Original Scientific Article UDC: 341.4:343:355

MILITARY AID AS COMPLICITY IN INTERNATIONAL CRIMES: INDIVIDUAL OR STATE RESPONSIBILITY?

Tina Drolec Sladojević,
LLB, LLM (University of Amsterdam, Amsterdam Law School, The Netherlands), attorney at law at Ulčar & partners, PhD candidate at the Faculty of Law of the University of Ljubljana

1. INTRODUCTION

This article examines the question of whether political decisions of states to provide military aid to another state or to a non-state actor in situations involving commission of international crimes[1] should be qualified as acts of state and should, accordingly, be addressed within the framework of international law of state responsibility, or whether they should be regarded as acts invoking individual criminal responsibility within the realm of international criminal law. The analysis is methodically limited to the provision of military aid by one state to another or to a non-state actor, operating in an armed conflict situation.[2]

Within this framework, the goal is to expose the apparent tension between the existing rules on the provision of military aid deriving 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),

[1] The notion of *international crime* is used here as abbreviation and umbrella term for serious violation of international law committed both by individual and/or state. It therefore encompasses crimes under international law committed by individuals and international crimes *stricto senso* contained in ex- Article 19 of Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter: DASR).

[2] The scope of this article 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.

whilst the responsibility of a state remains unclear. The article addresses this tension particularly in light of the recent developments in international criminal law. Namely, different international tribunals have rendered conflicting decisions on individual criminal responsibility of a political and/or military leader for the provision of military aid to another state or its armed forces.

In addition, the article explores the proposition that provision of military aid could be said to necessarily entail the implementation of a state policy, and should therefore be considered as an act of state rather than (or in addition to) an act of an individual. Current international law is called up to solve special unlawful situations where identical conduct invokes parallel legal consequences both in the province of state and individual responsibility.[3] If certain acts (that essentially boil down to implementation of state policy) invoke criminal responsibility when committed by an individual, the same acts should also invoke responsibility when committed by the state. To conclude otherwise would enable states to shield themselves behind the individual. Thus, it is argued that the whole of the international law norms concerning the prohibition of international crimes should operate at inter-state as well as individual level so that no legal loopholes are left, resulting in state and individual responsibility being complementary instruments aimed at suppressing international crimes.

The relationship between state responsibility and individual criminal responsibility for acts or omissions that constitute internationally wrongful acts as well as crimes under international criminal law forms one of the most fascinating, yet underdeveloped, aspects of international law. While questions of both state responsibility and individual criminal responsibility have generated considerable debate in literature, the articulation of the relationship between state and individual responsibility in the realm of international crimes remains for the most part unclear. Some scholars argue that one of the main characteristics of the relationship between state and individual criminal responsibility is a dual attribution, as there are certain acts, which are attributable to both, states and individuals, and invoke a dual responsibility under international law.[4] The

[3] Ondrej Svacek: State and Individual Responsibility for International Crimes – Case of Genocide, p. 4, <www.duo.uio.no/bitstream/handle/10852/22658/OndrejxSvacek.pdf?sequence=1> (24. 11. 2010).

[4] Shabtai Rosenne: State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility, in: NYU Journal of International Law and Politics, 30 (1997-1998), pp. 145-166; Maurice Kamto: Responsabilité de l'Etat et responsabilité de l'individu pour crime de génocide. Quels mécanismes de mise en oeuvre?, in: K. Boustany and D. Dormoy (eds.): Genocide(s). Bruylant, Bruxelles 1999, pp. 487-511; Vladimir-Djuro Degan: Responsibility of States and Individuals for International Crimes, in: Yee, S. and Tieya, W. (eds.): International Law in the Post-Cold War World: Essay in Memory of Li Haopei. Routledge 2001, pp. 202-223; David D. Caron: State Cri-

second characteristic of the examined relationship is complementarity, which 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.[5]

In sum, it is generally accepted that international crimes give rise to dual responsibility, of the state as well as of the concerned individual.[6] In other words, "[i]ndividual responsibility has certainly coupled state responsibility but is far from replacing it."[7] Thus, it is maintained that state and individual responsibility often coexist and complement each other, by being subject to different rules and pursuing different goals. Indeed, despite their different operations, the two regimes should act in a complementary way and enhance effectiveness of international criminal justice.[8]

In respect of certain crimes, the circle of potential perpetrators is inevitably limited to leaders or organizers, 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. As regard such crimes, state responsibility should not be considered as precluding individual responsibility of the leaders or organizers for the same crimes. Crimes such as genocide, war crimes, and crimes against humanity can thus be considered as amounting to either "crimes of state"[9] or individual crimes or both, depending on the circumstances of the unlawful act.

---

mes: Looking at Municipal Experience with Organizational Crime, in: Maurizio Ragazzi (ed.): International Responsibility Today: Essays in Memory of Oscar Schachter. Martinus Nijhoff Publishers, Leiden 2005, pp. 23-30; Hector G. Espiell: International Responsibility of the State and Individual Criminal Responsibility in the International Protection of Human Rights, in: Maurizio Ragazzi (ed.): International Responsibility Today: Essays in Memory of Oscar Schachter. Martinus Nijhoff Publishers, Leiden 2005, pp. 151-160.

[5] *Ibid.*

[6] Christian Dominicé: La question de la double responsabilité de l'Etat et de son agent, in: E. Yakpo and T. Boumedra (eds.), Liber Amicorum Judge Mohammed Bedjaoui, Kluwer Law International, The Hague 1999, p. 147.

[7] Andrea Bianchi: State Responsibility and Criminal Liability of Individuals, in: The Oxford companion to international criminal justice. Oxford University Press, Oxford 2009, p. 17.

[8] Beatrice Bonafe: The Relationship Between State and Individual Responsibility for International Crimes. Martinus Nijhoff Publishers, Leiden 2009.

[9] The notion of "crime of state" is 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 liability. The use of the term is not intended to make any reference to the now obsolete concept of state international crimes reflected in Draft Art. 19 of the ILC Articles on State Respon-

The review of jurisprudence of international criminal courts and tribunals leads to a conclusion that before the case of the *Prosecutor v. Momčilo Perišić* (hereinafter: the *Perišić case*), adjudicated before the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY), no international court had dealt with criminal responsibility of an individual charged with aiding and abetting international crime(s) by way of provision of military aid to another state or its armed forces. Thus, the *Perišić* case represents a precedent on the issue of individual criminal responsibility for aiding and abetting by way of provision of military aid to another state or a non-state actor operating in the territory of another state. The other notable case of aiding and abetting by way of provision of military aid is the *Charles Taylor* case, examined by the Special Court for Sierra Leone (hereinafter: SCSL). The analysis of individual complicity cases is methodically limited to these two cases, being the most significant in the history of international criminal law. Not only have they raised novel legal issues, concerned mass atrocities and involved high-profile defendants; these two cases also stand out as instances where international courts have either impliedly, or at times overtly, considered how international relations could be affected by a precedent involving a top state official convicted for providing military assistance to a foreign military force responsible for war crimes and crimes against humanity. Yet, the courts reached vastly different conclusions.[10]

Concerning the question of state responsibility, the International Court of Justice (hereinafter: ICJ or the Court) has been little instructive on the issue of states providing military and other type of aid to another state.[11] It is interesting to note that the *Case concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide* (hereinafter: the *Genocide case*)[12] represents an almost parallel case in the realm of state responsibility.

sibility (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.

[10] Mugambi Jouet: Judging Leaders who Facilitate Crimes by a Foreign Army: International Courts Differ on a Novel Legal Issue, in: Vanderbilt Journal of Transnational Law, 47 (2014), p. 1092-3.

[11] The cases where the Court was asked to adjudicate on the issues of state responsibility concerning provision of military aid from one state to another or to a non-state actor acting in the territory of another state involve the *Military and Paramilitary Activities in and against Nicaragua* (hereinafter: *Nicaragua case*), the *Case concerning the Application of the Convention of the prevention and punishment of the crime of Genocide* (hereinafter: *Genocide case*) and the *Case concerning Armed Activities on the Territory of the Congo* (hereinafter: *Armed activities case*).

[12] ICJ, Case Concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 11 July 1996, ICJ Reports 1996, p. 595 *et seq*.

This represents a distinctive opportunity for comparison of treatment of complicity between the two distinct responsibility regimes. Contemporary armed conflict of the war in Bosnia and Herzegovina (hereinafter: BiH) between 1992 and 1995 has been selected as a unique example allowing to explore both, the role of a third state (i.e., the Federal Republic of Yugoslavia) and its military leader (i.e., the Head of the Army of Yugoslavia) as potential accomplices in crimes committed in BiH.

The scope of this article is limited to analysis of a particular form of participation in international crimes by way of provision of military aid, namely aiding and abetting. This mode of liability is of particular relevance to those furnishing military aid to commit core international crimes or contributing in other ways to such commission. Part One of the article examines elements of aiding and abetting in international criminal law and considers their application on a selected case of provision of military aid. Part Two explores elements of state complicity and their application on a selected case in the realm of state responsibility. Concluding remarks provide for a comparison between the two regimes of responsibility.

2. DEFINITION OF MILITARY AID AS COMPLICITY IN INTERNATIONAL CRIMES

Determination of an appropriate mode of participation for prosecuting the provision of military aid to direct perpetrators of international crimes is a challenging task. The statutes of the *ad hoc* tribunals provide that those persons who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" are liable to prosecution.[13] In contrast, the Rome Statute of the International Criminal Court (hereinafter: Rome Statute) provides a more detailed treatment of the various forms of individual criminal responsibility in Articles 25 and 28.[14]

[13] 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 Sierra Leone, 16 January 2002, 2178 UNTS 138 (entered into force 12 April 2002), UN Doc. S/2002/246 (hereinafter: SCSL Statute), Appendix II, Art. 6(1).

[14] Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc A/CONF.183/9. See also Sabina Zgaga: Posredno storilstvo in so-

Aiding and abetting as a form of liability is of particular relevance to persons who supply the means to commit core international crimes, or who contribute in other ways to such commission. 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.[15] In criminal law, the central means of achieving this end is through a differentiated model of participation in wrongdoing, distinguishing principals from other participants in the wrong.[16] Distinguishing principal perpetrators and accomplices carries an implied suggestion that the latter are less blameworthy than the former. 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.

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. The relevant knowledge requirement is a lower *mens rea* standard – 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".[17] This form of liability (i.e. superior responsibility), however, is "predicated upon the power of the superior to control or influence

storilstvo mednarodnih hudodelstev, in: 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 relaxes 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.)

[15] Miles Jackson: Complicity in International Law. Oxford University Press, Oxford 2015, p. 20.

[16] Albin Eser: Individual Criminal Responsibility, in Cassese A., Gaeta P., and Jones J (eds.) The Rome Statute of the International Criminal Court: A Commentary – Vol I (2002), 782.

[17] Rome Statute, Art. 28(a)(i).

the acts of subordinates",[18] whereas for aiding and abetting, it is not necessary to show that an accused "had any power to control those who committed offences".[19] 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.[20] 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.[21]

While it remains difficult to draw a clear distinction between joint liability and complicit liability, the need for complicity liability 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. While the International Law Commission (hereinafter: ILC) in its Articles on State Responsibility (hereinafter: ARSIWA)[22] 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.[23]

In order for an individual to be held responsible for aiding and abetting an international crime by way of provision of military aid, it must be proven that they provided practical assistance, encouragement, or moral support to the principal perpetrator of the crime, which had a substantial effect on the per-

[18] ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber, Judgment, 7 June 2001, para. 37.

[19] ICTY, *Prosecutor v. Simić*, Case No. IT-95-9-A, Appeals Chamber, Judgment, 28 November 2006, para. 103.

[20] Tadić Appeals Judgment, para. 228.

[21] ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, paras, 273, 284, 285.

[22] International Law Commission: Responsibility of States for Internationally Wrongful Acts, annexed to United Nations General Assembly Resolution 56/83 (12 December 2001), UN Doc A/Res/56/83.

[23] International Law Commission Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary on Article 41, para. 11, ILC Report A/56/10 (2001), Yearbook of ILC, Volume II, Part Two, p. 65 (hereinafter: ILC Report on State Responsibility); Georg Nolte and Helmut P. Aust: Equivocal helpers – Complicit States, Mixed Messages and International Law, in International and Comparative Law Quarterly, 58 (2009) 1, p. 16.

petration of the crime.[24] 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). 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".[25]

3. PART ONE - INDIVIDUAL COMPLICITY

States provide military and technical assistance to each other with varying strategic objectives in a number of regions around the world. The examined case study attempts to provide as answer as to whether such assistance renders the leaders of the assisting states individually criminally responsible for aiding and abetting the crimes committed during such wars, simply because they provided the aid. The author argues that for the determination of individual criminal responsibility it must be shown that one has committed or aided and abetted the commission of specific crimes during the war, an act which is distinct, and apart, from the mere provision of military assistance. By holding military leaders criminally liable for aiding and abetting crimes of a foreign army, new boundaries are being drawn in the international criminal law.

[24] ICTY, *Prosecutor v. Mrkšić and Šljivančanin*, Appeals Chamber, Judgement, 5 May 2009, para. 81 (hereinafter: Mrkšić and Šljivančanin Appeals Judgment); ICTR, *Prosecutor v. Karera*, Appeals Chamber, Judgment, 2 February 2009, para. 321; ICTY, *Prosecutor v. Blagojević and Jokić*, Appeals Chamber, Judgment, 9 May 2007, (hereinafter: Blagojević and Jokić Appeals Judgment), paras. 127, 188, quoting ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgment, 10 December 1998, para. 249 (hereinafter: Furundžija Trial Judgment); ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgment, 29 July 2004, para. 45 (hereinafter: Blaškić Appeals Judgment); ICTY, *Prosecutor v. Simić*, Appeals Chamber, Judgment, 28 November 2006, para. 85 (hereinafter: Simić Appeals Judgment); ICTY, *Prosecutor v. Orić*, Appeals Chamber, Judgment, 3 July 2008, para. 43 (hereinafter: Orić Appeals Judgment). For a thorough analysis of the *actus reus* of aiding and abetting, see Furundžija Trial Judgment, paras. 192-235.

[25] ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, para. 228.

3.1. Elements of Aiding and Abetting in International Criminal Law

3.1.1. The *actus reus* Elements (The Objective Elements)

The first ICTY Appeals judgment setting out the parameters of aiding and abetting was the *Tadić* Appeal Judgment, rendered in 1999, which described the *actus reus* of criminal liability 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".[26]

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.[27] Article 25(3)(c) of the Rome Statute refers to those who aid, abet *or otherwise assist* in the commission or attempted commission of crime, and specifically includes the provision of means for the commission of crime.[28] 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.[29]

Assistance, often termed as "practical" assistance by the tribunals,[30] is in many cases relatively straightforward, and encompasses the range of conduct aimed at helping the principal to commit crime.[31] Examples are provision of wea-

[26] Tadić Appeals Judgment, para. 229.

[27] Mrkšić and Šljivančanin Appeals Judgment, para. 81; ICTY, *Prosecutor v. Simić*, Appeals Chamber, Judgment, 28 November 2006, para. 85; ICTY, *Prosecutor v. Vasiljević*, Appeals Chamber, Judgment, 25 February 2004, para. 45 (hereinafter: Vasiljević Appeals Judgment); ICTY, *Prosecutor v. Krstić*, Appeals Chamber, Judgment, 19 April 2004, para. 238 (hereinafter: Krstić Appeals Judgment); ICTY, *Krnojelac Appeals Chamber*, Judgment, 17 September 2003, para. 51 (hereinafter: Krnojelac Appeals Judgment); ICTY, *Prosecutor v. Blaškić*, Appeals Chamber, Judgment, 29 July 2004, para. 48; Tadić Appeals Chamber, Judgment, 15 July 1999, para. 229.

[28] Article 25(3)(c) Rome Statute.

[29] Gerhard Werle: Individual Criminal Responsibility in Article 25 ICC Statute, in: Journal of International Criminal Justice, 953 (2007) 5, p. 491.

[30] Blaškić Appeals Judgment, para. 46.

[31] Sanford H. Kadish: Complicity Cause and Blame, in: California Law Review, 73 (1985) 323, p. 345.

pons, transport, or information concerning location of potential victims to the principal perpetrator.[32] 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".[33] Yet, already in its first judgment on aiding and abetting in the *Tadić* case, the ICTY called for a minimum *actus reus* requirement. 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.

3.1.1.1. The Substantial Effect Requirement

The substantial effect requirement was introduced by the *Tadić* Trial Chamber as an *actus reus* threshold to give aiding and abetting quantifiable limits. In its strive to determine what "amount of assistance"[34] 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".[35]

Notably, the *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.[36] The 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 "*directly and substantially*" to the commission of the crime.[37] ILC commented that the assistance "facilitates the

[32] ICTR, *Prosecutor v. Ntakirutimana*, Ntakirutimana, Case No. ICTR-96-10-A & ICTR-96-17-A Appeals Chamber, Judgment, 13 December 2004, paras. 530, 532.

[33] ICTR, *Prosecutor v. Rutaganca*, Case No. ICTR-96-3, Trial Chamber, Judgment, 6 December 1999, para. 43, ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Trial Chamber, Judgment, 27 January 2000, para. 126.

[34] ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 681 (hereinafter: Tadić Trail Judgment)

[35] Tadić Trial Judgment, para. 688.

[36] Flavio Noto: 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.

[37] Report of the ILC work of its forty-eight session, UN doc. A/51/10, 1998, Volume two: The Treaties, Part II, Oxford 2004, p. 18 (hereinafter: Report of the ILC work of its forty-eight session).

commission of a crime in some significant way,"[38] marking the contrast to its previous drafts, such as the 1991 Draft Code, which remained silent on any quantitative threshold.[39]

The Trial Chamber elaborated that "the substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime",[40] underlying this point by holding that the post-World War II cases it had reviewed showed 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".[41] Following *Tadić*, the Trial Chamber in *Furundžija* also attempted to base the substantial effect requirement on customary international law. It found that substantial effect meant that "[h]aving a role in a system without influence would not be enough to attract criminal responsibility."[42] Both *Tadić* and *Furundžija* remained unsatisfactorily vague. Even so, 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.[43]

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 liability as a co-perpetrator under Article 25(3)(a),[44] this subject may still be open to debate.[45] Should the ICC

[38] Report of the ILC work of its forty-eight session, p. 1693.

[39] Thomas Weigend: Article 3, in: M. Cherif Bassiouni (ed.): Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind, Toulouse 1993, pp. 113-118.

[40] Tadić Trial Judgment, para. 688.

[41] Tadić Trial Judgment, para. 688.

[42] Furundžija Trial Judgment, para. 233.

[43] 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.

[44] ICC, *Prosecutor v. Lubanga Dyilo*, Case No. ICC 01/04-01/06, Trial Chamber, Judgment, 14 March 2012, para. 997.

[45] 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

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 *ad hoc* tribunals render the prospect of a meaningful test for cases of marginal assistance rather unlikely.[46]

3.1.1.2. 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.[47] The Trial Chamber 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.[48] Direct effect requirement from *Tadić* has only been reaffirmed in three judgments – *Akayesu, Strugar* and Čelebići.[49] In other cases, the ICTY either explicitly rejected[50] or simply did not mention[51] *Tadić*'s direct effect requirement when assessing the *actus reus* requirements of aiding and abetting. In Čelebići, the Trial Chamber followed *Tadić* in merging direct and substantial effect into one single *actus reus* element.[52]

3.1.1.3. The Specific Direction Requirement

In defining the elements of aiding and abetting liability, the *Tadić* Appeal Judgment contrasted aiding and abetting with JCE, distinguishing the modes of liability on the basis of specific direction.[53] The Appeals Chamber underscored

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 William A. Schabas: Enforcing International Humanitarian Law: Catching the Accomplices, in: International Review Red Cross, 83 (2001) 439, p. 448; Zorzi Giustiniani: Stretching the Boundaries of Commission Liability, in: Journal of International Criminal Justice, 6 (2008), p. 442; William A. Schabas: Introduction to the International Criminal Court. Fourth Edition, Cambridge University Press, Cambridge 2011, p. 228).

[46] Flavio Noto, *op. cit.*, p. 188.

[47] Tadić Trial Judgment, paras. 678-680.

[48] Tadić Trial Judgment, paras. 680, 688.

[49] ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 477; ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber, Judgment, 31 January 2005, paras. 349, 355 (hereinafter: Strugar Trial Judgment); ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Trial Chamber, Judgment, 20 February 2001, para. 326.

[50] Furundžija Trial Judgment, para. 232; Orić Trial Judgment, para. 285.

[51] Aleksovski Trial Judgment; Tadić Appeals Judgment; Blaškić Trial Judgment and Blaškić Appeals Judgment; Kvočka *et al.*, Appeals Judgment; Mrkšić *et al.* Appeals Judgment.

[52] Strugar Trial Judgment, para. 349, fn. 1042.

[53] Tadić Appeals Judgment, para. 229.

that, while *actus reus* of JCE requires only "acts that in some way are directed to the furthering of the common plan or purpose" the *actus reus* of aiding and abetting requires a closer link between the assistance provided and particular criminal activities: assistance must be "specifically" – rather than "in some way" – directed towards relevant crimes. Many subsequent ICTY and the International Criminal Tribunal for Rwanda (hereinafter: ICTR) appeal judgments explicitly referred to "specific direction" in enumerating the elements of aiding and abetting, often repeating verbatim the *Tadić* Appeal Judgment's relevant holding.[54] However, according to *Blagojević* Appeals Chamber "specific direction" ought not constitute the focus as it had effectively served as a proxy for practical assistance having a substantial effect on commission of the crime.[55]

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."[56] The *Perišić* Appeals Chamber asserted that "previous appeal 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."[57] 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.[58] 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 individual is remote from relevant crimes, evidence proving other elements of aiding and abetting may not be sufficient

[54] *See* Blagojević and Jokić Appeals Judgment, para. 127; Kvočka et al. Appeals Judgment, para. 89; Blaškić Appeals Judgment, para. 45; Vasiljević Appeals Judgment, para. 102; Krnojelac Appeals Judgment, para. 33; ICTR, *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Appeals Chamber, Judgment, 1 April 2011, para. 79; ICTR, *Prosecuor v. Kalimanzira*, Case No. ICTR-05-88-A, Appeals Chamber, Judgment, 20 October 2010, para. 74.

[55] See Blagojević and Jokić Appeals Judgment, para. 189.

[56] Perišič Appeals Judgment, para. 36.

[57] Perišić's Appeals Judgment, para. 38.

[58] 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. Lukic and Lukic Appeals Judgment, paras. 419-461; Kvocka et al. Appeals Judgment, paras. 563-564; Furundžija Appeals Judgment, paras. 124-127.

to prove specific direction. In such circumstances, explicit consideration of specific direction may be required.[59]

Relying on *Tadić* and *Perišić*, the Trial Chamber in *Stanišić and Simatović*[60] 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."[61] Contrary to the Appeals Chamber in *Perišić,* the SCSL Appeals Chamber in *Taylor* concluded that the specific direction is not a requisite element of *actus reus* of aiding and abetting. Moreover, a different panel of judges on the ICTY Appeals Chamber subsequently reversed the legal standard set in *Perišić* less than a year earlier. Namely, in *Prosecutor v.* Šainović *et al.* (known as the *Milutinović case*) 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.[62] The Šainović Appeals Chamber held that the *Perišić* had been wrongly decided[63] as it 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,[64] thereby siding with the SCSL's holding in *Taylor*.[65] The Šainović case should, however, be differentiated from *Perišić* as it did not concern the question of "remote assistance". It may be correct, as Judge Tuzmukhamedov held in dissent, that the *Perišić* specific direction requirement arguably did not apply because in *Šainović* the assistance provided was not "remote" in the same way as in *Perišić* case[66], meaning that the majority's decision[67] to reject the analysis in *Perišić* "unequivocally" may not have been strictly necessary.

---

[59] Mrkšić and Šljivančanin Appeals Judgment, para. 81. (finding that in the context of the actus reus of aiding and abetting, substantial contribution may be geographically and temporally separated from crimes of principal perpetrators). ICTY, *Prosecutor v. Perišić*, Case No. IT-04-81-A, Appeals Chamber, Judgment, 28 February 2013 (hereinafter: Perišić Appeals Judgment), paras. 38-39.

[60] ICTY, *Prosecutor v. Stanišić*, Case No. IT-03-69-T, Trial Chamber, Judgment, May 30, 2013 (hereinafter: Stanišić Trial Judgment).

[61] Stanišić Trial Judgment, para. 2360.

[62] ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 1615.

[63] Šainović Appeals Judgment, paras. 1612, 1649-50.

[64] 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 *acuts reus* of aiding and abetting liability and with customary international law in this regard.").

[65] Šainović Appeals Judgment, para. 1649.

[66] Šainović Appeals Judgment, Judge Tuzmukhamedov dissenting opinion, paras. 42-44.

[67] Šainović Appeals Judgment, para. 1650.

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.[68] Professor and renowned scholar William Schabas has suggested that this might be deduced from the acts of the accused,[69] 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.[70]

It should be emphasized that *Perišić* and other ICTY acquittals gave rise to considerable political and scholarly criticism.[71] Specific direction itself was seen as a conscious raising of liability standards that could render accountability for international crimes more difficult.[72]

3.1.2. The *mens rea* Elements (the Subjective Element)

The requisite mental element (*mens rea*) of aiding and abetting under the ICTY case law 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.[73] For many scholars, that standard reflects customary

[68] William A. Schabas: The International Criminal Court: A Commentary on the Rome Statute. Oxford University Press, Oxford 2011, pp. 435-436. See, however, Joanna Kyriakakis: Developments in International Criminal Law and the Case of Business Involvement in International Crimes, in: International Review of the Red Cross, 887 (2012) 94, pp. 998-1000; Andrew Clapham: Weapons and Armed Non-State Actors, in: Stuart Casey-Maslen (ed.): Weapons Under International Human Rights Law, Cambridge University Press, Cambridge 2014, p. 18.

[69] William A. Schabas, *op. cit.*, p. 436.

[70] Kevin Jon Heller: A Defence of the Specific Direction Requirement, in: Milestones in International Criminal Justice, Chatham House, London 2013, pp. 9-10.

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

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

[73] Mrkšić and Šljivančanin Appeals Judgement, para. 159; Orić Appeals Judgment, para. 43; ICTR, *Prosecutor v. Seromba*, Appeals Chamber, Judgment, 12 March 2008, 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,

international law.[74] In contrast, the Rome Statute explicitly adopted a "purpose" *mens rea* for most crimes of complicity.[75]

In *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.[76] As the Trial Chamber in *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".[77] Other chambers have consistently applied the knowledge standard.[78]

Article 25(3)(c) 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. 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. The term *purpose* has been left undefined in the Rome Stature and may therefore be open to interpretation.[79] Time will tell what reading of the notion of *purpose* the ICC will give Article 25(3)(c).

[74] Norman Farrell: Attributing Criminal Liability to Corporate Actors – Some Lessons from the International Tribunals, in: Journal of International Criminal Justice, 8 (2010), pp. 885-889; Flavio Noto, *op. cit.*, p. 175.

[75] See Art. 25.3(c) of the Rome Statute.

[76] Tadić Trial Judgment, paras. 674, 675; See also Delalić *et al.* Trial Judgment, para. 326.

[77] Aleskovski Trial Judgment, para. 61.

[78] In *Furundžija* the Trial Chamber held that the threshold was "knowledge, rather than intent" (Furundžija Trial Judgment, para 237). The Appeals Chamber in *Blaškić* held that *Furundžija* was correct to find that the applicate mental element was knowledge of the act of assistance alone (Blaškić Appeals Chamber, para. 49). 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" (Orić Trial Judgment, para. 286).

[79] Markus Dubber: Criminalizing Complicity: A Comparative Analysis, in: Journal of International Criminal Justice, 5 (2007) 4, p. 1000; John Ruggie: Report of the Special Representative of the Secretary-General on the Issue of Human Rights: Clarifying the Concepts of Sphere Influence and Complicity, UN Doc. A/HCR/8/16, 15 May 2008, para 42; Norman Farrell, *op. cit.*, p. 887.

3.2. Case Study of Aiding and Abetting by way of Provision of Military Aid

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 its armed forces merely for the reason that he supplied them with arms or personnel. In September 2011, the ICTY Trial Chamber convicted general Perišić, the former Chief of Staff of the Yugoslav Army for aiding and abetting crimes committed by the Army of Republika Srpska (hereinafter: VRS) in Sarajevo and Srebrenica during 1993 and 1995.[80] The Trial Chamber held Perišić responsible for his role in facilitating the provision of substantial military and logistical assistance to the VRS,[81] an independent army with separate chain of command. On 28 February 2013, the ICTY Appeals Chamber overturned the 2011 conviction of General Perišić.[82] Perišić's conviction by the Trial Chamber marked the first judgment against an official of the Yugoslav Army (hereinafter: VJ), an army of the Federal Republic of Yugoslavia (hereinafter: FRY), for international crimes committed in another internationally recognized state (i.e. BiH) and by principal perpetrators being members of (belonging to) another army (i.e. VRS).

3.2.1. 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 recognized that the ultimate authority over the FRY defence policy rested with the FRY Supreme Defence Council (hereinafter: SDC).[83] 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,[84] and the SDC continued to support the policy of assistance during Perišić's tenure.[85] Logistical assistance to the VRS was regularly discussed and agreed upon at the 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 Mon-

[80] ICTY, *Prosecutor v. Perišić*, Case No. IT-04-81-T, Trial Chamber, Judgment, 6 September 2011 (hereinafter: Perišić Trial Judgment).

[81] Perišić Trial Judgment, para. 1627.

[82] Perišić Appeals Judgment.

[83] Perišić Trial Judgment, para. 199.

[84] *Ibid.*, paras. 761-763, 948, 1595.

[85] *Ibid.*, paras. 962-988, 1622.

tenegro.[86] Yet, Perišić never suggested that the VJ discontinue its assistance to the VRS despite the problems with the VJ's funding and resources.[87]

The Trial Chamber classified the assistance provided by the VJ to the VRS in two broad categories: first, secondment of personnel,[88] and second, provision of military equipment, logistical support, and military training.[89]

With respect to the secondment of VJ soldiers to the VRS, the Trial Chamber found that Perišić had persuaded the SDC to create the 30th Personnel Centre (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.[90] 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[91] – were tailored to facilitate the commission of the VRS crimes.[92] According to the Appeals Chamber, the evidence does not suggest that VJ soldiers and officers were seconded in order to specifically assist the VRS criminal acts.[93] 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.[94]

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,[95] often not requiring payment for such assistance.[96] 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.[97]

[86] *Ibid.*, paras. 198-200.

[87] *Ibid.*, para. 963.

[88] *Ibid.*, paras. 761-940.

[89] *Ibid.*, paras.1010-1154, 1232-1237.

[90] *Ibid.*, paras. 763-766, 1607-1611, 793, 795.

[91] *Ibid.*, paras. 866-915.

[92] Perišić Appeals Judgment, para. 63.

[93] *Ibid.*, para. 63.

[94] *Ibid.*, para. 63.

[95] Perišić Trial Judgment paras. 1594, 1234-1237.

[96] *Ibid.*, paras. 1035, 1597, 1116-1134.

[97] *Ibid.*, paras. 1034-1069.

Furthermore, the VJ offered military training to VRS troops and assisted with military communications.[98]

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.[99] 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.[100] However, the Trial Chamber did not identify evidence demonstrating that Perišić urged the provision of VJ assistance to the VRS in furtherance of specific criminal activities. Rather, the Trial Chamber's analysis of Perišić's role in the SDC deliberations indicates that Perišić, 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 general VRS war effort.[101]

3.2.2. Perišić merely implemented FRY State policy on assisting VRS?

Perišić admitted that the VJ, pursuant to orders of the SDC, provided assistance to the VRS.[102] 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.

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.[103] 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 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 establis-

[98] *bid.*, paras. 1135-1154, 1352-1358.

[99] *Ibid.*, paras. 962-988.

[100] *Ibid.*, paras. 963-974.

[101] *Ibid.*, paras. 1007-1009.

[102] Perišić Defence Final Brief, para. 607, at <http://www.icty.org> (4. 3. 2011).

[103] 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.

hed channels.[104] 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.[105]

3.2.3. Aid specifically directed towards the commission of crimes

3.2.3.1. Specific Direction in the *Perišić* case

This chapter will focus on the extremely high legal standard to convict a top official for facilitating atrocities from a remote location, as laid down in the appellate decision in *Perišić*. While an apparent solid majority of experts disagree with the requirement of "specific direction", certain experts have defended it.[106]

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. In finding Perišić guilty of aiding and abetting, the Trial Chamber held that "the acts of the aider and abettor need not have been "*specifically directed*" to assist the crimes."[107] The Trial Chamber defined the objective element of aiding and abetting as "acts or omissions directed at providing practical assistance, encouragement or moral support to the perpetration of the crime, which have a substantial effect on the perpetration of the crime."[108]

On the other hand, the *Perišić* Appeals Chamber recalled that the element of specific direction establishes a culpable link between assistance provided by the accused and the crimes of the principal perpetrators.[109] The Appeals Chamber observed that Perišić's assistance to the VRS was remote from the relevant crimes of the principal perpetrators.[110] In particular, the Trial Chamber

[104] Perišić Appeals Judgment, para. 67.

[105] *Ibid.*, para. 64.

[106] See, e.g., Kai Ambos & Ousman Njikam: Charles Taylor's Criminal Responsibility, in Journal of International Criminal Justice, 11 (2013) 789, pp. 804-08 (expressing support for the "specific direction" standard), Kevin Jon Heller: Why the ICTY's "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*.") <http://opiniojuris.org/2013/06/02/why-the-ictys-specifically--directed-requirement-is-justified> (2. 6. 2013).

[107] Perišić Trial Judgement, paras. 126, 1264 [emphasis added].

[108] *Ibid.*, para. 126 [emphasis added].

[109] Perišić Appeals Judgment, para 37.

[110] *Ibid.*, para 42.

found that the VRS was independent from the VJ[111] and that the two armies were based in separate geographic regions.[112] Furthermore, the Trial Chamber did not find that the VRS was *de jure* or *de facto* subordinated to the VJ.[113] Rather, it found that the VRS had a separate command structure.[114] 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 Perišić provided and the crimes.

The Appeals Chamber overruled the convictions on the grounds that the necessary link (nexus) was missing. 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.[115] While the Appeals Chamber recognized that the parameters of its inquiry are limited and focus 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,[116] 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, which would suggest 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.[117]

The Appeals Chamber found that Perišić had indeed furthered the FRY's policy of supporting the VRS war effort; however, providing general assistance that could be used for lawful and unlawful activities did not by itself suffice to prove

[111] Perišić Trial Judgment, paras. 2-3, 205-210, 235-237, 262-266.

[112] *Ibid.*, paras. 183-184, 195-196, 235-237, 262-266.

[113] *Ibid.*, paras. 262-293, 1770-1779.

[114] *Ibid.*, para. 265.

[115] Perišić Appeals Judgment, para. 47.

[116] Statute ICTY, Articles 6-7; Report of the Secretary-General Pursuant to Paragraph 2 of 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").

[117] Perišić Trial Judgment, paras. 763-771, 780-787, 966-967, 974. Perišić Appeals Judgment, para. 54.

that the assistance was *specifically directed* towards the commission of crimes by the VRS perpetrators.[118]

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.[119] By finding that no basis existed for concluding that the highest state defence body pursued the policy of specifically directing aid towards VRS crimes,[120] 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 the analysis of the objective element of aiding and abetting liability of individual military commander significantly depended on the Chamber's analysis of state policy on assisting the army of another state.

3.2.3.2. Specific Direction Disregarded in the *Charles Taylor* case

In one of the most high-profile international prosecutions to date, that of the former Liberian president Charles Taylor, the Appeals Chamber of the SCSL departed from the *Perišić* decision concerning specific direction. Much of the case against Charles Taylor rested upon finding him criminally responsible for the assistance he provided, including various quantities of arms and ammunition, to the rebel groups fighting and committing war crimes in the civil war in Sierra Leone. The Trial Chamber considered that this aid amounted to practical assistance to the commission of crimes, being indispensable to military offensives in certain instances, and having an overall substantial effect on the commission of the crimes charged.[121]

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 liability for individual aid providers absent of proof that the relevant assistance was specifically directed towards criminal activities.[122] Nonetheless, it is no-

[118] Perišić Appeals Judgment, para. 58.

[119] *Ibid.*, para. 52.

[120] *Ibid.*

[121] SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, Trial Chamber, Judgment, 26 April 2012, paras 6912-6914 (hereinafter: Taylor Trial Judgment).

[122] Perišić Appeals Judgment, para. 72.

teworthy to recall Judge Liu's view on imposition of such a strict standard for aiding and abetting liability:

> "Given that specific direction has not been applied in past cases with any rigour, to insist on such a requirement now that effectively raises the threshold for aiding and abetting liability. This shift risks undermining the very purpose of aiding and abetting liability by allowing those responsible for knowingly facilitating the most grievous crimes to evade responsibility for their acts".[123]

Seven months later the Appeals Chamber in the *Charles Taylor* case reached a completely contrasting decision.[124] With an almost identical factual basis to the one examined in the *Perišić* case,[125] the case of Charles Taylor enables a direct comparison of decisions reached by two different international judicial institutions.[126]

Contrary to the Appeals Chamber in *Perišić,* the Appeals Chamber in *Taylor* concluded that the *actus reus* of aiding and abetting liability under Article 6(1) of the Statute of SCSL and customary international law is that an accused's acts and conduct of assistance, encouragement and/or moral support had a

[123] Perišić Appeals Judgment, Partially Dissenting Opinion of Judge Liu, para 3.

[124] Appeal Chamber in *Taylor* case contends that "specific direction", as used in the *Tadić* Appeal Judgment, merely clarified 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 [The accused's acts and conduct] have to contribute to the crime. It submitted that this was the understanding expressed by the ICTY Appeals Chamber held in *Blagojević and Jokić* and *Mrkšić and Šljivančanin*. See Taylor Appeal transcript, 22 January 2013, pp. 49849-49851.

[125] The Trial Chamber found Taylor individually criminally liable 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 Charles Taylor Trial Judgment, paras. 4262, 6936, 5835, 5842, 6914, 6949.

[126] 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 recognises and respects that the ICTY Appeals Chamber is the final arbiter of the law for that Court. See Taylor Appeals Judgment, para. 472.

substantial effect on the commission of a crime for which they are to be held responsible.[127] According to the Appeals Chamber in *Taylor,* this requirement ensures that there is a sufficient causal, a 'culpable',[128] link between the accused and the commission of the crime before an accused's acts and conduct may be adjudged criminal.[129] The SCSL subsequently held that the controversial *Perišić* precedent did not comport with customary international law, and therefore affirmed the conviction of Charles Taylor, the former Liberian President, 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"[130], had the Appeals Chamber in *Taylor* followed its specific direction requirement, Taylor's convictions would most likely had been overruled. Indeed, under the *Perišić* standard, it would be nearly impossible to convict a high-ranking military or political official of knowingly facilitating mass atrocities from a remote location.[131]

Recognizing the *Perišić* case as factually distinct from any of the cases that have come before the ICTY, it is necessary to acknowledge the political implications for military and political leaders if the standards as articulated in the *Perišić* are applied in similar scenarios around the world. 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. Yet, after the two most recent and completely conflicting decisions in two strikingly similar cases of complicity for provision of military aid, the elements of aiding and abetting in international criminal law are murkier than ever.

This Chapter 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*, rather than the conduct of an individual, thereby blurring the boundaries between the two separate regimes of international responsibility. This

[127] Taylor Appeals Judgment, paras. 362-385, 390-392.

[128] *Contra* Perišić Appeal Judgment, paras. 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.), 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.).

[129] Taylor Appeals Judgment, paras. 390-392.

[130] Perišić Appeals Judgment, para. 72.

[131] Mugambi Jouet, *op. cit.*, p. 1110.

argument will be further examined in the next Chapter dealing with provision of military aid within the framework of state responsibility.

4. PART TWO - STATE COMPLICITY

International law prohibits state complicity by providing for different layers of responsibility. One way in which complicity is discussed is in the context of attribution. The issue of attribution arises in the context of the secondary rules of international law, as reflected in the ARSIWA. 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[132] of actors to states. This is achieved by examining the relationship between a state and the individual perpetrators of a relevant act to determine if there is a strong enough link to attribute the perpetrators' conduct to that state. In limited circumstances, international law attributes the conduct of non-state actors to the state where there is a sufficient connection between them. Traditionally, the nature of that connection entails an agency relationship.[133] Attribution, in this sense, may occur either under the test of complete dependence or strict control[134] – rendering the non-state actor a *de facto* state organ[135] – or the subsidiary test of direction or control of specific conduct.[136] Both of these tests constitute rules of customary international law[137] and denote the search for a relationship of principal to agent.[138]

Another way in which the term complicity might be used is in determining derivative state responsibility; that is, when one state is derivatively responsible

[132] 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 John Cerone: Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations, in: Vanderbilt Journal of Transnational Law, 39 (2006), 1447.

[133] Christine Chinkin: Third Parties in International Law. Clarendon Press, Oxford 1993, p. 142.

[134] *Nicaragua case*, para. 109; *Genocide case*, para 392.

[135] Article 4 ARSIWA.

[136] Article 8 ARSIWA; *Nicaragua case*, p. 115; *Genocide case*, p. 397.

[137] *Genocide case*, para. 385 with respect to Article 4 and para. 398 with respect to Article 8. See also ICJ Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 19 December 2005, para. 160.

[138] Christine Chinkin, *op. cit.*, p. 142.

for assisting another state in the commission of an internationally wrongful act.[139] Derivative state responsibility arising from complicit conduct is governed by the rule set forth in Article 16 of the ARSIWA.[140] 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 international wrongful act; and
>
> (b) The act would be internationally wrongful if committed by that State."[141]

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.[142] The rule reflected in Article 16 has been accepted as one of customary international law.[143]

According to ILC, a State will be responsible for the internationally wrongful conduct of individuals or groups, absent acknowledging or adopting such conduct as its own, if those persons are acting on the instructions of, or under the direction or control of that State in carrying out the conduct.[144] As determined by Article 16, absent the direction and control of another State in the commission of a wrongful act, a State can be responsible for knowingly providing aid or assistance to the commission of an international wrong by another State. The ILC Articles thus envisage different standards for when a State is implicated in violations committed by an individual or group, compared to when those are perpetrated by another State. For a State to be responsible for providing aid or assistance to non-State groups that commit international crimes,

[139] This type of complicity (i.e. derivative responsibility) 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 (or assistant). Thus, derivative responsibility is generally predicated on the internationally wrongful act of a principal state.

[140] Helmut P. Aust: Complicity and the Law of State Responsibility. Cambridge University Press, Cambridge 2011, p. 102.

[141] ILC Report on State Responsibility, Commentary on Article 16(1), p. 65.

[142] Article 16 ARSIWA.

[143] 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.

[144] Articles 8 and 11 ARSIWA.

the Articles require that such groups were instructed, directed or controlled by the State in relation to the specific conduct.[145]

4.1. The elements of state complicity

4.1.1. The Objective Element: The Scope of Aid and Assistance

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 international wrongful act by another State.[146] 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 of the ILC Report on State Responsibility (hereinafter: the Commentary) lists financing, the provision of an essential facility, the provision of means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, and assisting in the destruction of property belonging to third state nationals.[147] In light of this, it is necessary to determine whether Article 16 is contingent on the provision of a certain kind of aid.[148] It is argued that all kinds of aid and assistance fall within the rule.[149] Moreover, the ILC has made it clear that no particular kind of aid or assistance is necessary in order for this responsibility to arise.[150] 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.[151] 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.

4.1.2. 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

[145] *Ibid*.

[146] 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.

[147] ILC Report on State Responsibility, Commentary on Article 16[1], p. 66.

[148] Vaughan Lowe: Responsibility for the Conduct of Other States, in: Japanese Journal of International Law, 101 (2007) 1, p. 5.

[149] James Crawford: State Responsibility: The General Part. Cambridge University Press, Cambridge 2013, 402.

[150] Stefan Talmon: A Plurality of Responsible Actors, p. 218 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1018172> (3. 10. 2007).

[151] Vaughan Lowe, *op. cit.*, pp. 5-6.

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 Commentary specifies as follows:

> "There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act".[152]

This standard demands that the assistance materially facilitates the commission of the wrongful act.[153] It excludes assistance that is indirectly or remotely related to that act.[154] 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.[155] 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.[156]

4.1.3. The Subjective Element

Considering the standard of fault[157] required by Article 16, strict liability was never an option.[158] This builds on the general principle that states may presume that recipient states will use their aid lawfully.[159] As it stands, the standard of fault for the specific primary rule prohibiting state complicity is not clear. The

[152] ILC Report on State Responsibility, Commentary on Article 16 [5].

[153] James Crawford: Second Report on State Responsibility, A/CN.4/498/Add. 2, p. 180, Vaughan Lowe, *op. cit.*, p. 5.

[154] Georg Nolte and Helmut P. Aust, *op. cit.*, p. 10.

[155] 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 Tal Becker: Terrorism and the State: Rethinking the Rules of State Responsibility. Hart Publishing, Oxford 2006, p. 326.

[156] 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.

[157] The Commentary of Article 2 ARSIWA, in considering the necessary elements of an international wrongful act of a State, uses the term "fault". The same terminology is used in literature on the respective subject.

[158] Roberto Ago: Seventh Report on State Responsibility of the Special Rapporteur, at 30th session of the ILC (1978), pp. 108-120. U.N. Doc A/CN.4/307, <http://legal.un.org/ilc/sessions/30/30sess.htm> (8. 5. 1978).

[159] ILC Report on State Responsibility, Commentary on Article 16 [4], p. 66; Vaughan Lowe, *op. cit.*, p. 10.

text requires only that the aid or assistance be given "with knowledge of the circumstances of the international wrongful act…".[160] In interpreting the text, the Commentary suggests that the aid or assistance "must be given with a view of facilitating the commission of the wrongful act",[161] suggesting a more stringent fault requirement. Thus, some scholars argue that the textual knowledge standard is subsumed by one of wrongful intent.[162] No responsibility arises unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct.[163] In his 7th Report on State Responsibility, the Special Rapporteur Ago stated:

> "The very idea of 'complicity' in the international wrongful act of another necessarily presupposes an intent to collaborate in the commission of an act of this kind, and hence, knowledge of the specific purpose for which the State receiving certain supplies intends to use them."[164]

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.[165] Likewise, the ICJ has, *mutatis mutandis*, adopted this approach in the *Genocide case*.[166] Inquiring whether Serbia 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."[167]

The words "at the least" suggest that, as a general rule, more than mere knowledge is required. Moreover, 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, in cir-

[160] Article 16 ARSIWA.

[161] ILC Report on State Responsibility, Commentary on Article 16 [5], p. 66.

[162] Miles Jackson, *op. cit.*, p. 159; Georg Nolte and Helmut P. Aust, *op. cit.*, p. 14.

[163] ILC Report on State Responsibility, Commentary on Article 16, p. 66.

[164] Roberto Ago, *op. cit.*, p. 58.

[165] Georg Nolte and Helmut P. Aust, *op. cit.*, p. 14; Similarly, Alexandra Boivin: Complicity and Beyond: International law and the transfer of small arms and light weapons, in: International Review of the Red Cross, 87 (2005) 859, p. 471.

[166] *Genocide case*, paras. 420-424.

[167] *Ibid.*, para. 421.

cumstances where the obligation breached is equally opposable to the assisting state.[168]

It is interesting to note that the debate on the fault element in Article 16 corresponds to the knowledge/purpose debate concerning aiding and abetting in international criminal law. The requirement of specific direction for individual complicity seems to impose a similar standard to the one required for state complicity. Thus, the introduction of lower thresholds of individual criminal responsibility as reflected by the *Perišić* Trial Judgment and *Taylor* Appeals Judgment may create tension within both systems. Where the standard for complicity in international criminal law becomes significantly lower than the one 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.

4.2. State Complicity for Provision of military aid to another state/army

The current state of international law does not provide for a clear answer on whether foreign policies that result in the provision of different types of military aid necessarily amount to state complicity in international crimes merely by reason of providing such aid. The ICJ has been little instructive on the issue: the issue of state responsibility for the provision of military aid to another state (or rather, to a non-state actor) has been adjudicated in the *Nicaragua case* and in the *Genocide case*.[169] In the *Genocide case*, the ICJ was called upon to determine, *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 invokes state responsibility for complicity.[170]

[168] 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 is 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.

[169] For the reasons explained in the Introduction, the scope of this Article is limited to demonstrate the relevant issues of state complicity as deriving from the *Genocide case*.

[170] *Genocide case*, paras. 418-424. According to the ICJ, customary international law prohibits complicity in genocide.

In the first place, the Court held that complicity certainly "includes the provision of means to enable or facilitate the commission of the crime".[171] Although "complicity" is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of "aid or assistance" furnished by one State for the commission of a wrongful act by another State. In constructing the meaning of complicity, the Court turned to Article 16, 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."[172]

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.[173] Clearly, the Court located the prohibition of complicity in genocide within the general law of international responsibility for aid and assistance.

4.2.1. Substantial Contribution Applied

As argued 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 asserts 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".[174] 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

[171] *Ibid.*, para. 419.

[172] *Ibid.*, para. 420.

[173] *Ibid.*

[174] *Ibid.*, para. 422.

them by the FRY.[175] 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 in the law of state responsibility,[176] it can implicitly be read to endorse the nexus requirement in the Article 16.

4.2.2. Provision of Military Aid does not Establish Total Dependence

The ICJ found that while 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 authorities and 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.[177] Differences over strategic options emerged at the time between FRY authorities and Bosnian Serb leaders evidenced that the latter "had some qualified, but real, margin of independence".[178] 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"[179], did this signify a total dependence of the RS upon FRY.

4.2.3. Complicit Relationship does not Suffice for Attribution

In both the *Genocide case* and the *Nicaragua case*, 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.[180] Particularly, in the *Genocide case* the ICJ affirmed the

[175] *Ibid.*

[176] *Ibid.*, para. 420.

[177] *Ibid.*, para. 394.

[178] *Ibid.*

[179] *Ibid.*

[180] *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.

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.[181] Similarly, in the *Nicaragua case,* the ICJ held that substantial provision of military and other 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.[182]

4.2.4. Application of the Subjective Element of Complicity

The level of fault required by the primary rule prohibiting state complicity in genocide proved problematic for the ICJ. Indeed, the Court in the *Genocide case* appeared unsure of how to approach the simple question whether the accomplice needs to share in the specific intent of the principal or if, instead, knowledge of that intent is sufficient.[183] It was on that basis that the Bosnian claim failed.[184] According to the ICJ, the FRY was not found guilty for complicity to genocide simply because it had not been established that at the crucial time, the authorities of the FRY supplied with their aid and assistance the VRS leaders (perpetrators of the genocide) in full awareness that the aid supplied would be used to commit genocide.[185]

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.[186] Some scholars have

---

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.

[181] *Genocide case*, paras. 369-407.

[182] *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.

[183] *Genocide case*, para. 421.

[184] The ICJ held that the link between the specific intent (*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 (*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 (*dolus specialis*) of the principal perpetrator.

[185] *Genocide case*, para. 423.

[186] *Ibid.*, para. 421.

taken this holding to imply that, in general, complicity requires more than knowledge.[187] 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. There remains an ongoing debate as to whether a standard of knowledge or wrongful intent is required for the rule reflected in Article 16.[188]

5. CONCLUSION

Provision of military aid by a state or its political or military leader in contemporary armed conflicts which involve the commission of international crimes may, under certain circumstances, be characterized as complicity in those crimes. Whether such military aid should be considered as amounting to individual criminal responsibility alone, or also state responsibility continues to be challenged in the world of international law. The *Genocide case* provided the ICJ with an opportunity to examine the various aspects of the relationship between state responsibility and individual criminal liability. Regrettably, the Court avoided an in-depth analysis on the matter. The examined case showed that in addressing accomplice liability in the context of provision of military aid, there exist a direct connection between state responsibility and individual criminal responsibility. Specifically, 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 international wrongful act is demonstrated. The general context of a violation serves a fundamental role in proving that material element. The assessment of individuals' crimes reveals traits of overlap with the assessment of states' violations.

A comparison of the legal requirements for complicity for State and individual responsibility under international law reveals similarities as well as differences between the two. Firstly, there is no requirement in the law of state responsibility that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.[189] The 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.[190] On the other hand, the law of Sta-

[187] Helmut P. Aust, *op. cit.*, p. 236; James Crawford, *op. cit.*, p. 407.

[188] Miles Jackson, *op. cit.*, pp. 135-174.

[189] ILC Report on State Responsibility, Commentary on Article 16 [5], p. 66. On military support to other States, see Helmut P. Aust, *op. cit.*, pp. 129-145.

[190] 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

te responsibility requires more than the mere provision of aid or assistance to non-State actors for the providing State to be liable for violations committed by such groups. The internationally wrongful acts must have been committed under the instructions or direction of the State, or the group must have been under the State's control, be it "effective" or "overall". Such standard does not apply in case of an individual knowingly providing aid or assistance: in order to be held criminally liable it is not necessary that the aider and abettor issued instructions to, or exercised control over, the direct perpetrators of international crime.

Further differences are revealed in terms of the culpable provision of aid or assistance. On the one hand, individuals must know that their acts assist the commission of a specific crime and have a substantial effect on its commission. By contrast, for States that knowingly provide aid or assistance to another State, it must be shown that the relevant State organ by providing the aid or assistance, intended to facilitate the occurrence of the wrongful conduct. The criterion of intent could well stand in the way of holding complicit States responsible in a number of cases.

If one holds that the applicable international criminal law standard in terms of *actus reus* of aiding and abetting international crimes needs to be that the aid was "specifically directed" to the commission of the crime, the "specifically directed" standard is, coincidentally, almost identical to the standard for state complicity and for attribution in the Articles of State Responsibility. It may be that an effort to synchronize the requirements of both forms of responsibility lay at the heart of *Perišić*, even if this meant raising the threshold requirement for individual responsibility. It would seem logical that a State should also be responsible for acts of its officials, which invoked liability under international criminal law. The emphasis on "specific direction" by the Appeals Chamber in *Perišić* did not require that the accomplice directed the crimes of the actual perpetrators, but rather that the assistance itself was directed towards those crimes. It entailed a raising of the aiding and abetting standard by insisting on a purposive element, one which has not been accepted in subsequent jurisprudence, although it is arguably required by the Rome Statute.

Many serious violations of international law should invoke international responsibility of the state as well as individual criminal responsibility of the persons who have committed the said violations, either as officials, agents, or in any other respect. As demonstrated by the *Perišić* case, the provision of military aid 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. However, by rejecting the specific direction standard in relation

Judgment, para. 48; Tadić Appeals Judgment, para. 229.

to complicity, the *Perišić* Trial Judgement and *Taylor* judgments expose the disconnection of individual responsibility from state responsibility and add to the complexity and uncertainty. It would seem that the ICTY Trial Chamber in *Perišić* and the SCSL regard individual responsibility as the result of an autonomous development of principles of individual criminal responsibility, which does not need to be derived from responsibility of the state. Yet, it remains conceptually problematic to disconnect the responsibility of a military or a state leader, particularly if his acts can only be explained by the fact that he acted for the state, entirely from the responsibility of the state itself.

The current system calls for a full appreciation of the mutual relationship and coexistence of the two systems. New developments in international criminal law should affect the rules governing the responsibility of the 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/its armed forces in an armed conflict situation, then the assisting state should also be held responsible for that conduct. In other words, the determination of individual criminal responsibility for complicity in the commission of international crimes through provision of military aid should entail the presumption of state responsibility for the same act.

Izvirni znanstveni članek UDK: 341.4:343:355

VOJAŠKA POMOČ KOT UDELEŽBA PRI MEDNARODNIH HUDODELSTVIH: OSEBNA ODGOVORNOST POSAMEZNIKA ALI ODGOVORNOST DRŽAVE?

Tina Drolec,
univerzitetna diplomirana pravnica, LL.M. (University of Amsterdam, Amsterdam Law School, Nizozemska), odvetnica v Odvetniški pisarni Ulčar & partnerji, študentka doktorskega študija na Pravni fakulteti Univerze v Ljubljani

Države po vsem svetu iz različnih strateških vzgibov ena drugi nudijo vojaško pomoč in tehnično podporo v oboroženih spopadih, v katerih prihaja do mednarodnih hudodelstev. Članek se ukvarja z vprašanjem, ali politične odločitve države o nudenju take vojaške pomoči štejejo za dejanja države in jih je torej treba presojati na podlagi mednarodnega prava odgovornosti držav, ali pa jih je treba presojati na podlagi pravil o osebni kazenski odgovornosti v mednarodnem kazenskem pravu. V tem okviru je cilj članka izpostaviti in razjasniti očitno napetost med obstoječimi pravili, 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 osebno kazensko odgovornost posameznega vojaškega ali političnega voditelja, medtem ko ostaja odgovornost držav nejasna. Omenjeno napetost članek preučuje v luči sodobnih normativnih sprememb na področju mednarodnega kazenskega prava. Sodobna sodna praksa mednarodnih kazenskih sodišč namreč razkriva nasprotujoče si odločitve v zvezi z osebno kazensko odgovornostjo političnih in/ali vojaških voditeljev zaradi zagotavljanja vojaške pomoči drugi državi ali nedržavnim oboroženim skupinam v drugi državi v situacijah oboroženih spopadov.

Članek se osredotoča zlasti na vprašanje, ali nudenje vojaške pomoči nujno vključuje uveljavljanje državne politike in bi jo bilo zato treba dojemati (tudi) kot dejanje države, ne (samo) kot dejanje posameznika. Članek predstavi em-

piričnо študijo izbranega primera sodobnih oboroženih spopadov in vlogo tretjih držav kot morebitnih udeležencev pri izvršitvi mednarodnih hudodelstev v kontekstu teh spopadov.

Analiza različnih teoretskih pristopov k odnosu med državno in osebno odgovornostjo za mednarodna kazniva dejanja razkriva, da je strokovna literatura na tem področju nepopolna. Med režimoma državne in osebne odgovornosti nedvomno obstaja povezava, hkrati pa obstaja tudi možnost, da oba režima obstajata in delujeta vzporedno. Resne kršitve temeljnih načel mednarodnega prava predvidevajo tako osebno kazensko odgovornost kot odgovornost države. Cilj članka je pokazati, da mora na področju nudenja vojaške pomoči v oboroženih spopadih, v katerih prihaja do mednarodnih hudodelstev, obstoječi sistem v polni meri upoštevati medsebojni odnos in so-obstoj obeh sistemov.

V primeru ugotavljanja odgovornosti za udeležbo v obliki nudenja vojaške pomoči obstaja tesna zveza med odgovornostjo držav in osebno kazensko odgovornostjo. Analiza se zato osredotoča na vprašanje, ali je mogoče nudenje pomoči drugi državi ali oboroženim skupinam z namenom vojskovanja enačiti s »pomočjo in napeljevanjem« k hudodelstvom, storjenim med takšnim oboroženim spopadom. To vprašanje ostaja predmet burnih razprav v mednarodnem pravu. Mednarodno pravo ne daje jasnega odgovora na vprašanje, ali zunanje politike, ki vodijo v nudenje različnih oblik vojaške pomoči, avtomatično pomenijo udeležbo v mednarodnih hudodelstvih zgolj na podlagi dejstva nudenja takšne pomoči. Koncept vojaške pomoči je širok in zajema različne stopnje vpletenosti države donatorke. Tako na primer vključuje varnostno pomoč v smislu, da ena vlada drugi nudi vojaška sredstva ali storitve brezplačno, pa tudi v zameno za druga materialna sredstva ali proti plačilu. Nudenje tovrstne vojaške pomoči drugi državi, ki pridobljeno pomoč uporabi pri izvršitvi kršitev mednarodnega prava, lahko vodi v odgovornost države donatorke ne glede na to, v kakšni obliki je pomoč dana. Različne oblike in stopnje te pomoči pa lahko vplivajo na odločitev o tem, ali država donatorka nosi odgovornost za vpletenost v dejanje države prejemnice ali ne.

Sodbi sodnega in pritožbenega senata Mednarodnega kazenskega sodišča za nekdanjo Jugoslavijo (MKSJ) v primeru *Perišić*[1] ponujata podlago za morebitno razširitev novo razvitih standardov za odgovornost za udeležbo pri hudodelstvih na področje odgovornosti držav, hkrati pa predstavlja skoraj vzporeden na tem področju primer *Uporaba konvencije o Genocidu* (v nadaljevanju

[1] MKSJ, *Tožilec v Momčilo Perišić*, sodba sodnega senata z dne 6. septembra 2011 in sodba pritožbenega senata z dne 28. februarja 2013.

»primer *Genocid v BiH*«)[2] pred Meddržavnim sodiščem v Haagu (v nadaljevanju: MDS). Obravnavani empirični primer pokaže, da je treba v primeru ugotavljanja odgovornosti za udeležbo pri najhujših kršitvah mednarodnega prava ta dva režima odgovornosti obravnavati hkrati.

Članek je zasnovan na predpostavki, da je nudenje vojaške pomoči v sodobnih oboroženih spopadih, v katerih prihaja do mednarodnih hudodelstev, pod določenimi pogoji mogoče opredeliti kot udeležbo pri teh hudodelstvih. Kar se tiče pravil, ki urejajo osebno kazensko odgovornost političnih in vojaških voditeljev v tem smislu, nekaj smernic ponuja sodna praksa mednarodnih sodišč in tribunalov, zlasti nedavni sodbi sodnega senata MKSJ v obravnavanem primeru *Perišić*[3] in sodbi sodnega in pritožbenega senata Posebnega sodišča za Sierro Leone (SCSL) v primeru *Charles Taylor*[4], ki ambiciozno začrtajo nove meje ter postavljajo nižje standarde za presojo odgovornosti vojaških in političnih voditeljev zaradi nudenja vojaške pomoči tuji državi ali nedržavnim delovalcem v tuji državi. K nejasnosti glede obravnave omenjenega vprašanja odgovornosti za udeležbo je z zagovarjanjem strožjih standardov za osebno odgovornost za pomoč in napeljevanje pripomogla sodba pritožbenega senata MKSJ v primeru *Perišić*. Analiza sodne prakse MKSJ in Mednarodnega kazenskega sodišča za Ruando (MKSR) razkriva, da mednarodna kazenska sodišča vse do primera *Perišić* niso obravnavala primerov kazenske odgovornosti posameznika, obtoženega za pomoč in napeljevanje v primeru storitve vojnih hudodelstev, hudodelstev proti človečnosti ali genocida, z nudenjem vojaške pomoči drugi državi ali nedržavnim delovalcem v drugi državi. Sodna praksa MDS pa ponuja zgolj nekaj smernic glede vprašanja nudenja vojaške ali druge pomoči drugi državi, konkretno, v sodbah v primeru *Vojaške in paravojaške aktivnosti v in proti Nikaragvi*[5] (v nadaljevanju »primer *Nikaragva*«) in v primeru *Genocid v BiH*.[6]

---

[2] MDS, *Genocid v BiH (BiH v Jugoslavija)*, predhodni ugovori, sodba, 11. julija 1996, I.C.J. Reports 1996, str. 595 in naslednje; MDS, Zahtevek za revizijo sodbe z dne 11. julija 1996 v primeru *Genocid v BiH (BiH v Jugoslavija)*, predhodni ugovori, sodba z dne 3. februarja 2003, I.C.J. Reports 2003, str. 7 in naslednje; MDS, *Genocid v BiH (BiH v Srbija in Črna Gora)*, sodba v glavni stvari z dne 26. februarja 2007.

[3] MKSJ, *Tožilec v Momčilo Perišić*, sodba sodnega senata z dne 6. septembra 2011.

[4] SCSL, *Tožilec v Charles Taylor*, sodba sodnega senata z dne 26. aprila 2012 in sodba pritožbenega senata z dne 26. septembra 2013.

[5] MDS, *Vojaške in paravojaške aktivnosti v in proti Nikaragvi (Nikaragva v ZDA)*, sodba v glavni stvari, 27. junij 1986, I.C.J. Reports 1986.

[6] MDS, *Genocid v BiH (BiH v Jugoslavija)*, predhodni ugovori, sodba, 11. julija 1996, I.C.J. Reports 1996, str. 595 in naslednje; MDS, Zahtevek za revizijo sodbe z dne 11. julija 1996 v primeru *Genocid v BiH (BiH v Jugoslavija)*, predhodni ugovori, sodba z dne 3. februarja 2003, I.C.J. Reports 2003, str. 7 in naslednje; MDS, *Genocid v BiH (BiH v Srbija in Črna Gora)*, sodba v glavni stvari z dne 26. februarja 2007.

Za vzpostavitev odgovornosti posameznika za pomoč in napeljevanje k mednarodnim hudodelstvom je treba dokazati, da je nudil praktično pomoč, spodbudo ali moralno podporo glavnemu storilcu, ki je imela znaten učinek na izvršitev kaznivega dejanja.[7] Pomoč je lahko logistična (dobava orožja in/ali vojaške opreme, goriva, neupravičenih donacij), tehnična ali osebna pomoč (preskrba ali urjenje osebja, financiranje, namestitev vojaških enot). Nudenje pomoči s strani države v nasprotju z njenimi mednarodnopravnimi obveznostmi je MDS opisalo kot:

> »zbiranje, urjenje, oboroževanje, opremljanje, financiranje, preskrba ali druge oblike spodbujanja, podpiranja, pomoči ali usmerjanja vojaških in paravojaških aktivnosti v drugi državi«.[8]

Obravnavani empirični primer pokaže, da bi bilo treba nedavne normativne spremembe v mednarodnem kazenskem pravu na tem področju upoštevati tudi pri razvoju in uporabi pravil, ki urejajo mednarodno odgovornost držav: če so politični in vojaški voditelji osebno kazensko odgovorni za dejanja, ki pomenijo uveljavljanje državne politike glede nudenja vojaške pomoči tuji državi oziroma nedržavnim delovalcem v situacijah oboroženih spopadov, so tudi države odgovorne za enaka dejanja. Povedano drugače, ugotavljanje (vzpostavitev) osebne kazenske odgovornosti za udeležbo pri mednarodnih hudodelstvih z nudenjem vojaške pomoči bi moralo vključevati tudi ugotavljanje (vzpostavitev) odgovornosti države za enako dejanje.

[7] MKSJ, *Tožilec v Mrkšić in Šljivančanin*, sodba pritožbenega senata z dne 5. maja 2009, odst. 81; MKSJ, *Tožilec v Blagojević in Jokić*, sodba pritožbenega senata z dne 9. maja 1997, odst. 127, 188, navajajoč sodbo sodnega senata v primeru *Tožilec v Furundžija* z dne 21. julija 2000, odst. 249; MKSJ, *Tožilec v Blaškić*, sodba pritožbenega senata z dne 29. julija 2004, odst. 45; MKSJ, *Tožilec v Simić*, sodba pritožbenega senata z dne 28. novembra 2006, odst. 85.

[8] MDS, *Vojaške in paravojaške aktivnosti v in proti Nikaragvi (Nikaragva proti ZDA)*, sodba v glavni stvari, 27. junija 1986, I.C.J. Reports 1986.

Izvirni znanstveni članek UDK: 341.4:343:355

DROLEC SLADOJEVIĆ, Tina: Vojaška pomoč kot udeležba pri mednarodnih hudodelstvih: osebna odgovornost posameznika ali odgovornost države?

Pravnik, Ljubljana 2015, let. 70 (132) št. 9-10

Nudenje vojaške pomoči drugi državi ali nedržavnim oboroženim skupinam v situacijah oboroženega spopada, ki vključuje izvršitev mednarodnih hudodelstev, se pod določenimi pogoji lahko opredeli kot udeležba pri mednarodnih hudodelstvih. Politične odločitve države o nudenju vojaške pomoči drugi državi ali nedržavnim skupinam v situacijah, ki vključujejo storitev mednarodnih hudodelstev, štejejo za dejanja države in jih je treba presojati na podlagi mednarodnega prava odgovornosti držav, hkrati pa tudi na podlagi pravil o osebni kazenski odgovornosti v mednarodnem kazenskem pravu. Članek izpostavlja očitno napetost med obstoječimi pravili, 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 osebno kazensko odgovornost posameznega vojaškega ali političnega voditelja, medtem ko ostaja odgovornost držav nejasna. To napetost avtorica preučuje v luči sodobnih normativnih sprememb na področju mednarodnega kazenskega prava. Upoštevaje nejasno opredelitev odnosa med državno in osebno odgovornostjo na področju mednarodnih hudodelstev, nudenje vojaške pomoči nujno vključuje uveljavljanje državne politike in bi jo bilo zato treba dojemati (tudi) kot dejanje države, ne (samo) kot dejanje posameznika.

Original Scientific Article UDC: 341.4:343:355

DROLEC SLADOJEVIĆ, Tina: Military Aid as Complicity in International Crimes: Individual or State Responsibility

Pravnik, Ljubljana 2015, Vol. 70 (132), Nos. 9-10

Provision of military aid in contemporary armed conflicts, which involve commission of international crimes may, under certain circumstances, be characterized as complicity in those crimes. Political decisions of states to provide military aid to another state or to a non-state actor in situations involving the commission of international crimes should be qualified as acts of state and should, accordingly, be addressed within the framework of international law of state responsibility. Additionally, these decision should invoke individual criminal responsibility within the realm of international criminal law. The article exposes 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 is on the individual criminal responsibility of (an) individual (military or political) leader(s) while the responsibility of a state remains unclear. This tension is addressed particularly in the light of the recent developments in international criminal law. Observing that the articulation of relationship between state and individual responsibility in the realm of international crimes remains for the most part unclear, the provision of military aid should 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.