductive to impose an impossible burden on assisting State of bearing responsibility where it has no reason to anticipate the wrongful use of contributed resources.

It is therefore submitted that with respect to the subjective requirement in Article 16, intent on the part of the complicit State is required. This follows both from the analysis of international practice as well as from considerations concerning the construction of Article 16. The intent need

\textsuperscript{1275} That was the view stated by the Special Rapporteur. That approach is consistent with imposition of responsibility in the examples given by Ago and by the ILC as a whole as instances of State practice on complicity.

not be focused on the eventual effect of the wrongful act of the main actor, but on the contribution of the complicit State to the commission of the wrongful act. This does not require the complicit State to actually wish for the outcome of the wrongful act.\textsuperscript{1277}

9.3.4. A Double Obligation Requirement

In addition to the elements set out above, Article 16 demands that the act committed by the principal State would also be internationally wrongful if committed by the complicit State. Where the rule is one of customary international law, both parties will most likely be bound by the obligation. However, with respect to treaty law, this element may limit the scope of the rule.

10. State Complicity in Customary International Law

While the debates in the ILC have left unresolved the question of whether Article 16 actually reflects a rule of customary international law,\textsuperscript{1278} the ICJ, considering Serbia’s potential complicity in the genocide at Srebrenica, has held that the rule reflected in Article 16 has been accepted as one of customary international law.\textsuperscript{1279}

Arguing in favour of the customary status of such a rule, both Special Rapporteurs Roberto Ago and James Crawford relied on ambiguous state practice.\textsuperscript{1280} This practice consists of protests against the supply of financial and military aid to a belligerent,\textsuperscript{1281} the permission of the use of a State’s territory by another State to carry out an armed attack against a third State,\textsuperscript{1282} the circumvention of sanctions imposed by the UN Security Council,\textsuperscript{1283} and calls by the United Nations General Assembly to UN Member States to refrain from supplying arms and other assistance to countries with questionable human rights records.\textsuperscript{1284} Almost all of these examples can be interpreted as relating to primary rules rather than to a distinct secondary rule: for example, the supply of financial and military aid to a belligerent may be a violation of the laws of neutrality. In addition, the use of a State’s territory by another State to carry out an armed attack is a violation of the primary obligation of a State not to knowingly allow its territory to be

\textsuperscript{1277} Aust, H.P., \textit{supra} note 1121, p. 420.
\textsuperscript{1278} Nolte, G. and Aust, H.P., \textit{supra} note 357, p. 7.
\textsuperscript{1279} \textit{Genocide} case, para. 420.
\textsuperscript{1281} ILC Report on State Responsibility, Commentary to Article 16, para 7.
\textsuperscript{1282} \textit{Ibidem}, Article 16, para 8.
\textsuperscript{1283} \textit{Ibidem}, Article 16, para 9.
\textsuperscript{1284} \textit{Ibidem}.
used to the detriment of other States. It is true that the ILC has also made reference to specific primary rules which prohibit States to provide assistance for the commission of wrongful acts by other States in certain areas, but this argument only raises the question of whether the norms referred to are exceptions to or whether they are expressive of a general rule. In other words, it is doubtful whether a secondary rule can be derived from a combination of mostly primary obligations. It is questionable whether a strict distinction between primary and secondary rules can always be drawn.

Whether the practice quoted by the ILC is sufficient to prove the existence of a customary rule cannot be answered here. Governmental comments expressed during the ILC drafting process seem to lend more support to the existence of a customary rule than not. The Venice Commission of the Council of Europe has referred to Article 16 when determining the international legal obligations of the Council of Europe Member States in respect of secret detention facilities and inter-state transport of prisoners. The presence of French military advisors in Rwanda prior to the genocide in 1994 prompted the Rwandan government to establish an investigatory commission in order to show that France was complicit in the genocide. The US State Department held an investigation into the possible Israeli use of US-made cluster bombs in the 2006 Lebanon conflict which may have violated an agreement between the US and Israel prohibiting the unlawful use of such weapons. Article 16 was also considered and applied by the German Federal Constitutional Court and the German Federal Administrative Court.

The array of statements and state practice listed below suggest that there does indeed exist a primary rule prohibiting aid or assistance to internationally wrongful

1285 Ibidem, Article 16, para 2.
1287 Support was, among others, expressed by Finland, UN Doc. A/C.6/33/SR.39, para 4; Mali, YBILC 1980, Vol. II Pt. One, 101; Mexico, the Netherlands, Japan, the United Kingdom, the USA, UN Doc. A/CN.4/488, 75 et seq.
1288 These governments include Germany and Switzerland, See UN Doc. A/CN.4/488, at 75 et seq.
1291 See Israel May Have Violated Arms Pact, U.S. Officials Says, New York Times (28 January 2007, Section 1, Column 1, 3).
conduct, although its exact scope remains unclear. It remains to be determined how far Article 16 is the proper articulation of this norm.

While the vast majority of authors hold that Article 16 ARSIWA represents customary international law, others discuss this issue, while some are sceptical in this regard.\textsuperscript{1294} In the meantime, the ICJ has stated that Article 16 ARSIWA represents customary international law.\textsuperscript{1295} As the Court only posited the customary character of Article 16 and assessed neither state practice nor the underlying \textit{opinion juris}, it is not possible to infer from the judgment what the Court had in mind as the exact content of the rule. Therefore, it is worthwhile attempting to shed more light on Article 16 as an expression of customary international law. An overview of the relevant international practice on state complicity is presented below.\textsuperscript{1296}

\section*{10.1. Status of Complicity as a Customary Norm}

There is as yet no treaty on the law of state responsibility. Thus, if complicity is prohibited, it must be by a customary norm. Customary norms are developed by state practice.\textsuperscript{1297} The ILC has concluded that state practice on complicity is sufficient to warrant a conclusion that complicity is accepted by States as customary law.\textsuperscript{1298} Until the ILC drafted a complicity provision in the 1970s, writers on state responsibility did not mention it.\textsuperscript{1299} But the post-War world produced enough state practice to enable the ILC to conclude that such responsibility had been accepted as customary law.\textsuperscript{1300}

\subsection*{10.1.1. Complicity by Way of Provision of Military Aid in State Practice}

State practice reveals that States have formed the conviction that they are forbidden by international law to provide material aid to other States for the commission of internationally

\begin{thebibliography}{99}
\bibitem{1294} Aust, H. P., \textit{supra} note 1121.
\bibitem{1295} \textit{Genocide} case, para. 420.
\bibitem{1296} The most complete surveys of international practice so far has been conducted by Quigley, J, \textit{supra} note 356, p. 77 et seq.
\bibitem{1298} Ago, R., \textit{Seventh report on State Responsibility}, p. 59.
\bibitem{1300} ILC Report on State Responsibility, pp. 252-3 (1978 Yearbook of the ILC, pp. 103).
\end{thebibliography}
wrongful acts.\textsuperscript{1301} Acts constituting complicity may involve a direct violation of international law. The Organization of American States (OAS) characterized as illegal the provision of material assistance by the US to the UK during the Malvinas-Falklands conflict in 1982. Charging the UK with ‘acts of war against the Argentine Republic’, the OAS resolved ‘to urge the Government of the United States of America…to refrain from providing material assistance to the United Kingdom, in observance of the principle of hemispheric solidarity recognized in the Inter-American treaty of Reciprocal Assistance’.\textsuperscript{1302}

The rule prohibiting the placing of territory at the disposal of an aggressor State addresses a narrow and specific form of complicity. There exists a state practice denoting a wider rule in respect of both aggression and the prohibition on the use of force. The strongest evidence may be found in the provision of military aid that is used to commit aggression, though some practice is more general both at the level of aid provided and in respect of the wrong assisted.\textsuperscript{1303} As a general principle, the provision of aid, military or otherwise, is lawful in international law, setting a basic presumption allowing free intercourse among nations.\textsuperscript{1304} This basic presumption is confined by allegations of complicity.

For example, in 1951, the UN General Assembly condemned the People’s Republic of China’s participation in North Korea’s acts of aggression during the Korean Crisis, stating that … ‘by giving direct aid and assistance to those who were already engaged in committing aggression …has itself engaged in aggression in Korea.’\textsuperscript{1305} In 1982, after declaring that Israel’s occupation of the Golan Heights constituted an act of aggression, the General Assembly called on Member States to refrain from supplying aid or assistance to Israel.\textsuperscript{1306} The ILC, citing practice in support of the general rule in Article 16, notes that in 1984 the Islamic Republic of Iran protested the

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{1301}] The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of \textit{opinion juris sive necessitates}. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough’: \textit{North Sea Continental Shelf}, ICJ Reports, 1969, p. 44.
\item[\textsuperscript{1302}] Twentieth Meeting of Consultation of Ministers of Foreign Affairs, Res. 1, Serious situation in the South Atlantic, OEA/Ser.F/II.20, doc. 80/82, rev. 2, at p. 3 (29 May 1982), reprinted in International Legal Materials, 21 (1982), p. 672, at p. 674.
\item[\textsuperscript{1304}] See Lowe, V., supra note 1115, p. 6, discussing the requirement of knowledge for state responsibility to arise: 'There is, for example, nothing wrong in principle, with supplying vehicles to another State.'
\item[\textsuperscript{1305}] UN General Assembly Resolution 498 (V) 1 February 1951 UN Doc. A/RES/498 [1], Aust, H.P., supra note 1121, p. 109.
\item[\textsuperscript{1306}] UN General Assembly Resolution 37/123 of 16 December 1982, UN Doc. A/RES/37/123.
\end{enumerate}
\end{footnotesize}
United Kingdom’s supply of financial and military aid to Iraq in the Iran-Iraq armed conflict, aid which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance facilitated Iraq’s aggression. This allegation was denied by the United Kingdom. In 1998, a similar allegation surfaced that the Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq’s representative to the United Nations.

10.1.1.1. Military Aid Used for Aggression

In recent years state practice on complicity has been most substantial in provision of material aid. Aid has been asserted to be unlawful where it has been used for committing aggression, for violating rules of warfare, and for violating human rights. Brownlie writes that ‘the objective of aid must be lawful’, that provision of material aid is unlawful if ‘intended to further preparation for unlawful resort to force’, and that supply that may entail responsibility includes ‘weapons, military aircraft, radar equipment’ used for aggression. As complicity in aggression Ago cited the supply of another State with weapons to attack a third State. The Thai ILC member stated that Article 27 ARSIWA (now Article 16) would apply to sale of arms or military equipment for use by the recipient State to commit an internationally wrongful act.

The issue of arms supplies was discussed in a 1958 statement of the British Secretary of State. The underlying scenario involved ‘substantial shipments of arms from the Soviet bloc … to the Yemen and some of this equipment, including mortars and heavy machine guns, has been used on the frontier’ to (then British) Aden. The Secretary of State, when asked in parliament whether it would protest to alleged suppliers of arms to Yemen, when Yemen was allegedly using those arms for aggressive purposes, replied that ‘the policy of Her Majesty’s Government has always been to urge restraint in arms deliveries to the Middle East but arms deliveries do not

\[1307\] ILC Report on State Responsibility, Commentary on Article 16, para. 7.
\[1308\] Ibidem.
\[1309\] Brownlie, I., supra note 294, pp. 259-60.
\[1310\] Ibidem, p. 1919.
\[1311\] Ago, R., Seventh report on State Responsibility, p. 58.
in themselves constitute grounds for protest.\textsuperscript{1314} Commenting on the aforementioned Government statement, Lauterpacht wrote:

> There is…nothing in the Answer to support the view that a State which knowingly supplies arms to another for the purpose of assisting the latter to act in a manner inconsistent with its international obligations can thereby escape responsibility for complicity in such illegal conduct.\textsuperscript{1315}

The concept that States must refrain from facilitating aggressive acts by other States appears in the UN Charter. Article 2, paragraph 5, requires Member States to ‘refrain from giving assistance to any State against which the UN is taking preventing or enforcement action’. The rationale is that the target State is acting unlawfully. The UN Charter requires States to avoid assisting that illegality.

The US has invoked complicity in aggression in charging the Soviet Union with supplying other States financially and militarily. One US official charged:

> Soviet arms are the life’s blood of Soviet aggression by proxy. In recent years, the Soviets and their proxies have repeatedly used force or the threat of force to expand their influence and frustrate peaceful change. With Soviet arms and support, Vietnamese troops occupy Kampuchea and threaten Thailand; Libya threatens Chad, Tunisia, the Sudan, Egypt and Morocco; Afghani planes and armoured units raid Pakistan; and Cuban troops stationed in Angola and Ethiopia threaten regional stability.\textsuperscript{1316}

In 1964 and again in 1967, the US threatened to terminate aid to Turkey to forestall possible Turkish aggression against Cyprus.\textsuperscript{1317} The US Congress cut military aid to Turkey after it invaded Cyprus in 1974.\textsuperscript{1318} Furthermore, the US cut-off military aid to Indonesia for six months in 1975-6, as a response to Indonesia’s military intervention in East Timor.\textsuperscript{1319} In 1981, Israel destroyed the nuclear site of Osirak in Iraq in what was widely considered to be a violation of

\textsuperscript{1314} Ibidem.
\textsuperscript{1315} Ibidem. The UK delegate to the UN General Assembly’s Sixth (Legal) Committee has also expressed the view that a State that renders aid for commission of an internationally wrongful act violates international law: GAOR, 33rd Session, Sixth Committee, 37th meeting, at p. 7, para. 18, UN Doc. A/C.6/33/SR.37 (1978).
\textsuperscript{1316} Buckley, J. L., Under-Secretary of State for Security Assistance, Science and Technology. Statement before the Senate Foreign Relations Committee, 5 February 1982, Department of State Bulletin, April 1982, at p. 84.
\textsuperscript{1317} At the time, the US was the primary supplier of military equipment and military grants to Turkey. See Selden, A. Z., Economic Sanctions as Instruments of American Foreign Policy, Greenwood Publishing Group, 1999, p. 128.
\textsuperscript{1318} Ibidem.
\textsuperscript{1319} Quigley, J., supra note 356, p. 90.
Article 2(4) of the UN Charter. In this context, the Movement of Non-Aligned States urged States not to render aid or assistance to Israel in the context and aftermath of the Osirak crisis. The non-aligned countries called upon all States, and especially the United States of America, to refrain from giving Israel any assistance, whether military, political or economic, that might encourage it to pursue its aggressive policies against the Arab countries and the Palestinian people. Subsequently, the UN General Assembly also condemned the attack and reiterated ‘its call to all States to cease forthwith any provision to Israel of arms and related material of all types which enable it to commit acts of aggression against other States’.

Moreover, Article 16 ARSIWA was invoked by Iran in 1992 in the *Oil Platforms* case against the United States where certain aspects of the so-called ‘tanker war’ in the Persian Gulf were at issue. In particular, Iran accused the United States of having violated its duties as a neutral State by actively supporting Iraq in a political, economic, diplomatic and military way. In a response to the United States’ Counter Claims issued in September 2001, Iran expressly relied on Article 16 ARSIWA to attribute responsibility to the United States. It called Article 16 a ‘general principle of law that participation in a violation of the law committed by a different actor itself constitutes a violation’. The memorial then cited Article 16. It further explained that:

> [t]he activities of the United States described above were not only violations of the law of neutrality; they also constituted unlawful assistance to an aggression, i.e., a violation of the prohibition of the use of force. This violation engages the international responsibility of the United States. This means that the United States is liable to make compensation for any damage sustained by the victim of that aggression. At the very least, as already explained above, the existence of this legal duty must be a bar to any claim for compensation raised by the United States in this case.

### 10.1.1.2. Military Aid Used to Violate Rules of Warfare

---

1325 *Oil Platforms Case*, Further Response to the United States of America Counter-Claim submitted by the Islamic Republic of Iran, 24 September 2001, para. 7.50.
1326 *Ibidem*, para. 7.51.
States have recognized a duty not to facilitate violation of the humanitarian law of war by other States. Provision of material used by another State to violate rules of warfare has provoked protest by States. Assisting States have cut-off supply of such materials upon learning of its unlawful use. Iran in 1984 lodged a protest based upon the premise of complicity against the UK for violation of the rules of warfare. It charged the UK with supplying chemical weapons to Iraq, which Iraq allegedly had used against Iranian troops.\textsuperscript{1327} Iran characterized the UK’s alleged provision of the weapons as a ‘criminal act’. The UK denied the charge.\textsuperscript{1328} Following publication of a UN inspection team report that Iraq had so used chemical weapons, the US and several European States cut-off sales to Iraq of chemicals that could be employed to make such weapons.\textsuperscript{1329}

The four 1949 Geneva Conventions oblige States parties to ensure that other States parties abide by these conventions. Article I, common to the four conventions, requires States to ‘ensure respect for the present Convention in all circumstances’.\textsuperscript{1330} This obligation prohibits assisting an unlawful act but requires States, in addition, to endeavour to bring an offending State into compliance. According to the Red Cross commentary, common Article I requires that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention.\textsuperscript{1331} The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.\textsuperscript{1332}

\textsuperscript{1327} New York Times, 6 March 1984, at p. A6, col. 3.
\textsuperscript{1328} The Times, 5 March 1984, at p. I, col. 6.
Beginning in 1978, various UN organs called on Member States not to assist Israel in the illegal occupation of the West Bank. In 1978, the UN Commission on Human Rights cited Article I in calling on States not to aid Israel in annexing and colonizing Arab territories under its military occupation. States were asked not to aid in violations of human rights and fundamental freedoms by Israel in the occupied Arab territories. After asserting that Israel had violated the Convention by annexing and colonizing such areas, the Commission reiterated[1] its call to all states, in particular the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War, in accordance with Article I of that Convention, … to avoid … extending any aid which might be used by Israel in its pursuit of the policies of annexation and colonization or any other policies and practices referred to in the present resolution.1333

In 1980, the Security Council utilized the concept of complicity by means of aid in a resolution on Israeli settlements in occupied Palestinian territory. After stating that the settlements violated international law, the Council unanimously called upon all States not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories.1334 Similarly, the General Assembly repeatedly called on States not to assist Israel in its occupation and annexation of the occupied Palestinian territory.1335 In one of these resolutions, the General Assembly expressly mentioned ‘the international responsibility of any parties that supply Israel with arms or economic aid that augment its war potential’.1336

Thus, one may conclude that the common Article I represents state practice of all State parties to the four Geneva Conventions to the effect that facilitating a violation of humanitarian norms is itself a violation of norms of state responsibility.

10.1.1.3. Military Aid Used to Violate Human Rights

Foreign aid in general may also contribute to violations of international law. As Antonio Cassese has remarked:

The question whether foreign economic assistance to states grossly disregarding human rights has an impact on the enjoyment of civil and political rights in those states is undoubtedly very complex. The nexus between economic assistance and human rights is often indirect and subtle.\textsuperscript{1337}

Although it may thus in practice be difficult to find state responsibility for complicity through the provision of foreign aid, it may nonetheless be possible to shed further light on States’ attitudes to the granting of foreign aid to other States violating international law.

The complicity concept has been invoked against giving aid to a State that commits gross violations of human rights. In the Seventh Report on State Responsibility Roberto Ago wrote:

\begin{quote}
Complicity may, for example, also take the form of provision of weapons or other supplies to assist another State to commit genocide, to support a regime of apartheid, or to maintain colonial domination by force, etc.\textsuperscript{1338}
\end{quote}

In 1984, Iran protested against the United Kingdom and France over the alleged supply of chemical weapons to Iraq which were subsequently used against Iranian troops in the First Gulf War. Both the United Kingdom\textsuperscript{1339} and France\textsuperscript{1340} denied having furnished such weapons to Iraq.

There have been official protests by Angola, Cuba and the Soviet Union in March 1986 against the United States allegedly granting military and financial support to South Africa in its aggression against and partial occupation of the territory of Angola.\textsuperscript{1341}

In 2006, Rwanda broke off diplomatic relations with France and set up a commission to investigate the role of France in the 1994 genocide against the Tutsi and Hutu moderates. France was a traditional supporter of the Rwandan government at the time, delivered arms and other military supplies and also had military advisers in the country about whom opinion is divided as to whether they were in any way involved in the planning of military operations which had an impact on the genocide.\textsuperscript{1342} Credible sources testify that the delivery of ammunition and

\textsuperscript{1340} \textit{Neue Zürcher Zeitung}, 9 March 1984, p. 4 (Fernausgabe).
\textsuperscript{1341} These protests are referred to – without further references – in Arangio-Ruiz, G., \textit{supra} note 273, p. 54, para. 246.
communication technology for the military continued while the genocide was already progressing.\textsuperscript{1343} Rwanda has announced its intention to bring a case before the ICJ if the Commission’s results were to show that France was complicit in the genocide.\textsuperscript{1344} In 2007, Rwanda has reiterated this position.\textsuperscript{1345} In 2008, it finally published the Commission’s report which held, \textit{inter alia}, that ‘at all times during the genocide, France diplomatically and militarily assisted the interim government which planned and implemented the genocide’.\textsuperscript{1346} The French government has denied all of the charges presented by the Rwandan government and held them to contain ‘unacceptable accusations’.\textsuperscript{1347} At the end of 2009, the two countries re-established diplomatic relations and there is no longer talk of judicial action against France.\textsuperscript{1348}

In 2008, Russia protested against alleged arms deliveries by Ukraine to Georgia during the summer conflict of 2008. Russia considered Georgia’s use of military force in the breakaway province of South Ossetia as a violation of international law. In the context of a meeting concerning bulk gas supplies in October 2008, Prime Minister Putin told his Ukrainian counterpart, Yulia Tymoshenko, that ‘a more serious crime than arms deliveries in a conflict cannot be imagined’.\textsuperscript{1349} Russian President Dmitri A. Medvedev remarked in this regard that ‘[u]nfortunately, several countries close to us participated in this’, meaning the Georgian conduct in the summer of 2008.\textsuperscript{1350} The Ukrainian response to this allegation is evasive. Ukrainian President Yushchenko has affirmed that ‘Ukraine has every right to sell weapons to any country, including Georgia, that is not under international sanctions’.\textsuperscript{1351} Furthermore, in the 2008 war

\begin{itemize}
\item \textsuperscript{1343} Dallaire, R., Manocha, K., Degnarain, N., \textit{supra} note 1290, pp. 865–6; see also Grünfeld, F., and Huijboom, A., \textit{The Failure to Prevent Genocide in Rwanda: The Role of Bystanders}, Leiden: Nijhoff, 2007, pp. 233 \textit{et seq}.
\item \textsuperscript{1344} \textit{Le Monde}, 2 November 2006, p. 6; \textit{Neue Zürcher Zeitung}, 27 November 2006, p. 5.
\item \textsuperscript{1345} \textit{Libération}, 19 April 2007, p. 9.
\item \textsuperscript{1349} See \textit{Pipe Down}, The Economist, 10 January 2009, p. 26.
\item \textsuperscript{1351} \textit{Ibidem}.
\end{itemize}
between Russia and Georgia, Russia accused the US of flying 2,000 Georgian soldiers from Iraq to the theatre of conflict in Georgia.\textsuperscript{1352}

In the 2009 conflict in Sri Lanka, India was accused of assisting Sri Lanka’s alleged violations of international humanitarian law.\textsuperscript{1353}

The following state practice shows that assisting States themselves have terminated their aid to States violating human rights. For example, in the case of Chile after the military coup in 1973 a number of States terminated aid to Chile, citing human rights violations.\textsuperscript{1354} The States terminating aid to Chile stated that they were doing so because of Chile’s human rights violations, they did not expressly state they considered themselves to be under an obligation to terminate aid. Yet that is the implication of their action.\textsuperscript{1355} A number of exemplary statements on this issue were made in the context of an examination by a UN Sub-Committee of ECOSOC. The Sub-Committee questioned States on their conduct towards the military government in Chile. Belgium stated that, ‘since the coup d’état of 11 September 1973, Belgium has refrained from supplying military or financial aid to Chile’, and ‘that the position of the Belgian Department of Foreign Affairs will remain unchanged until the rule of law is restored and human rights are fully re-established in Chile’.\textsuperscript{1356} The United Kingdom asserted that it had ‘taken a series of measures aimed at exerting pressure on the military regime in Chile over human rights’, including ‘a ban on all arms supplies’, ‘suspension of British aid’ and ‘denial of debt rescheduling facilities’.\textsuperscript{1357} The Federal Republic of Germany stated that it had not provided Chile with any more development aid and had also discontinued supplies of weapons and other

\textsuperscript{1353} See India Accused of Complicity in Deaths of Sri Lankan Tamils, The Times, 1 June 2009, available at www.timesonline.co.uk/tol/news/world/asia/article6401557.ece (last visited 1 November 2010).
\textsuperscript{1354} The vast majority of the States which have commented on their behaviour towards Chile in the filed of economic relations after 11 September 1973, have pointed out that they have either refused or substantially decreasing their economic assistance to Chile, as a direct consequences of the suppression of civil and political rights in that country carried out by the present authorities. Thus, the introduction of a repressive system in Chile has resulted in a vast segment of the international community denying economic aid to Chile, with a view to bringing pressure to bear on the present Chilean authorities for a restoration of human rights in that country. In Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile, Sub-Commission on Prevention of Discrimination and Protection of Minorities, vol. 31, p. 89, para 419, UN Doc. E/CN.4/Sub.2/412 (1978). On the 1973 Chile aid cut-offs, see generally Cassese, A., supra note 1337, pp. 251-63.
\textsuperscript{1355} Quigley, J., supra note 356, p. 95.
military equipment.\textsuperscript{1358} Italy stated that it had ‘suspended the privileges enjoyed by Chile under the Insurance and Export Credit Law’ and that ‘official aid by Italy to the Chilean government is virtually non-existent’\textsuperscript{1359} The Netherlands\textsuperscript{1360} and Norway\textsuperscript{1361} also stated that they had suspended their aid to Chile.

After the occupation of the Falkland Islands in 1982, the Federal Republic of Germany refused to allow further exports of weapons and war materials to Argentina. The German Federal Government posited in a statement that it would prevent the delivery of arms to a State responsible for a violent act contrary to international law and in non-compliance with UN Security Council resolutions.\textsuperscript{1362}

The Netherlands stopped financial support for the maintenance of the Surinam military after a new military government was blamed for massive human rights violations in 1982. Under agreements concluded in 1975, the Netherlands had agreed to deliver economic subsidies and financial assistance for the maintenance of the Surinam military. In 1982, the Dutch government suspended the 1975 treaties and protested against the human rights violations.\textsuperscript{1363} Although the Netherlands government did not motivate its move entirely on the basis of considerations of complicity but primarily on the basis of the \textit{clausula rebus sic stantibus}, it is noteworthy that in a diplomatic note of 14 December 1982 presented to Surinam it made reference to its position that the granting of development assistance shall not entail co-responsibility for serious human rights violations.\textsuperscript{1364} In this perspective, considerations of complicity could constitute the very change of circumstances which prompts a State to terminate its treaty relationship with another State engaged in violations of international law.\textsuperscript{1365}

\begin{itemize}
\item \textsuperscript{1358} \textit{Ibidem}, p. 9.
\item \textsuperscript{1359} UN Doc. E/CN.4/Sub.2/412 (1978), para. 407.
\item \textsuperscript{1360} UN Doc. A/32/234 (1977), pp. 12–13.
\item \textsuperscript{1361} UN Doc. E/CN.4/Sub.2/412 (1978), para. 410.
\item \textsuperscript{1363} This is reported in Tams, C. J., \textit{Enforcing Obligations Erga Omnes in International law}, Cambridge Studies in International and Comparative Law, 2010, p. 227.
\item \textsuperscript{1364} A translation of the note into German is provided by Hans-Heinrich Lindemann, ‘Die Auswirkungen der Menschenrechtsverletzungen in Surinam auf die Vertragsbeziehungen zwischen den Niederlanden und Surinam’, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 44 (1984), pp. 64–93, at pp. 67–8, note 17.
\end{itemize}
In 1995, the German Federal Government stated that it was in close contact with the Turkish
government to survey whether the limitations attached to German arms deliveries to Turkey were
respected. These limitations provided that the arms delivered could only be used in a situation in
which Article 5 of the NATO Treaty\textsuperscript{1366} would be applicable (self-defence against an armed
attack). The Federal Government would constantly monitor Turkey’s compliance with this
requirement.\textsuperscript{1367}

In 2004 the United Kingdom posited that due to accusations of gross violations of human rights
by the Colombian armed forces no military assistance would be granted ‘to individuals or units
known, or suspected to have been, implicated in human rights abuses or in collusion with
paramilitary forces’.\textsuperscript{1368} This statement is, however, ambiguous as to whether it also has delivery
of weapons to States in mind, as the Under Parliamentary Secretary of State for the Foreign and
Commonwealth Office spoke of ‘individuals or units’ and not of States. However, one could
assume that the same rationale should apply to States which engage in human rights abuses.
Support for this interpretation can be derived from the fact that, in March 2009, the UK
government ‘quietly ended nearly a decade of military aid to Colombia’s armed forces’.\textsuperscript{1369} It has
been mentioned that accusations of gross violations of human rights have been the motive for
this decision. In a previous statement to the parliament, the Foreign Secretary had announced that
the UK government ‘shares the concern … that there are officers and soldiers of the Colombian
armed forces who have been involved in, or allowed, abuses’.\textsuperscript{1370} The actual termination of the
military aid was not commented on by the UK government sources. The Colombian deputy
defence minister acknowledged, however, the termination, and said his government was
‘extremely surprised’.\textsuperscript{1371}

\textsuperscript{1366} North Atlantic Treaty of 4 April 1949, entered into force on 24 August 1949, 34 UNTS 243.
\textsuperscript{1367} Reported in Grote, R., \textit{Völkerrechtspraxis der Bundesrepublik Deutschland im Jahre 1995}, Zeitschrift für
\textsuperscript{1368} See the statement reprinted in \textit{British Year Book of International Law} 75 (2004), p. 706.
\textsuperscript{1369} See \textit{UK Ends Bilateral Military Aid to Colombia}, The Guardian, 29 April 2009, available at
www.guardian.co.uk/world/2009/apr/29/colombia-uk-military-aid (last visited 1 November 2010).
\textsuperscript{1370} Statement of Foreign Secretary David Miliband of 31 March 2009, available at
\textsuperscript{1371} See \textit{The Guardian}, 29 April 2009, \textit{supra} note 1369.
In 2004, the Commission on Foreign Affairs of the Swiss Bundesrat appealed to the Swiss government to stop arms deliveries to Israel as long as Israel did not comply with its obligation under international law, most notably its obligations under the Geneva Conventions.\(^\text{1372}\)

Another source of international practice which is frequently mentioned in studies on complicity in the law of state responsibility is United Nations practice.\(^\text{1373}\) This is not surprising, as every UN Security Council imposed sanctions regime has included an arms embargo against the targeted State except the Resolution 1054 sanctions regime against Sudan\(^\text{1374}\) and the measures adopted in the context of the Hariri murder in Lebanon in 2005.\(^\text{1375}\) Just as with domestic legislation banning the export of arms and weapons, the UN Security Council resolutions banning the granting of military support could be considered as having been adopted with a view to prevent support for unlawful activities. Hence, they could be considered as forming part of international practice for a rule against state complicity.\(^\text{1376}\)

In this regard, the sanctions against the racist regime of Southern Rhodesia were based on considerations of legality. The minority rule of the regime under Ian Smith was considered to be in violation of the right to self-determination of the majority of Rhodesians.\(^\text{1377}\) In Resolution 217, the Council called upon States to undertake a range of voluntary measures against the minority regime. These measures included not recognizing the illegal regime’s claim to power or entertaining diplomatic relations with it, refraining from providing arms to the illegal regime, and breaking all economic relations with the illegal regime.\(^\text{1378}\) These obligations were further strengthened in successive resolutions which called on all States not to provide financial or


\(^{1373}\) Quigley, J., supra note 356, pp. 92–3.


\(^{1376}\) However, this reasoning would presuppose that the UN Security Council resolutions impose sanctions in response to unlawful behaviour of the targeted State. That is, however, not necessarily the case. The UN Security Council, being a political organ, has a duty to ensure international peace and security according to Article 24(1) of the UN Charter. For this reason, not every sanctions regime which calls for some form of non-assistance to a State should be considered as contributing international practice relevant for this study of complicity. Things are, however, different with respect to sanctions regimes and other resolutions where notions of lawfulness have clearly played a role.

\(^{1377}\) UN Doc. S/RES/217 (1965).

\(^{1378}\) Ibidem.
economic aid to the racist regime" and ‘to refrain from recognizing the illegal regime or rendering any assistance to it’. The rational behind that provision was that the government of Southern Rhodesia was committing an internationally wrongful act by maintaining a racial-minority administration and that economic aid would facilitate illegality. Nearly all UN Member States complied with the boycott. In contrast to other sanctions regimes, this connection between the determination that the regime in Southern Rhodesia was ‘illegal’ and the adoption of sanctions may warrant the assumption that the idea of complicity had some role to play in the considerations leading up to this sanctions regime.

In 1982, the General Assembly invoked complicity in relation to aid to Guatemala, urging governments ‘to refrain from supplying arms and other military assistance as long as serious human rights violations in Guatemala continue to be reported’. The Assembly also called on States ‘to refrain from the supply of arms and other military assistance to El Salvador’ because of what it found to be serious human rights violations.

Considerations of illegality and the attitude of third States towards it also played a role in the way UN organs dealt with South Africa’s continued presence in Namibia. Formerly under a South African mandate granted by the League of Nations, it was at issue after the Second World War and the founding of the United Nations whether the territory of Namibia was to be introduced into the United Nations’ trusteeship system or whether, as was claimed by South Africa, it was to form part of the latter’s territory. After protracted institutional developments, the mandate of the League of Nations was terminated by the UN General Assembly. In Resolution 276 (1970), the Security Council recognized this termination and further defined the

---

1384 Situation of Human Rights and Fundamental Freedoms in El Salvador, 15 December 1980, Draft Res. IX. The vote was 70-12-55.
1385 UN Doc. A/RES/2145 (XXI) of 27 October 1966, para. 4.
legal status of Namibia and the ensuing obligations of South Africa and other UN Member States. In paragraph 2 of the resolution, it declared ‘that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid’. Furthermore, it called upon ‘all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution’. To further clarify the situation, an advisory opinion was secured by the UN General Assembly from the ICJ. In both situations, concerning Southern Rhodesia and South Africa’s continued presence in Namibia, the crucial question was on which legal basis the obligation of non-assistance rested and whether the UN Security Council had a general concept of complicity in mind or did it only impose an obligation of non-assistance in order to provide for an effective application of the sanctions. In this respect, the Court held in its advisory opinion on Namibia that ‘[a] binding declaration made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence’. As to the immediate effects for third States, the Court held that:

The Member States of the United Nations are … under an obligation to recognize the illegality and invalidity of South Africa’s continued presence in Namibia. They are also under an obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia.

The above examples taken from state practice show that the idea of participation in the internationally wrongful act of another State by providing aid or assistance, and thus, in this sense, of ‘complicity’, has become accepted in international law. That conclusion represents the view of many highly qualified publicists.

---

1387 Ibidem, operative para. 5; see also UN Doc. S/RES/301 (1971), operative para. 11, on the further concretisations obtained through the ICJ advisory opinion.
1389 Ibidem, para. 117.
1390 Ibidem, para. 119.
1391 ILC Report on State Responsibility, p. 252 (1978 Yearbook of the ILC, p. 103). Boyle suggested that complicity might even be considered to constitute one of the ‘general principles of law’ referred to in Article 38 (1) of the
10.1.2. Opinio Juris

In order to generate customary international law, the existence of practice alone is not sufficient. Rather, it needs to be supplemented by the accompanying opinion juris, the belief that the form of conduct represented by the practice is required by law. Opinion juris with respect to complicity is indicated by the protests and other charges made by States and responses to them, by the decisions and resolutions of UN organs, by the ICJ in the Nicaragua case and the Genocide case, by the practice of States refraining from aiding wrongful acts of other States and by statements of representatives of States in the General Assembly’s Sixth Committee.\(^\text{1393}\)

The protests made by States charging complicity have manifested a conviction of the protesting State that the allegedly complicit State has violated a legal obligation. UK protested to Yemen for having permitted Egyptian aircraft to use Yemeni territory for allegedly aggressive attacks against British territory: its protest was based on the ground that it was impermissible for Yemen to permit its territory to be so used. Iran, in charging the UK with providing Iraq with ingredients for chemical weapons, described the UK role as a ‘criminal act’. The US has stated that the USSR ‘cannot escape responsibility for the violence’ allegedly perpetrated by Cuba with Soviet material support. The USSR described the US and an ‘accomplice’ in alleged aggression by Israel in Lebanon in 1982. The USSR accused Israel of being a ‘direct accomplice’ in aggression allegedly perpetrated by the US and UK against Jordan in 1958.\(^\text{1394}\) The allegedly complicit States have never questioned the protesting State’s assertion that the conduct alleged to have aided the principal State would be wrongful.\(^\text{1395}\)

Opinio juris on complicity is further reflected in the work of the UN Security Council and the General Assembly. Resolutions and decisions embodying complicity manifest the view of the States supporting those resolutions and decisions that the allegedly complicit conduct is wrongful. The Human Rights Commission, in opposing provision to Israel of aid that would be used for annexation or colonization in the Arab territories occupied by Israel, manifested a

Statute of the ICJ. See Boyle, F., *Destructive Engagement in Southern Africa*, International Practitioner's Notebook, 1985, p. 34. An international tribunal might well conclude that complicity is such a ‘general principle’ though State practice seems to have established complicity as a customary norm.

\(^\text{1392}\) ICJ Statute, Article 38, para. 1 (d)


\(^\text{1394}\) Ibidem.

\(^\text{1395}\) Ibidem, p. 98.
conviction that State providing such aid would be acting wrongfully. That conclusion is reinforced by the fact that the resolution refers to the obligation of States Parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War to ensure compliance with the Convention by other State Parties, Israel being a State Party.\textsuperscript{1396}

The General Assembly, in calling on States ‘to renounce...providing Israel with military, economic and political assistance’, asserted that such withholding of aid would ‘discourage Israel from continuing its aggression, occupation and disregard of its obligations under the Charter’, thus implying that an aid-giving State would be acting wrongfully since it would be promoting wrongful acts by Israel.\textsuperscript{1397} The same implication is found in the UN Security Council resolution against aid to Israel ‘to be used specifically in connection with settlements in the occupied territories’.\textsuperscript{1398} The premise is that it is wrongful to aid the allegedly illegal acts.

In its 1971 \textit{Namibia} case, the ICJ found that States are obliged to refrain from engaging with South Africa in dealings that imply recognition of its occupation of Namibia, thereby suggesting that acts that promote the illegal act of another State are themselves wrongful.\textsuperscript{1399} The Court based its finding on two premises. First, it found States to be under such an obligation because the Security Council had ordered them not to engage in such dealings, and Article 25 of the UN Charter requires Member States to carry out the Security Council decisions. Secondly, the Court based its finding on the ‘general international law’.\textsuperscript{1400} It thus found in customary law a principle that States are obliged to refrain from aiding the indicated illegal acts of other States.

While the practice alone warrants an inference of \textit{opinion juris} regarding complicity, there is abundant indication of express recognition by States that complicity is forbidden by customary law. The complicity norm has been invoked by the UN General Assembly, the UN Security Council, the UN Commission on Human Rights, and the ICJ. A number of multilateral treaties have invoked it as well. On the other side, there is no body of practice that rejects the complicity norm.

\textsuperscript{1397} GA Res. 38/180, para I (102nd plenary meeting), 19 December 1983. In a 1982 resolution on acts by Israel in Palestinian territories occupied by Israel in 1967 the Assembly ‘urge[d] all Governments which have not yet done so...to renounce the policy of providing Israel with military, economic and political assistance...’.
\textsuperscript{1400} Brownlie, I., \textit{supra} note 294, pp. 259-60.
11. Special Rules on Complicity

The rules of the law of state responsibility constitute only the basic framework of international law in that regard. They are supplemented by subject-specific provisions which may establish the responsibility of complicit States in situation in which it would be impossible to do so under the general rules which are Articles 16 and 41(2) ARSIWA. That specialised rules on complicity may go further than the general ones is plausible as States have agreed to these constraints in specific international agreements. If we survey the field of international law, three areas are especially relevant as they include special rules on complicit State behaviour. These are the rules on the use of force and the system of collective security, international humanitarian law and human rights law.

11.1. The Use of Force and Collective Security

In the case of the unlawful use of force, it is warranted to speak of a ‘network’ of rules on state complicity, which mutually complement and reinforce each other.

Under a just war theory, restrictions were placed upon third States not to assist the party to a conflict which was waging an unjust war. In contrast, the international law of the classic, positivist period in the nineteenth century reaffirmed the law of neutrality as an option of choice, a third State having the right to remain aloof from a conflict and to keep an equal distance from the belligerents. With emergence of the mechanisms of collective security (the League of Nations, the UN), these questions had to be embedded in the interpretation of the UN Charter.

When attempting to assemble the pertinent rules on the role of third States with respect to the use of force, the following layer of rules are relevant. First, the general rule on aid or assistance to the commission of an internationally wrongful act as reflected in Article 16 ARSIWA. Secondly, Article 41(2) ARSIWA, supplementing Article 16 and providing that, after the commission of a serious breach of the international prohibition against aggression, States are under a special obligation not to render aid or assistance to the maintenance of the situation brought about by the serious breach. This rule will be further analysed in Chapter 17 below. Thirdly, Article 3(f) of

---

1401 See Article 55 ARSIWA on the principle of lex specialis.
1402 Cerone, J., supra note 1148, p. 533.
1403 Nolte, G. and Aust, H.P., supra note 357, p. 17.
the Definition of Aggression of 1974 provides that States shall not allow their territory, which they have placed at the disposal of another State, to be used by that State for the perpetration of an act of aggression against a third State.\footnote{Declaration on the Definition of Aggression, UN Doc. A/RES/3314 (XXIX) of 14 December 1974.} Responsibility under this provision is potentially more compelling than Article 16 as it does not require a special form of intent or knowledge on the part of the assisting State.\footnote{See further Nolte, G. and Aust, H.P., supra note 35, p. 6.} Fourthly, this strict and objective form of responsibility for the permission to make use of territory for the commission of an unlawful use of force is further supplemented by the general obligation on States to control their own territory.\footnote{See Orakhelashvili, A., Overlap and Convergence: The Interaction Between Jus ad Bellum and Jus in Bello, 12 Journal of Conflict and Security Law 1997, pp. 157-96, at p. 193.} Sovereignty over territory presupposes the effective exercise thereof which includes an obligation not to allow for unlawful conduct harming other States to take place on one’s own territory.\footnote{Island of Palmas Case, RIAA II, 839.} This obligation thus requires the exercise of due diligence on the part of States over the uses to which their territory is put.\footnote{On the due diligence as a standard for complicit states, see generally Talmon, S., supra note 1191, p. 219.} Fifthly, further obligations not to become complicit in the unlawful use of force may be triggered once the Security Council has taken preventive or enforcement action under Chapter VII of the UN Charter. In addition to concrete obligation of non-assistance which may be provided for in the operative parts of individual resolutions, Article 2(5) of the UN Charter provides that States are under an obligation to ‘refrain from giving any assistance to any State against which the UN is taking preventive or enforcement action’. Enhanced duties of isolation apply once the Security Council has taken a position on who is responsible for the bringing about of a situation which threatens international peace or security or may even constitute a breach of the peace or an act of aggression.

Finally, a sixth layer of obligations may apply for third States through the application of the traditional laws of neutrality.\footnote{See Lowe, V., supra note 1115, p. 13; Nolte, G. and Aust, H.P., supra note 357, p. 6.} Most authorities are willing to accord States the privilege to adopt a neutral position and not to side with one party to an ongoing armed conflict.\footnote{Brownlie, I., supra note 252, p. 404, Dinstein, Y., supra note 1127, p. 164.} Once applicable, the laws of neutrality trigger a special form of rules against complicity which aim to prevent the neutral State from rendering support to both sides of the conflict and to receive, in return, the benefit of remaining unaffected by the conflict.\footnote{Orakhelashvili, A., supra note 1407, pp. 157-96, at p. 193.} In order to uphold this status,
neutral States are required to refrain from supporting any of the parties to a conflict in an unequivocal manner and are subject to losing the status of a neutral State if they consistently violate their obligations of neutrality.\textsuperscript{1413}

Of these six layers of obligations of States potentially complicit with violations of Article 2(4) of the UN Charter, Article 16 is only the most basic one.\textsuperscript{1414} It is suggested that its strict criteria will mean that, in most cases concerning the unlawful use of force, it will not be the crucial rule upon which determination of responsibility for complicit States will depend.

11.2. International Humanitarian Law

In the field of international humanitarian law, no direct provision on complicity in violations of the rules of this body of law exists.\textsuperscript{1415} However, Common Article I of the 1949 Geneva Conventions I-IV is frequently interpreted as giving rise to an obligation of non-assistance with respect to the content of the Conventions.\textsuperscript{1416} The Article provides: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’ It has been referred to as the ‘nucleus for a system of collective responsibility’.\textsuperscript{1417} Hotly contested, and the relevant issue is the question whether the wording ‘to ensure respect’ is supposed to establish an obligation on States and what its precise scope would be. Some authors have held the view that it merely provides for a faculty of States to insist upon the application of the relevant rules of the Geneva Conventions in armed conflicts to which they are not a direct party.\textsuperscript{1418} The ICJ has interpreted the obligation ‘to ensure respect’ as having its roots in customary international law and as requiring States not to encourage violations of international humanitarian law by others.\textsuperscript{1419} The Court was even more explicit in its \textit{Wall} opinion, where it held that Common Article I provides that ‘every state party to that Convention, whether or not it is a party to the specific conflict, is under an obligation to ensure that the

\textsuperscript{1413} Dinstein, Y., \textit{supra} note 1127, p. 25.
\textsuperscript{1414} Corten, O., \textit{Le droit contre la guerre}, 1 Journal on the Use of Force in International Law 2, 2014, p. 268.
\textsuperscript{1418} Kalshoven, F., \textit{Respect and Ensure}, 2 Yearbook of International Humanitarian Law, 1999, pp. 3-61, at p. 60.
\textsuperscript{1419} \textit{Nicaragua} case, paras. 220, 255.
requirements of the instruments in question are complied with’.\textsuperscript{1420} Finally, reference can be made to the study on customary international law conducted by the ICRC.\textsuperscript{1421} Rule 144 provides:

States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible to stop violations of international humanitarian law.\textsuperscript{1422}

The Commentary to this rule expressly points to Article 16 ARSIWA which would support the customary status of Rule 144.\textsuperscript{1423}

The concrete content of Common Article I could be understood as at least requiring States not to render aid or assistance to violations of the Geneva Conventions.\textsuperscript{1424} In this respect, there is an ongoing debate whether Article 16 could imply the general principle which is underlying this interpretation of Common Article I.\textsuperscript{1425} A problematic feature of this debate is the conflation of encouragement with complicity, which occurs frequently. In the general law on state responsibility, incitement or encouragement do not render a state responsible.\textsuperscript{1426} In the context of international humanitarian law, the ICJ has, however, deduced the prohibition to encourage violations of the law from Common Article I.\textsuperscript{1427} Accordingly, responsibility of third parties under Common Article I may commence at a lower threshold than is the case with Article 16 ARSIWA.\textsuperscript{1428} However, for those cases in which assistance to violations of international humanitarian law is at stake, it is very possible to construe Article 16 as the \textit{lex generalis} and Common Article I as \textit{lex specialis}.\textsuperscript{1429} The strict criteria embodied in Article 16, especially with

\begin{footnotesize}
\begin{enumerate}
\item They may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible to stop violations of international humanitarian law.


\item Ibidem, p. 510.

\item Ibidem, p. 511.

\item Azzam, F., \textit{supra} note 1416, p. 70.

\item Graefrath, B., \textit{supra} note 1181, p. 373.


\item \textit{Nicaragua} case, paras. 220, 255.

\item Aust, H. P., \textit{supra} note 1121, p. 388.

\end{enumerate}
\end{footnotesize}
respect to the requisite degree of intent, may then be attenuated once complicity enters the scope of Common Article I.\textsuperscript{1430}

Assistance to violations of international humanitarian law can thus be seen as an example where more demanding standards change the interpretation of Article 16 ARSIWA. The obligation to ensure respect for the observance of international humanitarian law thus impacts upon the required vigilance of the complicit State. Sassoli has described this with respect to the transfer of weapons in a situation in which systematic violations of international humanitarian law would occur in the State to which the weapons are transferred.\textsuperscript{1431} Under the strict rules of Article 16, it would need to be established with certainty that the weapons were used for the concrete violations and the aiding State could possibly maintain that it rendered the support not for the violation of the international humanitarian law. However, such a narrow understanding of the obligations incumbent upon the assisting State would no longer be possible under the heightened standard imposed by Common Article I: ensuring respect for international humanitarian law would thus demand more of the complicit State than the general rule which is Article 16 ARSIWA.\textsuperscript{1432} However, one should also note the scepticism with respect to the practical impact of Common Article I, a provision which would only rarely be used. At least in theory, Common Article I is, however, a valuable addition to the rules on complicity. It may thus contribute to further ‘encircle’ complicit State action with normative barriers.

11.3. Human Rights Law

The field of human rights law is too diverse to point to a single mechanism by which the problem of complicit States is established beyond the general state of the law as embodied in the ARSIWA. However, three different mechanisms can be identified by which, in special areas of the law, more far-reaching responsibility for complicit States is established. These comprise special rules on complicity, obligations which cover different forms of State conduct which is, however, similar to complicity and the existence of positive obligations in several human rights treaties. Furthermore, complicity may have a role to play in determinations whether a given violation of the law took place within the jurisdiction of a particular State.

\textsuperscript{1430} Brehm, M., \textit{supra} note 1429, p. 386.
\textsuperscript{1431} Sassoli, M., \textit{supra} note 1429.
\textsuperscript{1432} \textit{Ibidem}, p. 413, Brehm, M., \textit{supra} note 1429, p. 386.
Article III(e) of the Genocide Convention provides that ‘complicity in genocide’ shall be punishable. The wording of this provision indicates that originally it was intended to require States to provide for the criminal prosecution of individuals who have been complicit in genocide. Article III (e) was not so much understood as a provision under which responsibility of States for complicity would be established. The ICJ established why it considered the Genocide Convention to directly impose obligations under Articles I and III for States party to the Convention. With respect to Article I of the Genocide Convention, the Court held that it would be:

[p]aradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.

The Court extended this finding to the acts enumerated in Article III. While the Court recognized the fact that:

[t]he concepts used in paragraphs (b) to (e) of Article III, and particularly that of ‘complicity’, refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals…it would not be in keeping with the object and purpose of the Convention to deny that the international responsibility of a State – even though quite different in nature from criminal responsibility – can be engaged through one of the acts, other than genocide itself, enumerated in Article III.

Accordingly, Article III (e) of the Genocide Convention imposes upon States an additional obligation not to become complicit in genocide. The crucial question then is how this obligation differs from the general obligation not to aid or assist in the commission of a genocide under Article 16 ARSIWA. In this regard, the judgment sends ambiguous signals. In order to interpret Article III(e), the Court had recourse to Article 16 ARSIWA. It noted that, although conceptually distinct, Article 16 would merit consideration as there would be no apparent reason ‘to make any distinction of substance between “complicity in genocide”, within the meaning of Article III (e)’.

1433 Schabas, W. A., supra note 386, pp. 285 et seq.
1434 Genocide case, para 166.
1435 Ibidem, para. 167.
and the “aid or assistance” of a State in the commission of a wrongful act by another State within the meaning of…Article 16’. This could be interpreted to mean that, with respect to genocide, no stricter standards with respect to complicity apply than the one embodied in Article 16. This issue will be further explored in Chapter 7.

Article 16 may indeed be suitable as a blueprint for responsibility for complicity in genocide under the Genocide Convention as the rules against genocide are among those rare examples in international law where intent on the part of a State is required in order to trigger responsibility. In order to hold a State responsible for the commission of genocide, it needs to be shown that the requisite dolus specialis was present. The ICJ has interpreted this requirement in the context of complicity in a way such that an accomplice must have, at the least, awareness of the special intent of the perpetrators of genocide. The words ‘at the least’ suggest that, normally, the accomplice should have more than this awareness. Although the provision on complicity in the Genocide Convention does not establish a stricter standard for complicit States, the ICJ has compensated for this finding in the form of a wide interpretation of the obligation to prevent genocide.

Positive obligations and obligations of prevention may also prove to be viable functional alternatives to Article 16 which may in some cases make it easier to establish the responsibility of a complicit State and may prove to be more flexible than a rigidly applied concept of complicity: first, determining the direct responsibility of a contracting party under a human rights instrument with respect to the compliance with positive obligations may absolve a court from having to consider the conduct of another State. Although no Monetary Gold principle in the technical sense would arguably hinder an international human rights body from doing so, it can be assumed that most courts would be reluctant to engage in such an assessment. Secondly,

---

1436 Ibidem, para 420.
1437 Schabas, W. A., supra note 386, pp. 206 et seq.
1439 Monetary Gold principle was enunciated by the ICJ in the Case of the Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954, p. 19, 32 (hereinafter: Monetary Gold case). According to that principle, the Court will not adjudicate on a case where the Court would be required, as a necessary prerequisite, to adjudicate on the rights or responsibilities of a non-consenting and absent third State. This principle is simply an application of the more general principle of consent and that the principle is derived from the more fundamental principle of the independence of States, i.e. the idea that States are not subject to external authority of other States or institutions created by other States.
1440 See, e.g., ECtHR, Saadi v. Italy, para. 126.
the criteria for a breach of a positive obligation are almost by definition vague; more so than with complicity. Accordingly, they allow for the consideration of policy questions.

The analysis of three distinct areas of international law has shown that international law may provide for a more far-reaching rule on state complicity which cure some of the deficiencies attached to Article 16 ARSIWA. These rules should be mutually reinforcing. Whereas the rules pertaining to the use of force provide for different consequences for complicit State behaviour, international humanitarian law provides for a functionally similar rule, the obligation ‘to ensure respect’ for the 1949 Geneva Conventions which demands more of complicit States than it is the case with Article 16.

12. Complicity and Peremptory Norms of International Law

The network of rules relating to States’ obligations arising in respect of other actors encompassing specific primary rules prohibiting state complicity as well as general primary rule prohibiting broader forms of complicity in any international wrong of another State is supplemented by additional obligations that States bear in respect of breaches of peremptory norms of international law, as reflected in Chapter III ARSIWA.1441 A peremptory norm of international law is one ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.1442 The prohibition on genocide, aggression, slavery and torture are commonly understood to be norms of this character.1443

Article 40 ARSIWA governs the international responsibility entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. According to Article 40(2) ARSIWA a breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation. Article 41 ARSIWA sets out the particular consequences of serious breaches of peremptory norms. These consequences,

1441 Chapter III ARSIWA.
almost entirely, entail obligations on non-responsible States. In the first place, all States are under an obligation to cooperate in bringing to an end the serious breach. Second, Article 41(2) ARSIWA provides that “[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.”

The second clause of Article 41(2) supplements the prohibition on aid and assistance in Article 16, dealing with ‘conduct “after the fact” which assists the responsible State in maintaining’ the situation created by the breach. In contrast to rules of complicity that respond to participation in a particular wrongful act, Article 41(2) defines the principal wrong more broadly as the situation created by the serious breach. Concerning the scope of Article 41(2) and its relationship with Article 16, it is argued that the rules are mutually reinforcing.

An obligation of non-assistance figures among the legal consequences that the Articles on State Responsibility attach to the commission of a serious breach of a peremptory norm under general international law. It is interesting to note that none of the three recent ICJ cases that involved assistance in arguably serious breaches of peremptory norms (i.e., the Wall case, the Genocide case and the Armed Activities case explicitly refer to Article 41).

Article 41(2) ARSIWA sets out an additional obligation of non-assistance in addition to that embodied in Article 16 ARSIWA. The relationship of this special provision to Article 16 is to be examined. The concept of non-assistance presupposes a close factual connection between the support rendered and the commission of a specific wrongful act. The obligations of non-assistance do not exist only with respect to serious breaches of peremptory norms, but apply with respect to the whole spectrum of international law. The ILC held that the obligation of non-

---

1444 The obligation of non-recognition applies to all states, including the responsible state. See ILC Report on State Responsibility, Commentary on Article 41 (9).
1445 Tams, C. J., supra note 166, p. 1161.
1446 Article 41(1) ARSIWA.
1447 Article 41(2) ARSIWA.
1448 ILC Report on State Responsibility, Commentary on Article 41 (11).
assistance in Article 41(2) ARSIWA needs to be viewed together with Article 16.\textsuperscript{1451} Article 41(2) can be considered as \textit{lex specialis} to Article 16. This entails that there should be some analogy between the criteria set out in Article 16 to trigger responsibility for complicity and those for Article 41(2), save for special considerations the ILC had in mind with respect to the regime of serious breaches of peremptory norms under general international law. Therefore, responsibility for complicity under Article 41(2) should also presuppose a certain factual and causal connection between the support rendered and the maintenance of the situation brought about by the serious breach.\textsuperscript{1452}

12.1. The Concept of Complicity in Article 16 and Article 41(2) ARSIWA

The following section will further examined whether different criteria exist rendering a complicit State responsible under Article 16 and 41(2) ARSIWA.

12.1.1. Aid or assistance ‘after the fact’

The first notable difference between Article 16 and Article 41(2) ARS is that the latter applies ‘after the fact’.\textsuperscript{1453} Accordingly, the concept of complicity as developed in Article 41(2) ‘extends beyond the commission of the serious breach, and it applies whether or not the breach itself is a continuing one’.\textsuperscript{1454} The issue of continuing wrongful acts would also be covered by Article 16. Article 14(2) ARSIWA provides that ‘[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation’. In its Commentary, the ILC explains that a wrongful act is not of a continuing character because its effects or consequences extend in time.\textsuperscript{1455} The examples the ILC gives for acts of a continuing character relate to the maintenance in effect of legislative provisions which are incompatible with international law, an unlawful detention, the unlawful occupation of territory or of premise or embassies or the stationing of armed forces in another State without its consent.\textsuperscript{1456} In such cases, Article 41(2)
ARS would apply alongside Article 16 whose applicability is not excluded by the fact that the aid or assistance is rendered continuously. However, the ILC has also remarked that Article 41(2) applies regardless of whether the obligation is of a continuing character. Hence, it must be presumed that there are other effects of serious breaches of peremptory norms which continue to have an impact although they have terminated as such in their quality as wrongful acts.

It is important to note that the ILC is apparently not very strict with the concept of assistance after the fact, as it considers the obligation of non-assistance in Article 41(2) ARS to be applicable in the case of wrongful acts of a continuing character. As Article 16 also applies in these cases, it is indeed the case that the additional impact of Article 41(2) is rather limited in terms of its temporal applicability. One such scenario has been analysed by the Joint Committee on Human Rights of the UK House of Lords and House of Commons. In its report on ‘Allegations of UK Complicity in Torture’, the Committee considered that a ‘general practice of passively receiving intelligence information which has or may have been obtained under torture’ would be ‘likely to be in breach of the UK’s international law obligation not to render aid or assistance to other States which are in serious breach of their obligation not to torture’. This would be aid or assistance which would help other State to maintain the wrongful situation. The Committee based its reasoning expressly on Article 41(2) ARS.

12.1.2. The Nexus Requirement in respect of Article 41(2)

Some commentators have argued that the ILC has attenuated the requirement of a causal connection between the support rendered and the commission or maintenance of the unlawful act/situation. This argument is deducted from the fact that the aid or assistance is to be rendered for the maintenance of the situation brought about by the serious breach which would require a less direct impact of the support rendered than is the case with Article 16. The requisite impact of the aid or assistance cannot be measured as to its effect upon the commission

1460 *Ibidem*.
1462 *Ibidem*. 

284
of the wrongful act, but with respect to its contribution to the maintenance of the situation brought about by the serious breach.

12.1.3. The Attenuated Subjective Requirement of Article 41(2) ARSIWA

A marked difference between Article 16 and Article 41(2) could lie in an attenuated subjective requirement of the latter provision. The ILC has stipulated that distinctions apply in this regard: there is no requirement of knowledge or intent set out in Article 41(2) or in the Commentary thereto. In this regard, the Commission expressly held that ‘it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State’.1463 The ILC’s Commentary merely notes that a State is ‘presumed’ to know when a ‘situation involving serious breaches’ exists.1464 This explanation is unsatisfactory, as awareness of the existence of a situation is quite different from knowledge that the aid provided will considerably assist the maintenance of that situation.

Thus, as to the knowledge requirement, it is open to debate whether the Article 41, like Article 25 (3) (d) ICC demands that the participant acts either with the aim that the group engages in (any) crime, or at least in the knowledge that the group will use the assistance to commit a specific crime. The ILC’s reasoning is convincing insofar as serious breaches of obligations under peremptory norms should not go unnoticed and therefore the intent requirement postulated by Article 16 need not be upheld in situations of serious breaches.1465 This different treatment of the subjective requirement can also be justified in light of the importance of the legal values protected by peremptory norms. Directed against aggression, slavery, genocide, racial discrimination, apartheid and torture as well as comprising the most basic rules of international humanitarian and human rights law, *jus cogens* norms define the bottom line of an *ordre public international*. It is thus only proper to demand of third States a higher degree of vigilance when obligations triggered by *jus cogens* rules are at stake.1466

However, as the ILC has remarked, ‘[i]nternationally wrongful acts usually take some time to happen’.1467 Accordingly, no strict distinction between complicity which occurs prior to and in

1463 ILC Report on State Responsibility, Commentary on Article 41, para 11.
1464 Ibidem, Commentary on Article 41, para 12.
1467 ILC Report on State Responsibility, Commentary on Article 14, para. 2.
parallel to the commission of a wrongful act and assistance which is rendered thereafter will be possible.

Article 41 (2) provides for a separate duty of non-assistance but, in contrast to Article 16, it does not require intent or knowledge. Thus, as far as serious violations of *jus cogens* are concerned there is a stronger rule against complicity.\(^{1468}\) It is striking that the ILC has only lowered the standards of attribution in the limited field of serious breaches of peremptory norms. As the ILC has pointed out in its Commentary, the lack of a subjective element in Article 41 (2) is motivated by the fact that ‘it is hardly conceivable that a State would not have noticed of the commission of a serious breach by another State.’\(^{1469}\) *A contrario*, this suggests that uncertainty about the commission of the main act is a relevant factor for the application of Article 16.

The obligation on States to stop violations of international law, the obligation to actively cooperate to bring a situation involving serious breaches of peremptory norms to an end – a failure to take positive action has, nevertheless, never led to a judicial finding that the obligation to ensure respect has been breached.\(^{1470}\) In *Nicaragua* it was the positive act of encouragement that led the Court to find a breach of the provision. Significantly, it found a breach *exclusively* in relation to the issuance of a manual that unequivocally promoted war crimes.\(^{1471}\) This despite the fact that US aid enabled the *contras* to fight and commit large-scale violations and that the US could have exercised considerable control over them if it desired.\(^{1472}\)

The relationship between Article 16, the serious breaches regime and the primary rules on complicity can thus be conceived in the following way: Article 16 provides for the general rule on complicity. As such it is characterized by the most restrictive interpretation among the three.

---

\(^{1468}\) The scope of application of Article 41 (2) is not easy to determine. Generally it applies 'after the fact' while being applicable regardless if whether the internationally wrongful act is continuing or not, see ILC Report on State Responsibility, Commentary on Article 41, para 11.

\(^{1469}\) ILC Report on State Responsibility, Commentary on Article 41, para 11.


\(^{1472}\) The Court at para. 109 refers to:

[T]he potential for control inherent in the degree of the *contra's* dependence on aid. Yet despite the heavy subsidies and other support provided to them by the US, there is no clear evidence of the US having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.
The other two regimes for responsibility of complicit States go further. The serious breaches regime does so because of the importance which the international community attaches to the values protected thereby and because of the assumption that serious violations of peremptory norms are clearly identifiable. Some primary rules go further because States have committed themselves to a stricter regime. It is thus a systematic and functional relationship between three different regimes which suggests a restrictive interpretation of Article 16.

13. State Participation in the Acts of Non-State Actors

The previous Chapters considered how international law prohibits state complicity in the commission of an internationally wrongful act by another State, analysing in particular the general complicity rule. However, States are not the only actors on the international plane that commit internationally wrongful acts; non-state actors also commit international crimes, and often enough they carry out these acts with the support of a State. This Chapter will assess two developments that affect the ways in which international law regulates the participation of States in the wrongs caused by non-state actors. Firstly, the increased regulation by international law of the conduct of non-state actors has opened up the possibility of States bearing complicity obligations in respect of that conduct. Now that non-state actors can commit principal wrongs on the international plane, there is principal wrongdoing by non-state actors for a State to be complicit in. Secondly, in limited circumstances international law attributes the conduct of non-state actors to the State where there is a sufficient connection between them.

The recent conflicts in BiH, Libya, Syria and Iraq, with their multitude of parties and participants, serve to underline the importance of complicity responsibility for States as a means of addressing violations of international law committed by non-state actors. Where States participate in the wrongs caused by non-state actors, conceptual problems arise for complicity. As previously argued, complicity is essentially derivative as it requires wrongdoing by the principal actor. Without any of such wrongdoing, there is nothing for the complicit State to be complicit in. The historical failure of international law to regulate the conduct of non-state actors directly limited the possibility of state responsibility for complicity in these situations.

---

1473 ILC Report on State Responsibility, Commentary on Article 41, para 11; De Hoogh, A., supra note 52, p. 161.
1474 Hakimi, M., supra note 1228, p. 341.
1475 Kadish, S. H., supra note 397, p. 12.
1476 Weisberg, R., Reappraising Complicity, 4 Buff Criminal Law Review 217, 244, 2000-2001; Quigley, J., supra note 356, pp. 77, 86.
There was simply no international wrong for the State to be complicit in. This follows from the historical normative structure of the international legal system. Even if the State is no longer the exclusive subject of international law, it has long been its primary subject. However, now that other legal subjects bear international obligations and non-state actors can commit principal wrongs on the international plane, it is possible to articulate a State’s responsibility for participating in violation of those obligations in terms of complicity. A non-state actor may be responsible for international wrongdoing as a principal and the participating State may be linked to that wrongdoing as an accomplice. The clearest example of this development is the prohibition on state complicity in genocide. The prohibition of state complicity in genocide is a specific complicity rule. Wherever international law imposes obligations on non-state actors, so state complicity in violations thereof would give rise to international responsibility.

Furthermore, some instances of State participation in the conduct of non-state actors will give rise to state responsibility under broader due diligence obligations that require States to protect against certain wrongs. There are number of areas where international law imposes obligations of non-participation in the actions of another actor, as opposed to complicity obligations. For instance, as elements of the principle of the non-use of force, the General Assembly’s Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereinafter: “the Declaration on Friendly Relations”) adopted in 1970, provides:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the resent paragraph involve a threat or use of force.

---

1477 De Frouville takes up this point in explaining that the rejection of complicity ‘simply follows from the classical structure of normativity in international law which is articulated around the obligations, the only subjects of which are States’ in de Frouville, O., Attribution of Conduct to the State: Private Individuals in Crawford et. al (eds.) The Law of International Responsibility, Oxford University Press, 2010, pp. 257, 276.


1479 De Frouville, supra note 1477, p. 277.

1480 Ibidem.

1481 UN General Assembly Resolution 2625 (XXV) of 24 October 1970, Declaration on Principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN (hereinafter: Declaration on Friendly Relations).
These, however, are not complicity rules *stricto senso*, for there is no principal wrong from which the state responsibility is derived.\textsuperscript{1482} These provisions reflect customary international law and might be seen as analogous to traditional duties of neutrality. Just as violation of the duty of neutrality does not give rise to a form of derivative responsibility in relation to some wrongful act of the belligerent State, so the participation by the State does not give rise to derivative responsibility in relation to some wrongful act of a non-state actor. In both cases, the responsibility of a State for its wrongful participation is not linked to any wrong of a principal actor.\textsuperscript{1483} Instead, a number of classic modes of complicity are used to constitute a direct and independent obligation of non-participation binding the State.\textsuperscript{1484}

### 13.1. State Complicity, Non-State Actors and Attribution

The idea of complicity has penetrated the rules of attribution in international law. In customary international law, the requisite connection between a State and a non-state actor for attribution is marked by a search for an agency relationship. As will be further discussed in the next Chapter, complicit relationship is insufficient to attribute the conduct of non-state actors to the State.\textsuperscript{1485} Only with a sufficient degree of dependence, direction, or control, the conduct of a non-state actor becomes attributable to the State.\textsuperscript{1486} Thus, in the absence of *lex specialis*, a complicit relationship is insufficient for attribution.

It is foundational in international law that state responsibility requires the attribution of conduct to the State.\textsuperscript{1487} As a basic rule, States are responsible for the conduct of their own organs.\textsuperscript{1488} The corollary of this rule is the non-attribution of conduct of non-state actors to the State.\textsuperscript{1489} Nonetheless, international law does attribute, in limited circumstances, the conduct of non-state actors to the State where these is a sufficient connection between them. Traditionally, the nature of that connection entails an agency relationship.\textsuperscript{1490} Attribution, in this sense, may occur under

\textsuperscript{1482} De Frouville, *supra* note 1477, pp. 276-7.
\textsuperscript{1484} In respect of state participation in terrorism, see UNSC Res 1373 (28 September 20019 UN Doc S/RES/1373; UNGA Res 40/61 (9 December 1985) UN Doc A/RES/40/61; UNGA Res 44/29 (4 December 1989) UN Doc.
\textsuperscript{1485} Article 8 ARSIWA; *Genocide* case, paras. 398-407.
\textsuperscript{1486} Articles 4, 8 ARSIWA.
\textsuperscript{1487} Article 2 ARSIWA.
\textsuperscript{1488} Article 4 ARSIWA.
\textsuperscript{1489} ILC Report on State Responsibility, General Commentary on Chapter II (2), (3).
\textsuperscript{1490} Chinkin, C., *supra* note 1186, p. 142.
the test of complete dependence or strict control\textsuperscript{1491} (rendering a non-state actor a \textit{de facto} State organ\textsuperscript{1492}) or the subsidiary test of direction or control of specific conduct (the effective control test).\textsuperscript{1493} Both of these tests constitute rules of customary international law\textsuperscript{1494} and denote the search for a relationship of principal to agent.\textsuperscript{1495} As will be shown below, in the law of state responsibility the attribution of conduct of non-state actors to the State is rooted in agency, not complicity.\textsuperscript{1496}

The ILC Articles envisage different standards for when a State is implicated in violations committed by a non-state actor, compared to when those are perpetrated by another State. Article 17 ARSIWA addresses state responsibility for the wrongful conduct of another State:

\begin{quote}
A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.\textsuperscript{1497}
\end{quote}

Similarly, according to the ILC, a State will be responsible for the internationally wrongful conduct of non-state actors (individuals or groups), absent acknowledging or adopting such conduct as its own, if those persons are “acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”.\textsuperscript{1498} As determined by Article 16 ARSIWA, in the absence of direction and control of another State in the commission of a wrongful act, a State can nevertheless be responsible for knowingly providing aid or assistance to the commission of an international wrong by another State. However, for a State to be responsible for providing aid or assistance to non-state actors that commit international crimes, the Articles on State Responsibility require that such groups were instructed, directed or controlled by the State in relation to the specific conduct.\textsuperscript{1499} Thus, comparing to requirements set forth in Article 16

\begin{thebibliography}
\bibitem{1491} Nicaragua case, para. 109; Genocide case, para. 392; Talmon, S., \textit{supra} note 62, pp. 493, 499. For a more detailed elaboration on the test, see Sections 14.1.2, 14.1.3.
\bibitem{1492} Article 4 ARSIWA. For a more detailed elaboration on the test, see Chapter 7, Section 14.1.1.
\bibitem{1493} Article 8 ARSIWA; Nicaragua case, para. 115; Genocide case, para. 397.
\bibitem{1494} Genocide case, para. 385 with respect to Article 4 and para. 398 with respect to Article 8. See also \textit{Armed Activities} case, para. 160.
\bibitem{1495} Chinkin, C., \textit{supra} note 1186, p. 142.
\bibitem{1496} See \textit{infra} Chapter 14.
\bibitem{1497} Article 17 ARSIWA.
\bibitem{1498} Articles 8, 11 ARSIWA.
\bibitem{1499} Article 8 ARSIWA.
\end{thebibliography}
ARSIWA, the ILC imposed a higher threshold in order to invoke state responsibility in cases of aiding and assisting a non-state actor.

### 13.2. Attribution of Conduct of Non-State Actors to a State

Considerable judicial attention has been paid to the precise meaning of “control” required for international responsibility to be triggered because of State assistance to non-state actors, leading to a divergence between the view of the ICJ and the ICTY regarding the concept of control in this context. There remains a degree of uncertainty in relation to the appropriate level of control required. It was in the *Nicaragua* case that the ICJ originally found that the state responsibility could arise if it were proved that the State had itself directed or enforced the perpetration of the acts contrary to human rights and humanitarian law:

“For the conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”

However, the *Tadić* Appeals Chamber did not follow the jurisprudence of the *Nicaragua* case, rather it sought to assert the existence of a different control requirement for attributing the conduct of organized armed groups for purposes of state responsibility. While considering the issue of control when assessing how a non-international armed conflict might become “internationalized”, the *Tadić* Appeals Chamber took the opportunity to pronounce on broader issues of state responsibility. Namely, it was held that the appropriate criterion to imputing the acts committed by a non-state actor (i.e. the VRS) to the State (i.e. the FRY) under the law of state responsibility, was that of the “overall control” exercised over the non-state actor by the State. The *Tadić* Appeals Chamber took the view that acts committed by the VRS could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the RS and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY’s instructions, or under its effective control.

---

1500 *Nicaragua* case, para. 115.
1501 *Tadić* Appeals Judgment, paras. 84, 87, 88, 91, 97-104 et. seq.
1502 *Ibidem*, paras. 112 et seq. (See in particular para. 131.)
1503 *Ibidem.*
Subsequently, in the *Genocide* case the ICJ specifically addressed the ICTY’s overall control test and firmly reasserted its position regarding the appropriate standard for state responsibility for violations by non-state groups, stating squarely that it was “unable to subscribe to the [ICTY] Chamber’s view”.\textsuperscript{1504} According to the Court, it has to be proven that the perpetrators acted in accordance with the State’s instructions or under its effective control. It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.\textsuperscript{1505} The Court asserted that Article 8 ARSIWA embodies customary international law and provides that a State is responsible for the internationally wrongful acts of persons or groups “acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”. The Court’s interpretation is such that the person or group must essentially be the vehicle through which the crime is committed. Thus, in the *Genocide* case it needed to be shown that organs of the FRY had “originated the genocide”.\textsuperscript{1506} For the wrongful acts to be attributable to a State, there needed to be effective control exercised, or instructions given, “in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken”.\textsuperscript{1507} Although the Court found that genocide was committed at Srebrenica, it had not been proven that instructions were issued from organs of the FRY to commit those massacres or that the principal perpetrators were under its effective control.\textsuperscript{1508}

Thus, the ICJ clearly rejected the application of the *Tadić* “overall control test” in the context of attribution of acts when dealing with state responsibility for considering that “the overall control test has the major drawback of broadening the scope of state responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct [...] the “overall control” test is unsuitable, for it “stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility”\textsuperscript{1509} The Court’s vice-president, Judge Al-Khasawneh, on the other hand, expressed support for the ICTY approach, saying that to require both control

\textsuperscript{1504} *Genocide* case, para. 403.  
\textsuperscript{1505} *Ibidem*, para. 400.  
\textsuperscript{1506} *Ibidem*, para. 397.  
\textsuperscript{1507} *Ibidem*, para. 400.  
\textsuperscript{1508} *Ibidem*, para. 413.  
\textsuperscript{1509} *Genocide* case, para. 406.
over the non-state actors and the specific operations in the context of which international crimes were committed is too high a threshold.\textsuperscript{1510} According to Judge Al-Khasawneh, the inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore.\textsuperscript{1511}

14. State Complicity by way of Provision of Military Aid in the Genocide case

States may be found complicit in genocide. However, if genocide was not recognized to be internationally wrongful without reference to the status of the principal perpetrator, it would be impossible to express a responsibility of a State for its participation in the conduct of non-state actors in terms of complicity. There would be no principal legal wrong for the State to be complicit in. International law’s traditional structure would impede the imposition of responsibility for complicity.\textsuperscript{1512}

In the Genocide case the ICJ had to adjudicate, \textit{inter alia}, on the question of complicity in genocide, an act for which individuals may be punished under the Genocide Convention. On the basis of evidence produced before international criminal tribunal, the Applicant (i.e. BiH) contended that from 1993 onwards, around 1,800 VRS officers were “administered” by the 30th PC of the VJ (i.e., by the FRY); their payment, promotions and pensions were handled by the FRY. BiH submitted that the FRY actively supplied the VRS with arms and equipment throughout the armed conflict in BiH. The Applicant contended that up to 90 per cent of the material needs of the VRS were supplied by the FRY. According to a “consumption review” given by General Mladić at the Bosnian Serb Assembly on 16 April 1995, 42.2 per cent of the VRS supplies of infantry ammunition were inherited from the former JNA and 47 per cent of the VRS requirements were supplied by the VJ. The FRY generally denied that it had supplied and equipped the VRS but maintained that, even if that were the case, such assistance “is very familiar and is an aspect of numerous treaties of mutual security, both bilateral and regional”.\textsuperscript{1513}

As regards effective links between the RS Government and the FRY Government in the financial sphere, BiH maintained that the economies of the FRY and the RS were integrated through the creation of a single economic entity, thus enabling the FRY Government to finance the VRS in

\textsuperscript{1510} \textit{Ibidem}, Dissenting Opinion of Vice-President Al-Khasawneh, para. 39.
\textsuperscript{1511} \textit{Ibidem}.
\textsuperscript{1512} Jackson, M., \textit{supra} note 348, p. 214.
\textsuperscript{1513} \textit{Genocide case}, para. 239.
addition to its own army (VJ). According to BiH, the RS budget had virtually no independent sources of income, rather the National Bank of Yugoslavia was making available funds for “special purposes”, namely “to avoid the adverse effects of war on the economy of the Serbian Republic of Bosnia and Herzegovina”.\textsuperscript{1514} The FRY emphasized that any financing supplied was simply on the basis of credits, to be repaid, and was therefore quite normal, particularly in view of the economic isolation of the FRY and the RS. It also suggested that any funds received would have been under the sole control of the recipient, the RS.\textsuperscript{1515} Accordingly, the Court found that the FRY was making its considerable military and financial support available to the RS, and had it withdrawn that support, such would have greatly constrained the options available to the RS authorities at the relevant time.\textsuperscript{1516}

In the Genocide case, the Court was called upon to determine, \textit{inter alia}, whether the provision of political, financial and military aid by the FRY to the authorities of the RS, a non-state entity in BiH, used in the commission of genocide by the VRS invoked state responsibility for complicity.\textsuperscript{1517} This was the first time complicity was discussed by the Court. Ruling on the responsibility of the FRY for complicity in genocide, the ICJ resorted to the criminal law notion of ‘aiding and abetting’. Although addressed to interactions between States and “not directly related” to the examined case of aid or assistance to a non-state actor, the Court nevertheless applied Article 16 and asked whether the FRY, or persons acting on its instructions or under its direction or effective control, had provided aid or assistance to the commission of the Srebrenica genocide.\textsuperscript{1518} Non-state actors are generally beyond the purview of the ARSIWA. The Court, however, examined whether the principle underlying Article 16 applied to the Genocide Convention’s norm establishing prohibition of complicity in genocide. The Court saw no reason why it could not resort to Article 16 by means of analogy.\textsuperscript{1519}

The ICJ ascertained that state parties to the Genocide Convention were obligated to refrain from acts constituting complicity in genocide. It does not matter if the genocide is attributable to

\textsuperscript{1514} Ibidem, para. 240.
\textsuperscript{1515} Ibidem.
\textsuperscript{1516} Ibidem, para. 241.
\textsuperscript{1517} Ibidem, paras. 418-424. According to the ICJ, customary international law prohibits complicity in genocide.
\textsuperscript{1518} Ibidem, para. 420.
\textsuperscript{1519} Ibidem.
another State or committed by a non-state actor. Customary international law should be seen to prohibit complicity in genocide. The Court located the prohibition of complicity in genocide within the general law of international responsibility for aid and assistance. In the first place, the Court held that complicity certainly “includes the provision of means to enable or facilitate the commission of the crime”. Although “complicity” is not a notion which exists in the current terminology of the law of international responsibility, the Court considered complicity to be similar “to a category found among the customary rules constituting the law of state responsibility, that of the –aid or assistance– furnished by one State for the commission of a wrongful act by another State.” Accordingly, in constructing the meaning of complicity, the Court turned to Article 16 ARSIWA, rather than to doctrines of complicity as developed in international criminal law.

“The Court sees no reason to make any distinction of substance between ‘complicity in genocide’, within the meaning of Article III, paragraph (e), of the Convention, and the ‘aid or assistance’ of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16…In other words, to ascertain whether [the FRY] is responsible for ‘complicity in genocide’… it must examine whether organs of the FRY, or persons acting on its instructions or under its direction or effective control, furnished “aid or assistance” in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.”

This is the basis of the holding that the meaning of complicity in the context of genocide did not differ significantly from the provision of “aid and assistance” under Article 16. As noted above, a State that provides aid or assistance to another State need not direct or control that State, whereas the Court here seemed to blend Article 8 ARSIWA requirements of instructions, direction or control with those of Article 16 requiring the knowing provision of aid or assistance. According to the Court, for complicity to arise the aid or assistance had to be provided

---

1520 *Ibidem*, para. 167.
1521 *Ibidem*, para. 419.
1522 *Ibidem*, para. 419.
1523 *Ibidem*.
1524 *Ibidem*, para. 420.
1525 *Ibidem*. 

295
“knowingly”, with the person or organ being aware of the specific intent of the perpetrator to commit genocide.\textsuperscript{1526}

In order to determine the responsibility for complicity in genocide, the Court relied on the strength of political, military and financial links between the FRY and the RS.\textsuperscript{1527} For asserting complicity, the Court considered it necessary that the accomplice should at least have acted knowingly, aware of the \textit{dolus specialis} of the perpetrator. The Court was not convinced by the evidence furnished by the Applicant that such condition was met “because it is not established beyond any doubt whether the authorities of the FRY supplied the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way.”\textsuperscript{1528}

Therefore, the ICJ concluded that the FRY could not be held internationally responsible for complicity in the commission of genocide.

The question remains how the idea of aid or assistance under Article 16 fits with ordinary understanding of the scope of complicity. Drawing as it does on Article 16, the ICJ’s approach seems to deny the possibility of complicity by encouragement or abetment. The Court gives the example of the ‘provision of means to enable or facilitate the commission of the crime…’.\textsuperscript{1529} By looking to Article 16 rather than to international criminal law, the ICJ adopted a limited interpretation of complicity, seemingly ignoring that complicity ordinarily comprises both the provision of assistance to the principal \textit{and} influence on the decision of the principal to commit the wrong.\textsuperscript{1530} The idea that cases of complicit State influence should not give rise to responsibility is generally predicated on the assumption that the principal actor in these instances is another State. This is evident in Ago’s own words: ‘[t]he decision of a sovereign State to adopt a certain course of conduct is certainly its own, even if it has received suggestions and advice from another State, which was at liberty not to follow.’\textsuperscript{1531} Even if it is right that international

\textsuperscript{1526} \textit{Ibidem}, para. 421.
\textsuperscript{1527} Hakimi, M., \textit{supra} note 1228, p. 364.
\textsuperscript{1528} \textit{Genocide} case, para. 422.
\textsuperscript{1529} \textit{Ibidem}, para. 419.
\textsuperscript{1530} Where the principal is another state, some extreme forms of influence – namely direction and control (Article 17 ARSIWA) or coercion (Article 18 ARSIWA) – may give rise to responsibility. Where the principal is a non-state actor, there is a chance that heightened forms of instigation will result in attribution under Article 8 ARSIWA. In this respect, see ILC Report on State Responsibility, Commentary on Article 8 (2).
\textsuperscript{1531} Ago, R., \textit{Seventh Report on State Responsibility}, 63. See also ILC Report on State Responsibility, General Commentary on Part IV (9).
law should not be concerned with cases of influence between sovereign States, it does not follow that a State that influences the decision of a non-state actor to commit an international wrong should escape responsibility for complicity.\textsuperscript{1532} As an analogy, we might look to the obligations of non-participation encompassed by the prohibition on the use of force and the principle of non-intervention, both including classical modes of complicity by influence. Under non-participation obligation, States are obligated to refrain from ‘\textit{encouraging} the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State’ and ‘\textit{instigating}…acts of civil strife or terrorist acts in another State’.\textsuperscript{1533} Under the principle of non-interventions, States may not ‘\textit{foment or incite}…subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State’.\textsuperscript{1534} Clearly, thus, international law does indicate concern for the influence of States on the conduct of non-state actors.\textsuperscript{1535}

\textbf{14.1. Provision of Military aid and Attribution in the Genocide case}

The next Section will examine whether complicit relationship may serve as basis for ascertaining attribution. In the \textit{Genocide} case the ICJ had to decide on the Applicant’s claim that the FRY “under the guise of protecting the Serb population of BiH, in fact conceived and shared with them the vision of a Greater Serbia, in pursuit of which it provided military support to those persons and groups responsible for the activities which allegedly constitute the genocidal acts complained of.”\textsuperscript{1536}

First, the Court needed to determine whether the acts of genocide could be attributed to the FRY under the rules of customary international law of state responsibility. This meant ascertaining whether the acts of genocide were committed by persons or organs whose conduct is attributable to the FRY under the rules of state responsibility. The inquiry over attribution of acts of genocide to the FRY comprised of two aspects, specifically (i) whether the acts committed at Srebrenica were perpetrated by organs of the FRY, namely by persons or entities whose conduct is necessarily attributable to it, and (ii) whether the acts in question were committed by persons

\textsuperscript{1533} Declaration on Friendly Relations (emphasis added); \textit{Armed Activities} case, para. 162.
\textsuperscript{1534} Declaration on Friendly Relations (emphasis added).
\textsuperscript{1535} See also Common Article 1 to the Geneva Conventions of 1949 (12 August 1949); \textit{Nicaragua} case, para. 220; Article III(c) Genocide Convention and \textit{Genocide} case, para. 167.
\textsuperscript{1536} \textit{Genocide} case, para. 237.
who, while not organs of FRY, nevertheless acted on the instructions of, or under the direction or control of FRY. In ascertaining whether any attribution rules apply, the Court based its analysis essentially on the provision of military aid by the FRY to the RS.

14.1.1. Attribution on the Basis of the Conduct of Its Organs

In ascertaining whether the acts of genocide could be attributed to the FRY on the basis of the conduct of its organs, the Court based its inquiry on the provision of military aid by the FRY in the form of salaries and other benefits provided to the VRS officers. The ICJ firstly had to determine whether the acts of genocide committed in Srebrenica were perpetrated by “persons or entities” having the status of organs of the FRY under its internal law. The Applicant claimed that all officers in the VRS, including General Mladić, remained under military administration of the FRY, and that their salaries were paid from Belgrade. Accordingly, these officers “were de jure organs of the FRY, intended by their superiors to serve in BiH with the VRS”. On this basis it has been alleged by BiH that those officers, in addition to being officers of the VRS, remained officers of the VJ, and were thus de jure organs of the FRY.  

The Court noted that no evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th PC of the FRY were, according to the internal law of the FRY, officers of the VJ — a de jure organ of the FRY. Nor was it proven that General Mladić was one of those officers; and even if he might have been, the Court did not consider that he would, for that reason alone, have to be treated as the organ of the FRY for the purposes of the application of the rules of state responsibility. According to the Court, there was no doubt that the FRY had been providing substantial financial and other military support to the RS, including payment of salaries and other benefits to certain VRS officers. However, this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the RS, and were subordinated to the political leadership of the RS. The Court held that in the absence of evidence to the contrary, those officers must have received their orders from the RS or the VRS, not from the FRY.

Further, neither the RS, nor the VRS had the status of organ of the FRY under its internal law, and were thus not de jure organs of the FRY. The expression “State organ”, as used in customary

---

1537 Ibidem, para. 387.
1538 Ibidem, para. 388.
international law and in Article 4 ARSIWA, applies to individual or collective entities which make up the organization of the State and act on its behalf. The functions of the VRS officers, including General Mladić, were however to act on behalf of the Bosnian Serb authorities, in particular the RS, and not on behalf of the FRY. They exercised elements of public authority of the RS. According to the Court, the particular situation of General Mladić, or of any other VRS officer present at Srebrenica and “administered” by the FRY, was not such as to conclude they were de jure organs of the FRY.

Subsequently, upon having rejected the possibility that the acts of genocide were perpetrated by de jure organs of the FRY, the Court had to ascertain whether the RS and the VRS could be deemed “de facto organs” of the FRY, so that their acts should be considered attributable to the FRY. In order to determine whether the acts of groups of individuals within the territory of a State could be attributed to another State the ICJ has set forward two control tests: the complete dependence test (i.e., the “strict control test” or the “agency test”) and the effective control test.

14.1.2. Attribution on the Basis of Complete Dependence Test – (i.e. “strict control test” or “agency test”)

According to the ICJ’s jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent. Any other solution would allow States to escape their

---

1539 ILC Report on State Responsibility, Commentary on Article 4, para. (1).
1540 Talmon, S., supra note 62, p. 497: points out that “the literature and decisions of other international courts, with very few exceptions, refer only to one test in connection with the ICJ: the effective control test. The ICJ, however, has in fact applied two different tests.”
1541 Talmon, S., supra note 62, p. 499, for a definition of complete dependence: “complete dependence means that the secessionist entity is “lacking any real autonomy” and is “merely an instrument” or “agent” of the outside power through which the latter is acting […] Common objectives may make the secessionist entity an ally, albeit a highly dependent ally, of the outside power, but not necessarily its organ”.
1542 Genocide case, para. 392.
international responsibility by choosing to act through persons or entities whose independence would be purely fictitious.\textsuperscript{1543}

14.1.2.1. Provision of Military Aid and Complete Dependence test in the Nicaragua Case

Similarly as for the assessment of attribution on the basis of the conduct of its organs, the Court looked into the provision of substantial military aid by a State to a non-state actor when assessing attribution on the basis of complete dependence test. The question whether it is possible in principle to attribute to a State a conduct of persons who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the attribution leading to the state responsibility for an internationally wrongful act was originally addressed in the Nicaragua case.\textsuperscript{1544} The ICJ has maintained its position in two subsequent cases which will be examined, namely in the Armed Activities case and the Genocide case.

In the Nicaragua case, the ICJ found that from 1981 until 1984 the US was providing funds for military and paramilitary activities by the contras with the aim to support the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua.\textsuperscript{1545} In the Court’s view it had been established that the support of the US authorities for the activities of the contras took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. Moreover, the Court found that a number of military and paramilitary operations by contras were decided and planned, if not actually by US advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support offered by the US, particularly the supply of the aircraft provided to the contras by the US.\textsuperscript{1546} The ICJ concluded that despite the secrecy which surrounded it, it was established that the US authorities largely financed, trained, equipped, armed and organized the contras.\textsuperscript{1547}

\textsuperscript{1543} Ibidem, para. 392.  
\textsuperscript{1544} Nicaragua case, paras. 109-116.  
\textsuperscript{1545} Nicaragua case, para. 99.  
\textsuperscript{1546} Ibidem, para. 106.  
\textsuperscript{1547} Ibidem, para. 108.
Moreover, the US authorities have openly admitted the nature, volume and frequency of this support.

The Court stated that it had to:

“determine . . . whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.”

The Court observed that “despite the heavy subsidies and other support provided to the *contras*, there is no clear evidence of the US having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf”, and went on to conclude that “the evidence available to the Court … is insufficient to demonstrate [the *contras’*] complete dependence on United States aid”, so that the Court was “unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States.”

The Court found that the *contras* constituted an independent force and that the only element of control that could be exercised by the US was cessation of aid. Paradoxically this assessment serves to underline, *a contrario*, the potential of control inherent in the degree of the *contras’* dependence on aid.

In sum, while the evidence before the Court indicated that the various forms of assistance provided to the *contras* by the US have been crucial to the pursuit of their activities, and that the *contras* have, at least in one period, been so dependent on the US that it could not conduct its crucial and most significant military and paramilitary activities without the multi-faceted support of the US, the Court still deemed such insufficient to demonstrate their complete dependence on the US aid. In the Court’s view, insufficient evidence was presented in order for it to reach a conclusion that the US devised the strategy and directed the tactics of the *contras*; such a conclusion, according to the Court, would depend on the extent to which the US made use of the potential for control inherent in that dependence. Furthermore, even though political leaders

---

1552 Ibidem, para. 110.
of the *contras* had been selected, installed and paid by the US, the Court held that the question of selection, installation and payment thereof is merely one aspect among others of the degree of dependency of that force. This partial dependency on the US authorities may, according to the Court, certainly be inferred *inter alia* from the fact that the leaders were selected by the US, as well as from other factors, such as the organization, training and equipping of the force, the planning of operations, the choosing of targets and the operational support provided.\(^\text{1553}\)

Finally, the Court held that the US participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, for the purpose of attributing to the US the acts committed by the *contras* in the course of their military operations in Nicaragua. Therefore, the “strict control test” or “agency test” developed by the ICJ requires a relationship of dependence and control to the degree that it can be qualified as “complete dependence” on the State. Dependence and control can be considered two correlative elements:\(^\text{1554}\) the group is dependent in the extent to which it is controlled by the State, and that dependence and control must be “complete”\(^\text{1555}\). The control requirement has to be proved at two levels: the potential for control and the actual exercise of control. Moreover, that actual exercise of control must extent to “all fields” of the group’s activity.

Hence, the control test used by the ICJ to decide whether a group can be equated with a State organ involves complete control of the State over the group. The examination of the element of control involves assessing the potential for control and also the actual exertion of that capacity of control “in all fields” of activity of the group.\(^\text{1556}\) These requirements are very demanding and it is very difficult for an Applicant State to provide enough evidence to the Court to satisfy such a high threshold. On the other hand, this demanding threshold of evidence ensures that the equation of a group with an organ of a State is only carried out in cases in which there is a firm basis supported by enough evidence so as to attribute the State acts of private individuals, which must be exceptional, taking into account that the general principle is that States are only

\(^\text{1553}\) *Ibidem*, para. 112.
\(^\text{1554}\) Talmon, S., *supra* note 62, p.498: he argues that “dependence and control are thus two sides of the same coin”.
\(^\text{1555}\) *Ibidem*, p. 497: “control results from dependence or, looking at it from the other side, dependence creates the potential for control”.
\(^\text{1556}\) *Genocide* case, para. 391.
responsible for their own conduct and that equation with a State organ involves the holding of responsibility also for \textit{ultra vires} acts, according to Article 7 of the ILC Articles.

The Court thus found that the assistance given by the US to the \textit{contras} does not warrant the conclusion that these forces were subject to the US to such an extent that any acts they have committed are imputable to that State. The Court took the view that the US is responsible not for the acts of \textit{contras}, but rather for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the \textit{contras}. The lawfulness of such acts is a question different from the violations of international law or which the \textit{contras} might have been guilty.

It is interesting to note that a clear parallel can be drawn between \textit{Perišić} Trial Chamber’s assessment of individual criminal responsibility of an accomplice and the complete dependence test (or “strict control test”) in the context of state responsibility. Namely, \textit{Perišić} Trial Chamber’s conviction of a military commander providing military aid to a non-state actor (i.e., the VRS) was essentially based on its determination of complete dependence of an armed group responsible for the commission of international crimes on the aid provided without being necessary to prove the potential for control or the actual exertion of that capacity of control by the individual accomplice. Moreover, while the \textit{Perišić} Trial Chamber acknowledged that Perišić did not control nor could have controlled the manner in which the VRS had put his assistance to use, his criminal responsibility as accomplice was nevertheless established.

14.1.2.2. Provision of Military Aid and Complete Dependence test in the \textit{Genocide} Case

To equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court described as “complete dependence”. The Court examined whether the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they could be deemed to have been completely dependent on it.

The ICJ found that while the FRY was making its considerable military and financial support available to the RS, neither the RS nor the VRS could be regarded as mere instruments through which the FRY was acting, and thus lacking any real autonomy. The ICJ recognized that while the political, military and logistical relations between the FRY and the RS authorities had been
strong and close, they were not such that the Bosnian Serbs’ political and military organizations should be equated with organs of the FRY.\textsuperscript{1557} Differences over strategic options emerged at the time between the FRY authorities and the Bosnian Serb leaders, demonstrating that the latter “had some qualified, but real, margin of independence”.\textsuperscript{1558} Nor, notwithstanding the very important support given by the FRY to the RS, without which it could not have “conduct[ed] its crucial or most significant military and paramilitary activities”\textsuperscript{1559}, did this signify a total dependence of the RS upon FRY. Therefore, the Court concluded that the RS and the VRS could not be deemed \textit{de facto} organs of the FRY and thus the acts of genocide should not be considered attributable to the FRY based on complete dependence test.

14.1.2.3. Provision of Military Aid in the \textit{Armed Activities} Case

In the \textit{Armed Activities} case, Uganda has acknowledged giving training and military support to the Congo Liberation Movement, a rebel group led by Mr. Bemba. However, the Court held it had not received probative evidence that Uganda controlled or could control the manner in which Mr. Bemba had put such assistance to use. The ICJ rejected equating the rebel group with an organ of Uganda and denied the engagement of its responsibility on the basis of issuance of instructions or control. Accordingly, the ICJ considered that “no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries”\textsuperscript{1560} and cited the \textit{Nicaragua} case when mentioning the control tests, which would be applied in case that the ICJ considered that the situation was such as to call for their application in order to decide whether the paramilitaries could be equated with State organs or acted under the control of Uganda. Since the ICJ denied there was enough evidence to consider any of these scenarios, it did not even enter to apply the control tests to the facts.

14.1.3. Attribution on the Basis of Instructions, Direction or Control – a Subsidiary Test (the Effective Control Test)

14.1.3.1. The Effective Control Test in the \textit{Nicaragua} Case

\textsuperscript{1557} \textit{Ibidem}, para. 394.
\textsuperscript{1558} \textit{Ibidem}.
\textsuperscript{1559} \textit{Ibidem}.
\textsuperscript{1560} \textit{Armed Activities} case, para 160.
Upon having denied the equation of the *contras* with an organ of the US, the latter may still have been held responsible for single acts over which the US had control or had given instructions for. Thus, the ICJ applied the effective control test, ascertaining that

“even the general control over a force with a high degree of dependence on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of acts contrary to human rights and humanitarian law alleged [...] Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”

Providing evidence of control over specific operations of a group involves proving the instructions, command or particular instances of State control over the acts in question, access to which is really difficult, since public demonstrations to that effect are unlikely to be done. Consequently, the effective control test, while more limited in scope of responsibility engaged and in the sense of evidence required (e.g., particular instances of control), remains a demanding test since a general degree of control or dependence of the group is not enough but the Applicant State needs to provide evidence of control in relation to the specific acts at issue.

14.1.3.2. The Effective Control Test in the Genocide Case

It is the state of the customary international law, as reflected in the ARSIWA, that genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control.

Accordingly, after having denied the claim that the genocide was committed by organs of the FRY, the ICJ assessed whether genocide was committed by persons whose acts were attributable to the FRY on the basis of acting on the instructions or under the direction or control of the FRY.

---

1561 *Nicaragua* case, para. 115.
1562 Talmon, S., *supra* note 62, p. 502: considers that “while the burden of proof for the –effective control– test is lower than that for the “strict control” test, in practice it will be extremely difficult to establish “.
1563 Talmon, S., *supra* note 62, p. 503: “the object of control is no longer the secessionist entity but the activities or operations giving rise to the internationally wrongful act “.
The ICJ underlined that this is a “completely separate issue” from the question of equation with organs of the FRY, since it “would mean that the FRY’s international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations.”

The Court examined Article 8 ARSIWA, reproducing the relevant paragraphs of the *Nicaragua* case in which the Court put forward the effective control test over specific operations of the group in order to determine whether the State could be held responsible for acts committed during those operations. The ICJ pointed out that the effective control test differs from the strict control test in two regards: for the former, there is no need to show that the group who committed the wrongful acts was in a relation of “complete dependence” to the State but that it acted under its instructions or its effective control, which must be exercised in relation to the specific acts at stake and “not generally in respect of the overall actions taken.” Moreover, the ICJ addressed the BiH’s claim that due to the “particular nature” of the crime of genocide, in the sense of being composed by a lot of specific acts that are separate but coordinated, the effective control test should be analysed not in relation to the specific acts but to the whole operations. The Court rejected this claim by asserting that “particular characteristics of genocide do not justify the Court in departing from the criterion elaborated [...] The rules for attributing internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*."

Accordingly, in the *Genocide* case the Court had to ascertain whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the FRY’s instructions, or under its direction or control. Thus, the Court had to determine whether FRY organs originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the FRY, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations. The applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 ARSIWA:

---

1564 *Genocide* case, para. 397.
1565 *Ibidem*, para. 400.
1566 *Ibidem*, para. 401.
“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”1567

The Court held it had not been proven that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent (dolus specialis) characterizing the crime of genocide. Rather, all indications were to the contrary, namely that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.1568

14.1.4. Complicit Relationship does not Suffice for Attribution

The above analysis has shown that the question of complicity is to be distinguished from the question whether the perpetrators of the acts of genocide committed in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY; if it were established that a genocidal act had been committed on the instructions or under the direction of a State, the necessary conclusion would be that the genocide was attributable to the State, which would be directly responsible for it and no question of complicity would arise.

In both the Genocide case and the Nicaragua case, the ICJ emphasized that a complicit relationship, established by financing, organizing, training, supplying and equipping of an armed group operating in another State, is, on a traditional understanding of the rules of attribution, insufficient to render the conduct of the assisted party as conduct of the State.1569 Particularly, in the Genocide case the ICJ affirmed the need for control, thus rejecting the idea that a complicit relationship may be sufficient to attribute the conduct of non-state groups to the State.1570

Similarly, in the Nicaragua case, the ICJ held that substantial provision of military and other

---

1567 Article 8 ARSIWA.
1568 Genocide case, para. 413.
1569 Nicaragua case, para. 109: The Court found that from 1981 until 1984 the US was providing funds for military and paramilitary activities by the contras in Nicaragua with the aim to support the opposition front in paramilitary and political operations in Nicaragua. The ICJ held that it was established that the US authorities largely financed, trained, equipped, armed and organized the contras. However, there was no clear evidence of the US having actually exercised such a degree of control as to justify treating the contras as acting on its behalf. The Court found that the contras “constituted an independent force” and that the only element of control that could be exercised by the US was cessation of aid. While various forms of assistance provided to the contras by the US have been crucial to the pursuit of their activities, such was insufficient to demonstrate their complete dependence on US aid.
1570 Genocide case, paras. 369-407.
type of aid by the US to the *contras* did not warrant attributing to the US the acts committed by the *contras* in the course of their military operations in Nicaragua.¹⁵⁷¹

As the ICJ puts it, the rules for attributing conduct to a State do not vary with the nature of the wrongful act, which reflects the state of customary international law.¹⁵⁷² The tests for attribution remain the same whether the non-state group is committing genocide, violation of the laws of war, or environmental harms.¹⁵⁷³ However, the Court left open the possibility that clearly expressed *lex specialis* could impose a different standards, potentially of a less demanding nature than as reflected in the ARSIWA under which conduct of a non-state actor may be attributed to the State.¹⁵⁷⁴

In the *Nicaragua* case, the ICJ had to assess the nature of the relationship between the United States and the *contras*, the armed opposition fighting against the Nicaraguan State, in order to determine whether the unlawful acts of *contras* could be attributed to the United States for purposes of State responsibility.¹⁵⁷⁵ The judgment explained the assistance provided included:

logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. The Court finds it clear that a number of military and paramilitary operations by the *contras* were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply of aircraft provided to the *contras* by the United States.¹⁵⁷⁶

Although the United States had largely financed, trained, equipped, armed and organized the armed group, this would not justify treating such an entity as having acted on its behalf.¹⁵⁷⁷ For the internationally wrongful acts of the *contras* to be attributed to the United States, the Court

---

¹⁵⁷¹ *Nicaragua* case, para. 115: All the forms of US participation in the financing, organizing, training, supplying and equipping of the *contras*, and even the general control by the US over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the US directed or enforced the perpetration of the acts contrary to human rights and humanitarian law. Such acts could well be committed by members of the *contras* without the control of the US.

¹⁵⁷² *Genocide* case, para. 401

¹⁵⁷³ Ibidem.

¹⁵⁷⁴ Ibidem. See also Article 55 ARSIWA.

¹⁵⁷⁵ *Nicaragua* case, para. 109.

¹⁵⁷⁶ Ibidem, para. 106.

required that it be shown that the latter exercised “effective control” over the military or paramilitary operations of the contras.\textsuperscript{1578} The involvement and general control exercised by the United States “would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law”.\textsuperscript{1579} While the United States was found to have breached the norm of non-intervention in the internal affairs of another State by its assistance to the contras, the Court did not find it responsible for their unlawful acts. The Court did reprimand the United States for producing and disseminating a military manual to the contras which was seen to encourage violations of humanitarian law, and thus was contrary to the obligation to ensure respect for international humanitarian law.\textsuperscript{1580}

In the \textit{Armed Activities} case with regard to rebel groups in Congo that had been provided training and support by Uganda, the ICJ did not find sufficient evidence to hold that they were acting “on the instructions of, or under the direction or control” of the latter.\textsuperscript{1581} Uganda has acknowledged that it assisted the rebel group that launched an offensive in Congo in 1998 which sought to overthrow its government. Particularly, Uganda conceded that it provided training and gave “just enough” military support to the rebel group to help Uganda achieve its objectives of driving the Sudanese and Chadian troops out of Congo. However, according to the Court such did not suffice for a conclusion that Uganda controlled, or could control, the manner in which the assisted rebel group put such assistance to use. In the view of the Court, the rebel group did not act on the instructions of, or under the direction or control of Uganda.\textsuperscript{1582}

Accordingly, it is interesting to compare the recent ICTY Appeals Chamber’s dispute concerning the contours of complicity\textsuperscript{1583} with the difference of opinion that emerged between the ICJ and the ICTY regarding the required level of State control over non-state actors for state responsibility to arise for violations of international law.\textsuperscript{1584} While the ICTY has relied upon the overall control standard in its conflict classification analysis, Judge Van den Wyngaert suggested that the overall control test enunciated by the ICTY in \textit{Tadić} requires “a new justification” in

\begin{itemize}
\item \textsuperscript{1578} \textit{Ibidem}, para. 115.
\item \textsuperscript{1579} \textit{Ibidem}.
\item \textsuperscript{1580} \textit{Ibidem}, paras. 109 and 220. See also Dissenting Opinion of Judge Schwebel, para. 259.
\item \textsuperscript{1581} \textit{Ibidem}, para. 160.
\item \textsuperscript{1582} \textit{Ibidem}, para. 106.
\item \textsuperscript{1583} See also Part II, Sections 5.2.1.3 and 6.5.
\item \textsuperscript{1584} See Section 13.2 for a more detailed elaboration on the matter.
\end{itemize}
light of its rejection by the ICJ. At the very least, it is clear that the law of state responsibility requires more than the mere provision of aid or assistance to non-state actors for the assisting State to be liable for violations of international law committed by such groups. The internationally wrongful acts must have been committed under the instructions or direction of the State, or the group must have been under the State’s control, be it “effective” or “overall”. Such standards do not apply in the case of knowingly providing aid or assistance to lawbreaking States, nor is it necessary that an individual aider and abettor issued instructions to or exercised control over the direct perpetrators of international crimes in order to be held criminally responsible.

14.2. Substantial Contribution Applied in the Genocide Case

As argued in Chapter 9.3.2. above, substantiality requirement ought to condition complicity rules. The ICJ paid little attention to the connection between the complicit State’s assistance and the principal’s wrong, though in its factual assessment it emphasized that “undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the RS and the VRS, beginning long before the tragic events of Srebrenica, continued during those events”. The Court held that there is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources, which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. Since the Court found that the concept of complicity in the prohibition on state complicity does not differ significantly from the concept of aid or assistance under the law of state responsibility, it can implicitly be read to endorse the nexus requirement of Article 16.

14.3. Subjective Element of Complicity Applied in the Genocide Case

The level of fault required by the primary rule prohibiting state complicity in genocide proved problematic for the ICJ. Indeed, in the Genocide case the Court appeared unsure of how to approach the simple question whether the accomplice needs to share the specific intent of the

1586 Genocide case, para. 422.
1587 Ibidem.
1588 Ibidem, para. 420.
principal or if, instead, knowledge of that intent is sufficient.\textsuperscript{1589} According to the Court, for complicity to arise the aid or assistance had to be provided \textit{at the least} “knowingly”, with the person or organ being aware of the specific intent of the perpetrator to commit genocide.\textsuperscript{1590} It was on that basis that the Bosnian claim failed.\textsuperscript{1591}

Specifically, in assessing the requisite link between the specific intent (\textit{dolus specialis}) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice, the Court examined whether complicity presupposes that the accomplice shares the specific intent (\textit{dolus specialis}) of the principal perpetrator:

There is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless \textit{at the least} that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (\textit{dolus specialis}) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity.\textsuperscript{1592}

The Court found that the requirements for complicity were not met in the \textit{Genocide} case, as it had not been shown that the FRY authorities supplied the VRS leaders with aid and assistance at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide. Thus, the Court concluded it has not been conclusively established that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide “in full awareness that the aid supplied would be used to commit genocide”.\textsuperscript{1593} The decision to commit genocide was taken relatively quickly by the relevant Bosnian Serbs, and it was not conclusively shown that the authorities in Belgrade were made aware of it at the time.\textsuperscript{1594}

\begin{thebibliography}{99}
\bibitem{1589} \textit{Ibidem}, para. 421.
\bibitem{1590} \textit{Ibidem}.
\bibitem{1591} The ICJ held that the link between the specific intent (\textit{dolus specialis}) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice must be established and that complicity presupposes that the accomplice is aware of the specific intent (\textit{dolus specialis}) of the principal perpetrator. There is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (\textit{dolus specialis}) of the principal perpetrator.
\bibitem{1592} \textit{Genocide} case, para. 421.
\bibitem{1593} \textit{Ibidem}, para. 424.
\bibitem{1594} \textit{Ibidem}, para. 423.
\end{thebibliography}
According to the Court, complicity would always require positive action. Additionally, while an individual accomplice must have given support in perpetrating genocide with a full knowledge of the facts, “a State may be found to have violated its obligation to prevent [genocide] even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way”.

The Court may have seen complicity in the context of genocide as somehow different from a State involvement in other breaches of international law, and thereby giving rise to responsibility for knowingly aiding and assisting. As the Court’s analysis did not go beyond the knowledge element, this remains something of an open question. One might argue that the FRY did not incur responsibility because of *dolus specialis* required for the crime of genocide. The same will be true only for special intent crimes (such as persecutions) but will not be true for all the rest of the international crimes as the awareness of a military or a political leader that such crimes were being committed would be easily proven.

It is strange that the Court chose not to resolve the requisite level of culpability required for state complicity in genocide. It remains unclear whether knowledge of the perpetrator’s specific intent or a shared specific intent is required. If the Court had drawn an inference of knowledge from the relationship and meetings between President Milošević and General Mladić, this question (which the Court failed to answer) would have been dispositive of Serbia’s legal responsibility for complicity in genocide.

Regrettably, the Court failed to set out precisely the fault element for complicity in genocide – and possibly Article 16 by implication. Instead, the ICJ merely held that “at the least” complicity requires knowledge. Some scholars have taken this holding to imply that, in general, complicity requires more than knowledge. It is argued that the words ‘at the least’ suggest that, normally, the accomplice should have more than this awareness. This is ultimately a convincing interpretation as it would not be logical to require a lesser degree of intent for the complicit State than of the main actor. Thus, the strict interpretation of Article III (e) appears to

---

1595 *Genocide* case, para. 432.
1597 *Genocide* case, para. 421.
be warranted. In determining the appropriate standard, there is the methodological question as to whether one should look to Article 16 or the requirement of fault in international criminal law. While there remains an ongoing debate as to whether a standard of knowledge or wrongful intent is required for the rule reflected in Article 16, this dissertation has argued in Section 2.3.3 that in accordance with international practice as well as considerations concerning the construction of Article 16, intent on the part of the complicit State is required.

15. Provision of Military Aid as Violation of Principles of Non-Use of Force and Non-Intervention

If a State provides military aid to a non-state actor due to security concerns or in support of legal activities of those engaged in an armed conflict, such support might constitute violation of other obligations arising under the principles of non-use of force and non-intervention. Accordingly, in the Armed Activities case, the Court held that even though provision of the training and military support by Uganda to the rebel group operating in Congo fell short of direction and control (and thus did not satisfy the test for attribution) it nevertheless violated certain obligations of international law. As mentioned above, the Declaration on Friendly Relations provides that “[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to […] involve a threat or use of force.” The Declaration further provides that “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.”

The ICJ concluded that Uganda by providing training and military support to the armed group (a non-state actor) operating in the territory of Congo violated the sovereignty and the territorial integrity of Congo. According to the Court, Uganda’s actions equally constituted an interference in the internal affairs of Congo. The unlawful military intervention by Uganda was of such a

1600 Jackson, M., supra note 348, pp. 135-174.
1601 Armed Activities Case, para. 163.
1603 UN General Assembly Resolution 2625 (XXV) of 24 October 1970, Declaration on Principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN.
1604 Ibidem.
magnitude and duration that the Court considered it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the UN Charter.\textsuperscript{1605}

Similarly, in the \textit{Nicaragua case}, the Court made it clear that the principle of non-intervention prohibits a State “to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State”.\textsuperscript{1606} In the \textit{Armed Activities} case, the Court held that military support provided by Uganda amounted to military intervention. The Court further affirmed that acts which breach the principle of non-intervention “will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.”\textsuperscript{1607} In the \textit{Nicaragua} case, the US was held responsible for its own conduct in relation to the \textit{contras}, namely “by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, [the US] has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.”\textsuperscript{1608} The ICJ further held that the US “by those acts of intervention [...] which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State.”\textsuperscript{1609} The US was also held responsible for its own conduct for producing a manual (“Operaciones sicológicas en Guerra de guerrillas”) and spreading it among the \textit{contras}, what was regarded as having “encouraged the commission by them of acts contrary to general principles of humanitarian law.”\textsuperscript{1610}

\textbf{16. Enforcement Mechanisms of State and Individual Criminal Responsibility for Complicity}

\textbf{16.1. The International Court of Justice}

Holding States responsible before international courts and tribunals is a different issue from the question whether a State is responsible for the commission of an internationally wrongful act.

\textsuperscript{1605} \textit{Armed Activities} Case, para. 165.
\textsuperscript{1606} \textit{Nicaragua} case, para. 206.
\textsuperscript{1607} \textit{Armed Activities} Case, para. 209.
\textsuperscript{1608} \textit{Nicaragua} case, para. 292.
\textsuperscript{1609} \textit{Ibidem}, para. 292.
\textsuperscript{1610} \textit{Ibidem}, Operative parts of the Judgment, para. 9.
The mere fact that no judicial avenue exists to hold a State responsible does not change the fact that there exists international responsibility. In the *Genocide* case, the ICJ recalled:

The fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with these obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them.\(^\text{1611}\)

This is also true for the case of complicity.\(^\text{1612}\) Namely, Article 16 ARSIWA does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding and assisting State in the absence of or without the consent of the aided or assisted State. The ICJ has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, “it would have to rule, as a prerequisite, on the lawfulness”\(^\text{1613}\) of the conduct of another State, in the latter’s absence and without its consent. This is the so-called *Monetary Gold* principle.\(^\text{1614}\)

In order to understand more fully the implications of complicity in contemporary international law, it is necessary to inquire into its potential role in international judicial dispute settlement. There is a further reason to inquire into the means available to hold complicit States responsible; namely, it is necessary to establish the responsibility of another State, i.e. the main actor, before responsibility for complicity can be established. Although situations may occur when all relevant States involved in a dispute have consented to the exercise of jurisdiction by a given court or tribunal, in the majority of cases this will not be the case. The issue whether the *Monetary Gold* rule will bar cases involving complicity has not been afforded a great deal of attention so far. Nevertheless, States appear to take this issue seriously. Namely, when the Federal Republic of Germany filed its declaration under Article 36(2) of the ICJ Statute in 2008, it expressly excluded the use of the German military armed forces abroad as well as the use of the German territory and other areas under German jurisdiction for military purposes by other States from the

---

\(^\text{1611}\) *Genocide* case, para. 148.
\(^\text{1612}\) ILC Report on State Responsibility, Commentary on Article 16, para 11.
\(^\text{1613}\) *East Timor* case, para. 35.
\(^\text{1614}\) *Monetary Gold* case, pp. 19, 32.
jurisdiction of the ICJ. A certain anxiety about becoming entangled in legal disputes in which Germany has participated only remotely emerges from these exceptions.\textsuperscript{1615}

The ILC has noted that the \textit{Monetary Gold} principle may well apply to cases under Article 16 ARSIWA, ‘since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act’.\textsuperscript{1616} The wrongfulness of the aid or assistance given by the former is dependent, \textit{inter alia}, on the wrongfulness of the conduct of the latter. This may present practical difficulties in establishing the responsibility of the aiding or assisting State, but it does not necessarily weaken the purpose of Article 16 ARSIWA. The \textit{Monetary Gold} principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of state responsibility as such. At the same time, the ILC has noted that ‘that principle is not all-embracing and … may not be a barrier to judicial proceedings in every case’.\textsuperscript{1617} States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.\textsuperscript{1618}

The structure of international dispute settlement is largely bilateral.\textsuperscript{1619} However, adjudicating a situation which involves a complicit State will require an international court or tribunal to consider a triangular situation, which involves the injured State bringing the claim forward, the complicit State and – in order to find that aid or assistance has been furnished to an internationally wrongful act – the main actor to which the support has been granted. Usually, only two States will be involved in judicial dispute settlement. The lack of a procedure to compulsorily join parties to a dispute if they are implicated in wrongful conduct will in most cases hinder the possibility of adjudicating the cases of complicity.\textsuperscript{1620} As Article 59 of the ICJ

\begin{footnotes}
\item[1616] ILC Report on State Responsibility, Commentary on Article 16, para. 11.
\item[1617] Ibidem.
\item[1618] Ibidem.
\end{footnotes}
Statute protects the absent third State (i.e., the main actor) from the consequences of a binding judgment passed in its absence\textsuperscript{1621} it could be argued that the adjudication of a case between an injured State and a complicit State should not give rise to particular problems. The Court points to Article 36 of the ICJ Statute, which defines the Court’s competence to decide disputes between States.\textsuperscript{1622} The underlying principle of Article 36 is that of State consent to the exercise of jurisdiction by the Court.\textsuperscript{1623}

In more general contexts, it is noteworthy that the ICJ has been prepared to settle disputes, even if theoretically the dispute would also involve rights and obligations of third States not party to the case before it.\textsuperscript{1624} In light of what the ICJ determined in the Monetary Gold case and reaffirmed in its East Timor case\textsuperscript{1625}, the wrongfulness of the act committed by the aided or assisted State would need to form the ‘very subject matter’ of the case at issue in order to trigger the Monetary Gold principle.\textsuperscript{1626} Arguably, it will not be possible to develop a clear-cut rule for all situations involving complicity. Whether or not the wrongful act of the main actor will form the very subject matter of the case or whether a determination of its wrongfulness would only affect the legal interests of the third State not present in the proceedings has to be determined in light of the individual case. The ICJ itself has affirmed that its approach in the Monetary Gold case represents the outer limit of its ability to decline jurisdiction:

There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning Monetary Gold Removed from Rome in 1943, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings ‘would not only be affected by decision, but would form the very subject-matter of the decision’. The circumstances of the Monetary Gold case probably represent the limit to the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be

\textsuperscript{1622} Monetary Gold case, pp. 19, 32.
\textsuperscript{1624} Okowa, P. N., supra note 1619, p. 196.
\textsuperscript{1625} The Monetary Gold principle remained a fairly isolated precedent until it was reaffirmed in the East Timor case in 1995 where the Court declined to exercise jurisdiction due to the Monetary Gold principle (See East Timor case, para. 90).
\textsuperscript{1626} Monetary Gold case, p. 17.
regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings.  

Other factors are conceivable which would allow the Court to find a basis upon which it could exercise jurisdiction in a dispute between an injured State and the complicit State without having to determine the responsibility of the State not party to a dispute. One such solution was advocated by Portugal in the *East Timor* case. Portugal argued that the wrongfulness of the Indonesian occupation of East Timor was already established by relevant UN Security Council and General Assembly resolutions. The Court did not accept this argument. But it did not, however, generally rule out the possibility that the illegality of a given situation can be established by resolutions of the political UN organs. This can be inferred from the Court’s reference to the resolutions in question and its examination of the implications of the UN General Assembly continuously referring to Portugal as the ‘administering power’. The Court concluded that, ‘[w]ithout prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as “givens” which constitute a sufficient basis for determining the dispute between the Parties’.  

Another situation under which the effects of the *Monetary Gold* principle could be reduced would be given when the main actor has expressed its general consent to the jurisdiction of the Court by means of a declaration under Article 36(2) of the ICJ Statute. In this regard, one has to note that the concept of the indispensable third party is applicable regardless of the fact whether the absence of the third State is due to its voluntary decision or whether it has not been properly impleaded. The existence of general consent to the jurisdiction of the Court under Article 36(2) of the ICJ Statute thus does not render the *Monetary Gold* principle inapplicable. However, in such a case, its effects are greatly mitigated as the State which wishes to bring a claim against the complicit State could likewise file a case against the main actor, given that all other criteria are met.

---

1627 *Nicaragua* case, para. 88.
1628 For the UN Security Council, see UN Doc. S/RES/384 (1975); S/RES/389 (1976); for the UN General Assembly, see UN Doc. A/RES/34/85 (XXX) (1975); A/RES/31/53 (1976); A/RES/32/34 (1977); A/RES/33/79 (1978); A/RES/34/40 (1979); A/RES/35/27 (1980); A/RES/36/50 (1981); A/RES/37/30 (1982).
1629 *East Timor* case, para. 31.
In discussing the impact of the *Monetary Gold* principle on cases in which complicity is to be adjudicated, one should not forget the fundamental rationale of this principle: it is an expression of ‘elemental due process’ insofar as it prevents the Court from adjudicating disputes in the absence of a State. It also works the other way around: without its consent, a complicit State cannot be dragged into ongoing proceedings between the main actor and the injured State. In this perspective, the *Monetary Gold* principle may also appear as a safeguard against arbitrary courses of action which are directed only against a remote actor while the ‘main culprit’ is left unaffected. Although deplorable from a viewpoint of legal policy, the option to remain absent from dispute settlement proceedings still exists in the contemporary international legal order. Therefore, it is the task of the Court to find the appropriate balance between preventing parties submitting as bilateral disputes claims to the Court which discount third party interests, and not allowing the absence of third parties to deprive the Court of jurisdiction legitimately bestowed upon it by the parties. In this respect, the ‘multilateralization’ of international disputes should be taken into account.

The ICJ as the principal judicial organ of the UN occupies a central place in considerations about the role which state complicity may play in judicial dispute settlement. During a long period of time the ICJ was the only international court in existence. It is still the judicial body that, at the universal level, possesses the largest jurisdiction. Its creation, after the First World War, under the name of the Permanent Court of International Justice (PCIJ), was rightly considered a decisive path towards the submission of sovereign States’ activities to the international rule of law. The mere existence of one international court was then viewed as a crucial element in the identification of one body of international rules and principles receiving

1634 Okowa, P. N., *supra* note 1619, p. 197.
1637 Article 92 of the UN Charter.
the same interpretation at a universal level. This remained true even if, as stated by the PCIJ in the *Eastern Carelia* Case, “it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.”\footnote{1639 Status of Eastern Carelia Case (Fin. v. U.S.S.R.), 1923 P.C.I.J. (ser. B) No. 5, at 27 (Advisory Opinion of July 23).} This single court system, already somewhat threatened by the persistent creation of arbitration tribunals and the multiplication of specialized regional international courts, such as the Court of Justice of the European Communities (CJEC), the European Court of Human Rights, and the Inter-American Court of Human Rights, has undergone a radical change. New judicial institutions have been created, such as the International Tribunal for the Law of the Sea, the World Trade Organization (WTO) Dispute Settlement System, and the ICC. All of them have a narrow function, but they are established at the universal level, as is the ICJ. Consequently, the proliferation of international courts and tribunals raises the issue of whether this phenomenon will lead to the fragmentation of the international legal system or, at least, to the fragmentation of the interpretation of its norms.

In a time of ‘proliferation’ of international courts and tribunals,\footnote{1640 On this phenomenon, see Dupuy, P. M., *supra* note 1638, pp. 791–807; Oellers-Frahm, K., *Multiplication of International Courts and Tribunals and Conflicting Jurisdictions – Problems and Possible Solutions*, Max Planck Yearbook of United Nations Law 5, 2001, pp. 67–104.} it is, however, important to consider alternative avenues in which complicit States could be held judicially responsible. In this respect, the prospects are more promising: in no other international judicial forum is the protection of absent third parties as imposing as it is in the case law of the ICJ. However, the constraints of the scope of this dissertation do not allow to present the other various forms of dispute settlement in detail. The mere mention thereof will have to suffice in order to indicate the alternative possibilities for finding state responsibility for complicity in international courts and tribunals. These alternative mechanisms are merely listed here in order to point out alternatives for judicial and quasi-judicial dispute settlement involving complicit States (e.g. WTO dispute settlement, Dispute settlement under UNCLOS, The European Court of Human Rights, international arbitration, domestic courts\footnote{1641 Domestic courts increasingly apply international law and also the secondary rules of State responsibility. Principles of State immunity (*par in parem non habet imperium*) will, in most cases, prevent the exercise of direct jurisdiction over foreign States. It is, however, conceivable, and has already occurred, that domestic courts may consider the complicity of their own State, thus implicating the wrongfulness of the conduct of another State. See, e.g., the Canadian Supreme Court, *R v. Hape*, 2007 SCC 26; *Canada (Justice *) v. *Khadr*, 2008 SCC 28; the UK High Court of Justice, *R. (on the Application of Binyan Mohammed *) v. *Secretary of State for Foreign and
cases involving complicity. However, in none of them can it be ruled out that this will happen in the future.

16.2. The International Criminal Court

The main forum for adjudicating individual criminal responsibility for complicity is the ICC. As clearly provided for in Article 25(4) of the Rome Statute, ‘[n]o provision of this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law’. However, it is also apparent that determinations of individual criminal responsibility may very well affect, albeit implicitly, state responsibility: especially in the case of so-called ‘leadership crimes’ a finding of individual criminal responsibility of a high-ranking State official will at the very least establish a strong presumption for concurrent state responsibility. These considerations may also inspire the concerns of non-parties to the Rome Statute about the exercise of criminal jurisdiction over their nationals. In general, the ICC may exercise jurisdiction in three situations: if a crime has been committed on the territory of a party to the Rome Statute, if the perpetrator is a national of a State party or if the Security Council has referred a situation to the ICC.

In the first of these situations, it is relevant to note that through the territoriality principle embodied in the Rome Statute, the conduct of third States may come under scrutiny and that there is no procedural rule built into the Rome Statute, which would prevent the exercise of jurisdiction in such a case. It is thus conceivable that, implicitly, the conduct of a complicit State may come under scrutiny in the ICC proceedings.

While no condition on State conduct is formally required for individual complicity in the “foreign assistance cases”, certain interesting parallels can be drawn with the crime of aggression. Namely, the latter is rooted on the basic assumption of identity between the conduct of the State and its political and military leaders. In the case of aggression, the only persons who can be held criminally responsible are those highest ranking organs representing the State as a whole and deciding the State general policies. Similarly, it has been argued in Part II that actus reus of individual complicity in the “foreign assistance cases” can be fulfilled primarily by

---

1643  Nollkaemper, A., *supra* note 5, pp. 615 *et seq.*, especially at pp. 627 *et seq*.
1644  See Articles 12 and 13 of the Rome Statute.
individuals occupying the highest decision-making positions in the political or military apparatus of the State. Hence, in the quest for applicable enforcement mechanisms for state complicity and individual complicity, respectively, important lessons may be learned from the enforcement mechanisms available for establishing individual criminal responsibility and state responsibility in the case of aggression.

Aggression is strictly defined in terms of State conduct. The ICC cannot proceed against individuals unless there is a prior determination of the State act of aggression. This is due to the fact that “it is necessary to determine that a State act of aggression has occurred before it can be determined that an individual crime of aggression is at hand”. Clearly, there is no such requirement in case of determination of individual criminal responsibility for complicity in the “foreign assistance cases”. Regarding the conditions for the exercise of the ICC jurisdiction in cases of a crime of aggression, the proposal of the PrepCom and the SWGCA reads as follows:

> Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court.

This provision tries to co-ordinate the jurisdiction of the ICC with the SC’s power under Chapter VII, so that the Rome Statute is consistent with the UN Charter. If the SC makes a determination with respect to State aggression, then the ICC must take it into account. However, this does not solve the problem where the SC takes no action. One could argue that the SC does not have an exclusive competence on determination of State aggression; rather, such competence could be claimed for other bodies as well, such as the UN General Assembly or the ICJ. Namely, the PrepCom and SWGCA proposals include two alternatives: first, the ICC jurisdiction would be precluded if there is no prior determination of aggression made by a competent organ outside the Court; or second, the ICC would be able to proceed with the case without any such prior

---

1647 The SC has determined the existence of a state aggression only on very few occasions. Moreover, the inactivity of the SC is generally due to the veto power of the permanent member states. These states would thus be able to leave the ICC in a state of paralysis.
These proposals enable different solutions, but at the same time show the two major problems concerning the exercise of the ICC jurisdiction over the crime of aggression. First, there is uncertainty over the legal effects of prior determination of State aggression (by the SC or another international body) with respect to the establishment of individual criminal responsibility by the ICC. Second, these proposals seek to keep the determination of State aggression and the establishment of individual criminal responsibility for aggression separate, in order to preserve the autonomy of the ICC and to respect the basic principles of international criminal law.

Turning to the case of complicity, similarly, a competence on determination of State complicity could be claimed for the UN Security Council, the UN General Assembly or the ICJ. However, a prosecution of individual complicity in the “foreign assistance cases” by the ICC or ad hoc international criminal tribunals is not conditioned upon a prior inquiry regarding the Security Council’s potential determination of complicity committed by the State concerned. Nor is the ICC formally obligated to take into account a possible determination with respect to State complicity by the ICJ, Security Council or the UN General Assembly. Nevertheless, Part II has argued that international practice shows that the determination of individual criminal responsibility in the “foreign assistance cases” necessarily establishes the corresponding act of state complicity (the same actus reus). This implies the assessment of material conduct amounting to complicity by way of provision of military aid. Where there is such a prior determination of individual criminal responsibility for complicity, the question concerns the legal effects of this determination for the ICJ (in its adjudication of state complicity). It is submitted that the prior finding of facts relating to the material conduct amounting to individual complicity in the “foreign assistance cases” should be seen as a preliminary question necessary to establish state responsibility. This dissertation argues that in practice a certain consistency must be guaranteed when international rules defining complicity for provision of military aid under both state and individual criminal responsibility are concerned. Turning to the legal finding on State attribution, arguably the ICC cannot depart from it. While this particular aspect should have no direct impact on the subsequent trial of State leaders for complicity, it can play an indirect role.

---


before the ICC. Once the *actus reus* of complicity by a political or military leader has been established, the *actus reus* of a State act of complicity has in fact already been determined. The *mens rea* of political and military leaders can be easily inferred from the general criminal context surrounding state complicity.

On the one hand, there is a clear need to maintain the separation between the determination of state complicity and the establishment of individual criminal responsibility. A certain autonomy for the ICC should be guaranteed. It is taken for granted that there must be a separation between the enforcement mechanisms of state and individual criminal responsibility. While the ICJ and/or the SC is considered as a competent institution to establish the existence of an internationally wrongful act of a *State*, the jurisdiction of *ad hoc* international tribunals and the ICC is limited to the prosecution of *individuals* for complicity. And this scheme has never been called into question concerning the exercise of the ICC jurisdiction over the crimes under Article 5 of its Statute. At the same time, in the “*foreign assistance cases*” it seems very difficult to keep the establishment of state and individual criminal responsibility for complicity separate. Prior determination of individual complicity by way of provision of military aid is likely to have a very profound impact on the ICJ. The same is true the other way around. Prior establishment of state complicity by the ICJ should influence the determination of individual criminal responsibility by the ICC or another international criminal tribunal.

17. Conclusion

The holding to account of persons or entities that aid and assist the commission of international crimes is not an alternative to pursuing the direct perpetrators of those violations.\textsuperscript{1651} A multitude of persons and entities can bear responsibility for the various contributions they might have made to serious breaches of international law.\textsuperscript{1652} States and their officials have undoubtedly contributed to the commission of core international crimes by States and non-state armed groups.

States provide military and technical assistance to one another with various strategic objectives in a number of regions around the world. Relations between States are often reinforced by the provision of significant military aid. Many foreign armies are dependent, to various degrees, upon such assistance to function. In this context in many conflict zones around the world, the

\textsuperscript{1651} See *supra* note 2.
\textsuperscript{1652} Schabas, W. A., *supra* note 508, p. 441.
provision of military aid is aimed at supporting mutual interests such as the deterrence of armed conflicts, the promotion of regional and global peace, stability and prosperity and other objectives. Part III critically examined whether foreign policies that result in the provision of different types of military aid necessarily amount to state complicity in international crimes, merely by way of providing such aid. While the current state of international law does not provide for a clear answer, this dissertation argues that the law of state responsibility requires more than a mere provision of aid or assistance to non-state actors for the assisting State to be liable for violations committed by such groups. Namely, the internationally wrongful acts must have been committed under the instructions or direction of the State, or the group must have been under the State’s effective control. While such a standard does not apply in the case of States knowingly providing aid or assistance to other States committing internationally wrongful acts, this dissertation argues that it must be shown that by the aid or assistance given the relevant State organ intended to facilitate the occurrence of an internationally wrongful act by the assisted State.

Part III examined the status of the complicity norm in the international law of state responsibility. International law prohibits state complicity by providing for different layers of responsibility. Chapter 8.2 has demonstrated that the issue of state complicity involves a complex interplay between primary (substantive) and secondary (framework) rules of international law. Complicity rules of a primary nature exist both in customary and in treaty law. The ICJ held that a State may be responsible under customary international law for the rendering of unlawful ‘aid and assistance’. The ILC sought to codify such responsibility through Articles 16 ARSIWA. Part III has argued that such a norm has been accepted as customary law. It argued that with respect to the subjective requirement in Article 16, intent on the part of the complicit State is required. This follows both from the analysis of international practice as well as from considerations concerning the drafting history of Article 16. The intent need not be focused on the eventual effect of the wrongful act of the main actor, but on the contribution of the complicit State to the commission of the wrongful act. This does not require the complicit State to actually intend for the outcome of the wrongful act.

1653 Genocide case, para. 420.
Complicity in the framework of the secondary rules of international law is discussed in the context of attribution. Where the link between perpetrators and the assisting State is strong enough to attribute the conduct of the perpetrators to the latter, the assisting State becomes a perpetrating State, giving rise to its international responsibility as such. Thus, such an assisting State bears independent or joint responsibility for breaching the negative obligation to refrain from violating international law. Chapters 13 and 14 have analysed the standards for attribution as set forth in the ARSIWA. In situations where the actor is, or can be assimilated to, an organ of the State, the conduct of de jure organs or de facto organs is attributable to the State. These would apply only if the perpetrators were under the exclusive control\textsuperscript{1654} or in a situation of complete dependence\textsuperscript{1655} upon, the assisting State. The next set of attribution rules apply in situations where the actor is acting on behalf of the State in particular circumstances. The conduct of such a non-state actor may be attributed to a State when the actor is in fact acting on the instructions of, or under the direction or control of, a State in carrying out the conduct. In the absence of specific instructions, a fairly high degree of control has been required to attribute the conduct to the State. Absent direction or control, the conduct of a non-state actor may be attributed to a State when the actor is “exercising elements of the governmental authority in the absence or default of the official authorities”;\textsuperscript{1656} when the conduct is subsequently adopted by a State;\textsuperscript{1657} or when the conduct is that “of an insurrectional movement that becomes the new government of a State.”\textsuperscript{1658}

While provision of military aid was examined in various cases by the ICJ (i.e. the Nicaragua case, the Genocide case, the Armed Activities case and the Wall case) the Court has been little instructive on the issue of States providing military and other type of aid to another State or a non-state actor. The ICJ asserted that a complicit relationship, established by financing, organizing, training, supplying and equipping of an army of another State, is, on a traditional understanding of the rules of attribution, insufficient to render the conduct of the assisted party conduct of the State.\textsuperscript{1659} Particularly, in the Genocide case the ICJ affirmed the need for control, 

\textsuperscript{1654} ILC Report on State Responsibility, Commentary on Article 6 (2), pp. 43-44.
\textsuperscript{1655} Genocide case, para. 393.
\textsuperscript{1656} ILC Report on State Responsibility, p. 49.
\textsuperscript{1657} Ibidem, p. 53.
\textsuperscript{1658} Ibidem, p. 50.
\textsuperscript{1659} See Nicaragua case, para. 109: The Court found that from 1981 until 1984 the US was providing funds for military and paramilitary activities by the contras in Nicaragua with the aim to support the opposition front in
thus rejecting the idea that a complicit relationship may be sufficient to attribute the conduct of non-state groups to the State.\textsuperscript{1660} Similarly, in the \textit{Nicaragua case}, the ICJ held that substantial provision of military and other type of aid by the US to the \textit{constras} (a non-state actor) did not warrant attributing to the US the acts committed by the \textit{constras} in the course of their military operations in Nicaragua.\textsuperscript{1661}

The analysis of international jurisprudence concerning individual and state responsibility for complicity in international crimes by way of provision of military aid conducted in Part II and Part III, has revealed interesting parallels between the judicial attempts to clarify and apply appropriate standards for these two distinct, yet complementary forms of responsibility under international law. There is no requirement that the aid or assistance provided by the assisting State should have been essential to the performance of the internationally wrongful act by the recipient State; as with aiding and abetting under international criminal law, it is sufficient if it contributed significantly to that act.\textsuperscript{1662} Furthermore, ‘\textit{specifically directed}’ criminal law standard in terms of \textit{actus reus} of aiding and abetting international crimes is almost identical to the standard for state complicity. However, such comparison also revealed notable differences. In particular, in terms of the subjective element of complicity: for individuals it must be shown that they knew that their acts assist the commission of a specific crime and have a substantial effect on its commission, while for States that knowingly provide aid or assistance to another State, it must be shown that the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the internationally wrongful act, and that internationally wrongful act is actually committed by the assisted State. This difference in approach proved fatal to the BiH’s submission on complicity in genocide by the FRY, which in Cassese’s view would have been

\textsuperscript{1660} \textit{Genocide} case, paras. 369 – 407.
\textsuperscript{1661} \textit{Nicaragua} case, para. 115: All the forms of US participation in the financing, organizing, training, supplying and equipping of the \textit{constras}, and even the general control by the US over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the US directed or enforced the perpetration of the acts contrary to human rights and humanitarian law. Such acts could well be committed by members of the \textit{constras} without the control of the US.
\textsuperscript{1662} ILC Report on State Responsibility, p. 66. On military support to other States, see Aust, H. P., \textit{supra} note 1121, pp. 129–145.
successful had a criminal law standard been applied.\textsuperscript{1663} Whereas the same standards apply for individual criminal responsibility for the provision of military aid to another State, compared to aiding a non-state actor, international law envisages different standards for when a State is implicated in violations committed by an individual or a group (i.e. non-state actor), compared to when the same are perpetrated by another State.

The jurisprudence in both contexts has been characterized by differences of opinion between international courts and by tensions arising from the pursuit of interpretations of the law of international responsibility that are viewed as either overly expansive or restrictive. The absence of a clear and unambiguous conventional legal standard for aiding and abetting applicable to all international criminal tribunals, and of a precise definition for the concept of control\textsuperscript{1664} in the context of attributing the acts of non-state actors to States, has allowed international judges to elaborate their own understandings as to the relevant tests and elements for individual and state complicity. The said resulted in legal uncertainty and lead to an inconsistency in the law of international responsibility given that military or political leaders can be individually responsible for actions conducted for the State, whereas the State itself incurs no responsibility. This apparent anomaly highlights the separate development of both legal regimes, but also suggests either that the standards applied to individuals may be too low, or that the rules of state responsibility are set too high. Part II has argued that the standards applied to individuals are set too low and proposed specific direction requirement as a solution to consistent application of the complicity rules in the law of international responsibility.

While there is no perfect match between grounds of individual criminal responsibility and grounds of state responsibility, according to the current state of international law, when a political or military leader is individually responsible, also the State, to which his acts can be attributed, can nevertheless be held responsible. That is, as shown in Part III, individual criminal responsibility of a political/military leader may be complemented by responsibility of his State, based, \textit{inter alia}, on breach of the principle of non-intervention, or breach of obligations of international humanitarian law.

\textsuperscript{1664} See \textit{supra} Sections 13.2 and 14.1.3.
A credibility gap is likely to develop if international law provides for increasing number of bases on which States can be held responsible without, at the same time, developing related procedural means. This concern mirrors general worries about the ineffectiveness of the enforcement of international law. The responsibility of States exists independently of procedural means to implement it. However, if structural reasons stand in the way of effectively implementing new bases of the responsibility of States, it is a legitimate question to inquire into these structural weaknesses and to seek change in that regard.\footnote{Fastenrath, U. et al., \textit{From Bilateralism to Community Interest: Essays in Honour of Bruno Simma}, Oxford University Press, 2011, p. 298.}

A brief survey of procedural possibility for holding complicit States responsible shows that the \textit{Monetary Gold} principle may prevent the ICJ from entertaining cases on complicity. Although the Court may have leeway to abandon its jurisprudence, the more promising prospects are offered by other judicial and quasi-judicial avenues (i.e. human rights bodies, domestic courts, CJEC, ICC, WTO). State consent plays a different role in these fora: in some situations, it respresents no obstacle, as all members to a treaty regime have automatically consented to the exercise of jurisdiction by a court. In other situations, third States are not legally affected by a decision of a court established under such a regime as they are not members of the regime. In this regard, it is the peculiar position of the ICJ which makes its reliance on consent so important: the effects of its jurisprudence are so readily apparent that the bindingness \textit{inter partes} of a judgment is not a sufficient means of protection for third parties. This is arguably a less acute problem with respect to other courts, which are not accredited with the hallmark of being ‘the principle judicial organ of the United Nations’. Although the \textit{Monetary Gold} principle is sometimes presented as a general principle of law applicable beyond ICJ proceedings,\footnote{Rosenne, S., \textit{International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications}, in Rudiger Wolfrum (ed.), Max Planck Encyclopaedia of Public International Law, online edition, Oxford University Press, 2008, p. 7.} its effects will have to be carefully established with respect to the features of the judicial dispute settlement at hand.

As no unified forum for adjudicating state as well as individual complicity exists, there is a threat of divergent jurisprudence emanating from different international jurisdictions, despite dealing with similar rules or legal notions. Thus, in order to prevent the fragmentation of the international legal system, it is imperative that elements of complicity in these two different
regimes of international responsibility develop in a similar way. The opposite trend will create dissatisfaction for the States concerned as it introduces a measure of legal insecurity.
PART IV – FINAL CONCLUSIONS

1. The question of when does a State’s provision of assistance to foreign armies or armed groups cross the line from legitimate foreign policy to complicity in commission of international crimes represents one of the most difficult dilemmas in criminal justice, has profound normative implications and has provoked sharp splits among international tribunals. Whether such military aid should be viewed from the realm of individual criminal responsibility and/or the one of state responsibility continues to be probed in the world of international law.

2. The dissertation clarified the current status of international law regulating how States and individuals should act when providing military aid to another State or a non-state actor operating in another State in order to avoid responsibility. It demonstrated that the respective normative frameworks for individual complicity and state complicity so far lack sufficient coordination and result in inconsistency when implementing international responsibility. Further, the normative framework of individual and state complicity was analysed with the aim to address the interplay between the two regimes of international responsibility in the given context. The existing doctrinal models of the relationship between state and individual criminal responsibility examined in Part I reveal the traditional dualistic model as the dominant doctrinal approach to this relationship.1667 This approach accepts certain connection and overlap between both responsibility regimes, but at the same time rejects the idea of formalized mutual dependency. While dualistic approach acknowledges double attribution and complementarity as the main characteristics of this relationship, it fails to provide for an adequate response to the relationship between state and individual criminal responsibility in the “foreign assistance cases”, as it suggests that both responsibility regimes are independent, separate and do not influence conclusions adopted in the other area of international law. While acknowledging that the finding of individual criminal responsibility in the “foreign assistance cases” before an international criminal jurisdiction cannot be a legally compelling argument for establishing state responsibility before an inter-state court, their legal, political and moral interconnectedness militates in favour of adopting a more holistic approach towards responsibility management. Accordingly, in “foreign assistance cases” criminal prosecutions of military or State leaders and state

1667 See supra Chapter 2.4.
responsibility proceedings should be viewed not only complementary, as suggested by the
dualistic model, but rather mutually co-dependent. Treating them otherwise might result in
inconsistent outcomes that would undermine the legitimacy of different courts involved in
establishing responsibility. Accordingly, it is imperative that the respective normative
frameworks for individual and state complicity are aligned so that both State and individual
leader may be prosecuted for the same act/conduct. This dissertation argues that the current
international law system does not provide for an adequate normative framework of complicity.

3. The dissertation has sought to show that in certain cases state responsibility and individual
criminal responsibility for international crimes should be regarded as mutually co-dependent and
complementary. Many serious violations of international law should entail both international
responsibility of a State and individual criminal responsibility of persons who have committed
the said violations, either as officials, agents, or in any other respect. Part II has demonstrated
that in “foreign assistance cases”, provision of military aid by a military or a political leader
giving rise to individual complicity could be said to necessarily entail the implementation of a
state policy, and should therefore be considered as an act of State in addition to an act of an
individual. Acknowledging that the two regimes serve parallel functions within their respective
spheres of application\textsuperscript{1668}, they nevertheless both aim at the protection of fundamental values
shared by international community as a whole and should therefore develop coherent rules in co-
dependence and appreciation of their mutual existence.

4. Part II examined the landmark contemporary foreign assistance case where the State and its
military leader have provided military aid to a non-state actor operating in another State, thereby
demonstrating implications of new developments in international criminal law on responsibility
of military (or political) leaders and the assisting States. Acknowledging that provision of
military aid in contemporary armed conflicts which involve the commission of international
crimes may, under certain circumstances, be characterized as complicity in those crimes, this
dissertation seeks to draw the limit(s) of internationally permitted conduct for States and
individuals, respectively, with regard to the provision of military aid. Thus, it provides further
transparency of the current status of international law concerning responsibility of a military or

\textsuperscript{1668} For the difference between reparative v. criminal function of the two responsibility regime, see supra Part I,
Sections 1.2.2., 1.2.4 and 2.4.
political leader(s) implementing a state policy on provision of military aid as well as responsibility of a State in that context.

5. Unfortunately, recent developments in international criminal law have left it ambiguous whether the mere provision of military aid to another State or a non-state actor engaged in an armed conflict can be equated with aiding and abetting international crimes committed during such an armed conflict. In particular, the ICTY Trial Chamber in the Perišić case ambitiously drew new boundaries and set a lower threshold in terms of accomplice liability of a military leader when providing military aid to another State or a non-state actor operating in another State. Whereas Perišić Appeals Chamber imposed the stricter requirement of ‘specific direction’ for aiding and abetting international crimes, such has not been accepted in subsequent jurisprudence of the ad hoc tribunals. The dissertation has argued that this subsequent approach fails to distinguish between aid to the commission of specific crimes and aid to the war effort generally, which is not inherently criminal for the purposes of the Statutes of ad hoc tribunals, particularly if the aid provided is of a general nature. Such a standard, whereby military assistance given to a party to an armed conflict with the knowledge that international crimes are likely to be committed by that party, will result in a finding of responsibility irrespective of any humanitarian intent, significance, specificity, direction or impact of that assistance. Accordingly, this work has argued that the rejection of a specific direction requirement, or even a lesser ‘purpose of facilitating’ standard as required by the Rome Statute, creates a threshold approaching that of a strict liability.

Thus, from the perspective of international criminal law, it remains unclear whether aiding to wage a war is criminalized to the effect that provision of military aid in itself would amount to aiding and abetting crimes committed in that armed conflict. Recognizing the Perišić case as factually distinct from any of the cases that have come before international criminal tribunals, it is necessary to acknowledge the political implications for military and political leaders if the lower standard is to be applied in similar scenarios around the world. Further, the current confusion and ambiguity concerning the existing rules and standards of responsibility for provision of military aid renders possible that such aid is being given without as much as analysing the potential responsibility of a State or its actors. The international courts may have

---

1669 See supra Part II, Sections 5.2.1.3., 5.3.3. and 6.3.
initiated this discussion but it is far from being applied in the reality of international relations. It is alarming that after more than two decades of the existence of various international criminal tribunals, their jurisprudence is less, rather than more predictable. Nevertheless, after the two most recent and completely conflicting decisions in two strikingly similar cases of individual complicity for provision of military aid, namely the Perišić and the Taylor case, the elements of aiding and abetting in international criminal law are murkier than ever.

6. The analysis of individual and state complicity undertaken in Part II and Part III has demonstrated a considerable resemblance between both forms of responsibility. In cases of complicity by way of provision of military aid a strict separation between the state responsibility and the individual criminal responsibility would be but artificial. Specifically, in the Perišić case, the material breach amounting to complicity in international crime(s) was established in a very similar way and irrespective of the fact that it entails state or individual criminal responsibility. Notably, the manner in which the international criminal tribunal established the material (objective) element of international crimes is very similar to the manner in which the State act amounting to an internationally wrongful act may be demonstrated. In determining actus reus of individual criminal responsibility for complicity, the international court analysed state policy on provision of military aid, rather than the conduct of an individual, thereby blurring the boundaries between the two separate regimes of international responsibility. The general context of a violation played a fundamental role in proving that material (objective) element. The assessment of individual criminal responsibility for complicity in international crimes reveals traits of overlap with the assessment of States’ violations. At a minimum, it deals with the same facts that are capable of entailing state responsibility. The foregoing analysis has revealed that individual complicity in the “foreign assistance cases” has been defined in terms of State action and thus requires international criminal tribunals adjudicating such cases – if not to establish state responsibility – at least to take into account that the relevant individual conduct has taken place in the context of an internationally wrongful act by a State before ascribing individual criminal responsibility. Accordingly, it is submitted that Perišić’s conviction by the ICTY Trial Chamber can also be seen as a general recognition of state responsibility of the FRY. Thus, in this specific context, it is proposed that state responsibility should be viewed as an (inevitable) consequence of determination of individual criminal responsibility.
7. This dissertation demonstrated that complicity in core international crimes by way of provision of military aid takes place chiefly as a part of institutional, systemic or State criminality; thus, it should be ethically and legally appropriate to allocate the responsibility to different types of actors (individual and State) in respect of the same kind of wrongful conduct. It is difficult to imagine individual acts of provision of military aid not forming part of a state policy that could produce substantial effect on the commission of the crime(s) by another State’s armed forces or armed groups operating in another State. Further, it is difficult to imagine how a ‘lone individual’ would be capable of orchestrating the system of provision of military aid directed at another State’s armed forces or armed groups operating in another State, that has a substantial effect on the commission of crimes by those armed forces or armed groups. It is argued that in the context of provision of military aid complicity standards require the type and quantity of military aid that can only be provided as a product of a state policy. This effectively means a course of conduct involving the multiple commission of acts (that is, multiple acts of military aid and assistance) directed towards the principal offender(s), pursuant to or in furtherance of a State or organizational policy to aid another State or a non-state actor.

Furthermore, the analysis of the legal requirements imposed by the elements of aiding and abetting (specifically, the actus reus standard of substantial contribution) suggests that complicity by provision of military aid necessarily requires the backing of the State. Rather, it requires that the State actively promotes or encourages such an undertaking. It is proposed that a state policy the object of which is assisting a third State or an armed group operating in a third State, would be implemented by a State rather than by a sole individual. In the Perišić case, the ICTY has effectively addressed the collective dimension of international crimes. Accordingly, the punishment of a State organ(s) for international crimes requires, at least indirectly, a previous assessment of the same facts giving rise to state responsibility. While the Genocide case provided the ICJ with an opportunity to examine the various aspects of the relationship between state responsibility and individual criminal responsibility, regrettably, the Court avoided an in-depth analysis on the matter.

8. The comparison of the respective normative frameworks for individual complicity and state complicity under international law reveals both similarities and differences. Similarly, the analysis of the pertinent international practice reveals that there are various points of contact between the two regimes which can hardly be eliminated. The study of the landmark case of complicity has shown that in addressing accomplice liability when dealing with military aid, there is a substantial overlap and interaction between state responsibility and individual criminal responsibility.

8.1. Firstly, it is interesting to note that the standard of significant contribution of Article 16 ARSIWA is similar to that imposed by international criminal law – the accomplice’s assistance must have a substantial effect on the commission of the crime.\textsuperscript{1671} If a common denominator from the existing jurisprudence of \textit{ad hoc} tribunals and the positions in scholarly works can be identified, it is the requirement that (military) aid must have made some difference for the main actor in carrying out its deed.\textsuperscript{1672} Similar considerations apply for complicity in the law of state responsibility. In order to find responsibility of a complicit State, its (military) aid should have changed the situation for the main actor. It must have made it ‘substantially’ easier to commit the internationally wrongful act.\textsuperscript{1673} It is noteworthy that the ILC required a very similar degree of causal impact in its commentaries to Article 2(3)(d) of the Draft Code of Crimes and to Article 16 ARSIWA. Whereas the former clarifies that the commission of a crime must have been ‘facilitated in some significant way’,\textsuperscript{1674} the latter refer to the requirement that the aid or assistance in question ‘contributed significantly’ to the wrongful act,\textsuperscript{1675} which has to be read in conjunction with the previously stated requirement that ‘the aid or assistance must be given with a view of facilitating the commission of that act; and must actually do so’.\textsuperscript{1676}

8.2. Secondly, if the applicable international criminal law standard in terms of \textit{actus reus} of aiding and abetting international crimes needs to be that the aid was ‘specifically directed’ to the

\textsuperscript{1671} See, e.g. Simić Appeals Judgment, para. 85; Vasiljević Appeals Judgment, para. 45; Krstić Appeals Judgment, para. 238; Krnojelac Appeals Judgment, para. 51; Blaškić Appeals Judgment, para. 48; Tadić Appeals Judgment, para. 229.
\textsuperscript{1672} Cassese, A., \textit{supra} note 30, p. 214.
\textsuperscript{1673} Report of the ILC work of its forty-eighth session, p. 24.
\textsuperscript{1674} Draft Code of Crimes with Commentary, Text adopted by the International Law Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (at para. 50). The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1996, vol. II (Part Two).
\textsuperscript{1675} ILC Report on State Responsibility, Commentary on Article 16, para. 5.
\textsuperscript{1676} \textit{Ibidem}, para. 4.
commission of the crime, the ‘specifically directed’ standard is, coincidentally, almost identical to the standard for state complicity and for attribution articulated in the ARSIWA. Thus, by raising the threshold requirement for accomplice liability under international law, the Perišić Appeals Judgment effectively synchronized the requirements of both forms of responsibility. The insistence on specific direction by the Appeals Chamber in Perišić required that the assistance had substantial effect on the crimes, namely that the assistance be directed/aimed towards the crimes, thereby establishing the requisite nexus between the acts of the accused and the crime(s) committed. Such requirement effectively raised the aiding and abetting standard by insisting on a purposive element, which has not been accepted by the subsequent jurisprudence of the ad hoc tribunals, although it is required by the Rome Statute. By insisting on specific direction, the Appeals Chamber adequately brought the standard of individual criminal responsibility for complicity closer to that of state responsibility as set out by the ICJ. As argued in Section 11.3., the Perišić Appeals Chamber had opted for this standard in search of the requisite “nexus” or “link” between the acts or conduct of the accused and the crimes. Even omitting the “specific direction” standard, the accomplice’s acts needed to have the necessary connection to the crimes in order to satisfy the requisite element of actus reus of aiding and abetting. Therefore, it is argued, the Perišić Appeals Chamber’s reasoning on the “specific direction” element is merely the fulfilment of the indisputably requisite element of substantial effect on the crime. Accordingly, the Perišić Appeals Chamber’s characterisation of specific direction did not amount to the introduction of any novel elements in the realm of the imposition of individual criminal responsibility. However, the subsequent rejection of the ‘specific direction’ standard by the ad hoc tribunals exposed the disconnection of individual criminal responsibility from state responsibility and added to the complexity and confusion. It would seem that the ICTY and the SCSL regard individual criminal responsibility as a result of an autonomous development of principles of individual criminal responsibility, which does not need to be derived from responsibility of the State. This dissertation has argued that it remains conceptually problematic to disconnect the responsibility of a military or a State leader, whose acts can only be explained by the fact that he acted for the State, entirely from the responsibility of the State itself.

8.3. Thirdly, there are clear parallels between the judicial divergence that exists with respect to the scope of individual criminal responsibility for such assistance to international crimes and the disagreement between international courts that arose in relation to the appropriate standard for
holding assisting States responsible for similarly contributing to violations by non-state actors during situations of armed conflict (i.e. overall control v. effective control). While clearly the pronouncements on issues of state responsibility are not within the competence of international criminal tribunals, the ICTY in Tadić nonetheless argued the “overall control” standard suffices for attribution of conduct of individual or a group to the State in the context of state responsibility. Specifically, the Tadić Appeals Chamber held that acts committed by the non-state actor (i.e. VRS) could give rise to international responsibility of the State (i.e. FRY) on the basis of the overall control exercised by the State over the non-state actor, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the State’s instructions, or under its effective control. Contrary to the ICTY, the ICJ asserted that it has to be shown that “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations. Similarly to the reasoning in Tadić, the Trial Chamber in Perišić asserted that general dependence of the non-state actor (VRS) on the FRY/VJ sufficed for imposing accomplice liability. Based on the foregoing study, the Perišić Trial Chamber’s analysis of accomplice responsibility is similar to the standard of overall control advocated by Tadić, while specific direction standard advocated by the Perišić Appeals Chamber resembles effective control standard endorsed by the ICJ, requiring control and/or instructions in respect of a specific operation in which crimes were committed. Thus, if one holds that the applicable standard is that of the specific direction, a general (complete) dependence of an armed group is not sufficient for imposition of criminal responsibility on the accomplice.

The ICJ clearly rejected the application of the overall control test in the context of state responsibility, considering that “the overall control test has the major drawback of broadening the scope of state responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct [...] the “overall control” test is unsuitable, for it”.

1677 Darcy, S., supra note 522.
1678 Tadić Appeals Judgment, paras. 131, 145, 156.
1679 Genocide case, para. 400.
standard put forward by the Perišić Trial Chamber is too broad and thus unsuitable for invoking individual criminal responsibility of the accomplice.

9. Notwithstanding these connections and overlaps between these two regimes of international responsibility, certain standards for individual complicity developed by international criminal tribunals diverge from the framework of state complicity rules.

First, it is proposed that the division regarding the standard of fault required for state and individual complicity might be the most notable one. While the debate on the subjective (fault) element in Article 16 ARSIWA corresponds to the knowledge/purpose debate concerning aiding and abetting in international criminal law, the subjective elements for complicity of the two regimes of international responsibility diverge. The specific primary rule prohibiting state complicity requires that for a State providing military aid to another State to be liable for complicity in internationally wrongful acts committed by the receiving State utilizing contributed resources, the assisting State had to intend the contributed resources to be so used. In contrast, the requisite mental element of aiding and abetting under the case law of the ad hoc tribunals is mere knowledge that the assistance aids the commission of the specific crime of the principal perpetrator along with the awareness of the essential elements of these crimes.\footnote{Mrkšić and Šljivančanin Appeals Judgment, para. 159; Orić Appeals Judgment, para. 43; ICTR, Prosecutor v. Seromba Appeals Judgment, para. 56; Blagojević and Jokić Appeals Judgment, para. 127; Simić Appeals Judgment, para. 86; Blaškić Appeals Judgment, paras. 45-46, 49; Vasiljević Appeals Judgment, para. 102.}\footnote{See Article 25.3(c) of the Rome Statute.} Interestingly, the Rome Statute explicitly adopted a “purpose” \textit{mens rea} for most crimes of complicity.\footnote{Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para. 274 (internal citations omitted). Furthermore, the knowledge standard provided under Article 30 does not alter the purpose standard in Article 25(3)(c), as this standard falls within the “[u]nless otherwise provided” clause of Article 30.\footnote{Dubber, M. D., \textit{supra} note 634, p. 1000; Farrell, N., \textit{supra} note 479, p. 887.}} The ICC clarified that “unlike the jurisprudence of the ad hoc tribunals, article 25(3)(c) of the Rome Statute requires that the person acts with the \textit{purpose} to facilitate the crime; knowledge is not enough.”\footnote{This might represent a window for a future alignment of the mental elements of the two respective regimes of international responsibility.\footnote{Dubber, M. D., \textit{supra} note 634, p. 1000; Farrell, N., \textit{supra} note 479, p. 887.}} Nevertheless, the term \textit{purpose} has been left undefined in the Rome Statute and may therefore be open to interpretation.\footnote{This might represent a window for a future alignment of the mental elements of the two respective regimes of international responsibility.\footnote{Dubber, M. D., \textit{supra} note 634, p. 1000; Farrell, N., \textit{supra} note 479, p. 887.}}

Second, whereas the same standard applies for individual complicity by way of provision of military aid to another State compared to aiding a non-state actor, international law envisages
different standards for when a State is implicated in violations committed by a non-state actor, compared to when those are perpetrated by another State. The law of state responsibility remains primarily focused on inter-state responsibility and needs yet to be adjusted if it is to apply to situations where States aid or assist individuals. Article 16 ARSIWA only concerns inter-state relations and fails to regulate aid and assistance to non-state actors. Simultaneous individual and state responsibility will not arise where violations of international law are committed by non-state armed groups without any State involvement. However, non-state armed groups are rarely fully autonomous entities and very often receive military and financial assistance from States themselves. As shown above, where the wrongful acts were perpetrated by individuals or groups, it must be shown that they acted under the instructions, direction or control of the State “in carrying out the conduct” in order for the State to be responsible.1685 Articles dealing with the responsibility of States constitute an indispensable counterpart of the rules dealing with individual criminal responsibility. It is therefore required to elaborate and define the rules with regard to the responsibility of States for aid and assistance to non-state actors consistent with those developed in the regime of individual criminal responsibility. These rules should not develop independently from the rules articulated by international criminal law. Furthermore, a consistent normative framework for complicity would require that the Articles on state responsibility govern aid and assistance to non-state actors similarly as they govern inter-state assistance.

Third, the insistence on specific direction in Perišić did not require that the accomplice directed or controlled the crimes of the principal perpetrators, but rather that the assistance itself had substantial effect on the crimes. According to Perišić, such requirement is met when the assistance is directed/aimed towards those crimes, thereby establishing the requisite nexus between the acts of the accused and the crime(s) committed. In this regard the reasoning in the Perišić Appeals Judgment might be interpreted as an attempt to offset the more expansive approach to the scope of state responsibility taken by the Tadić Appeals Chamber that argued for the overall control requirement as the appropriate criterion applicable to imputing the acts of non-state actor to a State under the law state responsibility1686, which sought to eliminate the need for specific instructions or directions for the commission of the crimes. Nevertheless, it is

1685 Article 8 ARSIWA.
1686 Tadić Appeals Judgment, para. 145.
argued that due to the subsequent rejection of specific direction standard by the *ad hoc* Tribunals, the legal requirements for individual and state complicity remain distinct, leading to inconsistency in the law of international responsibility.

10. The ICJ and the international criminal tribunals have autonomous, yet complementary roles, which would best be advanced if these institutions have broadly compatible rules regarding the determination of respective state and individual criminal responsibility for complicity. Accordingly, this dissertation argues for the adoption of the “specific direction” requirement in “foreign assistance cases”, thereby providing for greater consistency and predictability in application of complicity rules in both regimes of international responsibility.

One might argue that individual criminal responsibility is a different form of responsibility and thus need not be governed by the same standards. However, the introduction of lower thresholds of responsibility may create tension within both systems. Where the standard for complicity in international criminal law becomes significantly lower than that in the law on state responsibility, the possibility exists for an individual to be held criminally responsible for conduct that the State is permitted to undertake. In order to avoid such inconsistencies and with the aim to establish a coherent responsibility management, it is suggested that the *ad hoc* international criminal tribunals’ dilemma concerning the contours of complicity should be resolved by consulting the limitations of complicity in the Rome Statute as well as the norms of inter-state complicity reflected in the Articles on State Responsibility. Beatrice I. Bonafè has referred to “the need to establish some form of co-ordination between these two regimes of international responsibility, which cannot be achieved by relying too rigorously on the principle of individual criminal liability alone”. Perišić might be seen as an unsuccessful example of this. Bonafè notes that the reliance on modes of criminal responsibility, such as joint criminal enterprise, which focus on the collective nature of international crimes “has the effect of establishing individual criminal responsibility in a way which is increasingly similar to the

---


1688 This is expressly recognized in the Articles in the form of a “without prejudice” clause. See ILC Report on State Responsibility, p. 142. (“These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.”).

assessment of state responsibility for the same internationally prohibited conduct”.\textsuperscript{1690} Whereas no “direct legal connection” between the two forms of international responsibility exists,\textsuperscript{1691} the various connections between state and individual criminal responsibility for complicity in international crimes revealed by the case study and the study of international practice show a certain complementarity between these regimes. Accordingly, this dissertation calls for an establishment of a comprehensive normative framework capable of securing a more effective coordination between these regimes.

11. Furthermore, as shown in Part II, individual complicity by way of provision of military aid (necessarily) entails implementation of state policy on foreign assistance. Accordingly, this dissertation proposes that the determination of individual criminal responsibility for complicity in the “foreign assistance cases” should entail the presumption of state responsibility for the same act. Through Part II and Part III this dissertation aims to show that the current system needs a full appreciation of the mutual relationship and coexistence of the two systems. The inquiry focused on situations where a general overlap exists between the elements of state responsibility and the elements of individual criminal responsibility. In situations where the conduct of political and/or military leader(s) and the State conduct is the same, the determination of individual criminal responsibility is almost inextricably connected to the determination of a State act triggering state responsibility. Thus, it seems impossible to speak of dissociation or complete autonomy of individual criminal responsibility as far as complicity by way of provision of military aid is concerned. Rather, individual criminal responsibility in such cases seems closely connected to state responsibility arising out of the same conduct. Accordingly, state responsibility for complicity by way of provision of military aid should be implicit in the conviction of military or political leaders as accomplice.

12. An alternative plausible suggestion is that new developments in international criminal law should impact the rules governing the responsibility of States in this regard. If military and political leaders are to be held responsible for implementing the state policy of provision of military aid to another State or non-state actors in an armed conflict situation, then the assisting State should also be held responsible for that conduct. However, this development is less plausible as it requires lowering the normative threshold of state responsibility for complicity.

\textsuperscript{1690} Ibidem, p. 189.
\textsuperscript{1691} Ibidem.
The long codification process of state responsibility attests to the difficulties of adjusting the responsibility schemes to the evolving realities of international law. The open question remains whether revision of the ICJ judgment in the *Genocide* case is plausible due to the recent developments of complicit responsibility by international criminal tribunals. This dissertation aims to open the discussion and debate on individual and state responsibility and to prevent States to hide behind an individual who, in his capacity of a State official, may now be exposed to individual criminal responsibility while States, the architects of the policy, are shielded by the current state responsibility regime which shields them from application of complicity norms by the ICJ. A State, if confident in its policy to provide military aid to another State or a non-state actor, need to be subjected to new norms and the law on state responsibility should be brought into line with the new developments in international criminal law in order to avoid inner contradictions. Ending the culture of impunity is a forward-looking enterprise. Oddly enough, despite repeated cases of state complicity, only limited formal efforts have been made to conceptualize compliance with international law. This dissertation seeks to disrupt this disturbing silence.
Bibliography

Books


64. Doria, J. R., *The Relationship between Complicity Modes of Liability and Specific Intent Crimes in the Law and Practice of the ICTY*, in *The legal regime of the International Criminal Court: essays in*


Articles


256. Kalshoven, F., The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit, 2 Yearbook of International Humanitarian Law, 3, 1999, pp. 3-61.


### Table of UN SC Resolutions

<table>
<thead>
<tr>
<th>Resolution</th>
<th>Date and Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>UN SC Resolution 217</td>
<td>[Southern Rhodesia], UN Doc. S/RES/217 (1965) adopted by the SC at its 1257th Meeting, on 20 November 1965;</td>
</tr>
<tr>
<td>UN SC Resolution 1315</td>
<td>[on the Situation in Sierra Leone], UN Doc. S/RES/1315 (2000) adopted by the SC at its 4186th meeting, on 14 August 2000;</td>
</tr>
<tr>
<td>UN SC Resolution 808</td>
<td>UN Doc. S/25704 (1993) adopted by the SC at its 3175th Meeting, on 22 February 1993;</td>
</tr>
<tr>
<td>UN SC Resolution 988</td>
<td>U.N. Doc. S/RES/988; adopted by the SC at its 3522nd Meeting, on 21 April 1995;</td>
</tr>
</tbody>
</table>


**Table of International Treaties**


Charter of the United Nations (adopted 26 June 1945, entered into force 25 October 1945) 1 UNTS XVI

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987)

Convention concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 October 1907, entered into force 26 January 1910) 36 Stat 2415


Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287

European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953; as amended) 213 UNTS 222,

Geneva Conventions (I-IV) of 1949 and Additional Protocols:

  Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949)

  Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea (adopted 12 August 1949)

  Geneva Convention (III) on Prisoners of War (adopted 12 August 1949)

  Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949), 75 UNTS 287

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

  Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (adopted 8 June 1977, entered into force 7 December 1978)


International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171


### Table of Cases

**International Court of Justice**


Case Concerning Legality of Use of Force (Serbia and Montenegro v. Italy), Preliminary Objections, Judgment, 15 December 2004, ICJ Reports 2004, p. 865 et seq.


Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, in ICJ Reports 2004, p. 136 et seq.

Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, 6 November 2003, in ICJ Reports 2003, p. 161 et seq.


Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran), Judgment, 24 May 1980, ICJ Reports 1980, p. 3 et seq.

Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), Judgment of 14 February 2002, para. 60.

*International Criminal Tribunal for Former Yugoslavia*


**International Criminal Tribunal for Rwanda**