SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice George Gelaga King, Presiding
Justice Emmanuel Ayoola
Justice Renate Winter
Justice Jon M. Kamanda
Justice Shireen Avis Fisher
Justice Philip Nyamu Waki, Alternate Judge

Registrar: Ms. Binta Mansaray

Date: 26 September 2013

PROSECUTOR **Against** **CHARLES GHANKAY TAYLOR**
(Case No. SCSL-03-01-A)

JUDGMENT

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Nina Tavakoli
Ms. Leigh Lawrie
Mr. Christopher Santora
Ms. Kathryn Howarth
Ms. Ruth Mary Hackler
Ms. Ula Nathai-Lutchman
Mr. James Pace
Mr. Cóman Kenny

Defence Counsel for Charles Ghankay Taylor:
Mr. Morris Anyah
Mr. Eugene O'Sullivan
Mr. Christopher Gosnell
Ms. Kate Gibson
Ms. Magda Karagiannakis

> ii. The Accused is aware of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender.[1249]

The Trial Chamber further explained that:

> Although the lending of practical assistance, encouragement, or moral support must itself be intentional, the intent to commit the crime or underlying offence is not required. Instead, the Accused must have knowledge that his acts or omissions assist the perpetrator in the commission of the crime or underlying offence. Such knowledge may be inferred from the circumstances. The Accused must be aware, at a minimum, of the essential elements of the substantive crime or underlying offence for which he is charged with responsibility as an aider and abettor. The requirement that the aider and abettor need merely know of the perpetrator's intent — and need not share it — applies equally to specific-intent crimes or underlying offences such as persecution as a crime against humanity.[1250]

404. The two elements articulated by the Trial Chamber relate to, first, an accused's mental state regarding the consequence of his acts or conduct ("knowledge, or awareness of the substantial likelihood, that such act or conduct would assist the commission of a crime") and, second, an accused's mental state regarding the factual circumstances of the underlying crime ("aware of the essential elements of the crime").

405. In Grounds 16, 19 and 21, the Defence alleges that the Trial Chamber erred in law in articulating the *mens rea* elements of aiding and abetting liability. It presents two principal lines of argument in support. First, it argues that the Trial Chamber erred in law by adopting and applying a "knowledge" standard for an accused's mental state regarding the consequence of his acts or conduct, as a component of *mens rea*. Second, it argues that the law articulated by the Trial Chamber violates the principle of personal culpability.

406. Ground 18 states as follows: "The Trial Chamber erred in law and in fact in inferring that assistance provided to the RUF or AFRC, with an awareness of crimes that were committed in the past by some RUF or AFRC soldiers, constituted aiding and abetting of any and all subsequent crimes committed by a soldier affiliated, or in alliance, with the RUF or AFRC."[1251] In its Appeal Brief, the Defence did not present separate arguments in relation to Ground 18, submitting that "those arguments are sufficiently expressed in the other Grounds concerning *mens rea*. The ground of appeal is nevertheless maintained on the basis of those arguments."[1252] The Ground does not comply with the Practice Direction on the Structure of Grounds of Appeal, and further, it is vague and does not identify specifically the challenged finding. The Appeals Chamber is satisfied that the

[1249] Trial Judgment, para. 486.
[1250] Trial Judgment, para. 487.
[1251] Taylor Notice of Appeal, Ground 18.
[1252] Taylor Appeal, para. 318, fn. 641.

submissions referred to are fully presented and argued in the Defence's other Grounds, and that Ground 18 does not supplement those submissions in any way. Ground 18 is accordingly summarily dismissed.

1. Mental State Regarding Consequence

(a) Submissions of the Parties

407. In Ground 16, the Defence argues that the Trial Chamber erred in law by adopting and applying a "knowledge" standard for an accused's mental state regarding the consequence of his acts or conduct, as a component of *mens rea*.[1253] It submits that the standard applied by the Trial Chamber is not reflected in customary international law and that "knowledge" of the consequence is a necessary but not sufficient condition to incur aiding and abetting liability.[1254] The Defence advances three arguments in support of its contention that the knowledge standard is unsupported by customary international law.

408. First, it argues that the adoption of the "purpose" standard set out in Article 25(3)(c) of the Rome Statute demonstrates the absence of state practice and *opinio juris* accepting the legal standard applied by the Trial Chamber, as does the standards proposed in the ILC's Draft Articles on Responsibility for Internationally Wrongful Acts.[1255] Second, it submits that the ICTY's jurisprudence holding that "knowledge" of the consequence is sufficient for aiding and abetting liability is "manifestly incorrect."[1256] It contends that the sources relied on in that jurisprudence, particularly the *Furundžija* Trial Judgment, do not show practice and *opinio juris* establishing that "knowledge" of the consequence is sufficient for aiding and abetting liability.[1257] In particular, it submits that the *Furundžija* Trial Chamber's discussion of post-Second World War jurisprudence is "manifestly incorrect, incomplete and insufficient."[1258] Finally, it argues that State domestic practice supports the conclusion that customary international law at the relevant time required "purpose" for aiding and abetting liability,[1259] and cites examples of domestic jurisdictions requiring or applying a "purpose" standard to an accused's mental state regarding the consequence

[1253] Taylor Appeal, paras 327-367.
[1254] Taylor Appeal, para. 319.
[1255] Taylor Appeal, paras 338-346. The Defence emphasises that "[t]he salient issue, it must be recalled, is not whether Article 25(3)(c) declares customary international law; the issue, rather, is whether there is any evidence to justify the Chamber's pronouncement that the knowledge standard reflected customary international law as of the date of the alleged criminal activity." Taylor Appeal, para. 339.
[1256] Taylor Appeal, para. 348.
[1257] Taylor Appeal, paras 350-357, *discussing* the ILC 1996 Draft Code of Crimes (para. 347), Art. 25(3)(c) of the Rome Statute (para. 351) and the post-Second World War military tribunals' jurisprudence (paras 352, 353).
[1258] Taylor Appeal, paras 352, 353, *citing Einsatzgruppen, Zyklon B, Schonfeld, Hechingen* and *Ministries* cases.
[1259] Taylor Appeal, paras 360-364.

of his acts or conduct.[1260] The Defence concludes that "[t]he *opinio juris* of States has coalesced around the purpose standard set out in Article 25(3)(c). Even assuming that there is still some doubt about that, one point is beyond doubt: the *opinio juris* of States has not coalesced around a knowledge standard of *mens rea* for aiding and abetting."[1261]

409. The Prosecution responds that this Court, the ICTY and the ICTR correctly interpreted the post-Second World War jurisprudence and correctly applied the standard in relation to an accused's mental state as established in international customary law operative during the Indictment Period.[1262] It also contends that the Defence's argument is flawed in three respects:[1263] first, the Rome Statute in general, and the Article 25(3) liability scheme in particular, were never meant to codify customary international law;[1264] second, the Rome Statute does not define the term "purpose;"[1265] and third, the Rome Statute liability scheme is distinct from that of the Special Court Statute and the statutes of the *ad hoc* Tribunals, and that the form of criminal participation set out in Article 25(3)(c) of the Rome Statute is similar but not identical to "aiding and abetting" liability in Article 6(1) of the Statute.[1266] It further submits that aiding and abetting liability under Article 6(1) is similar to the form of criminal participation set out in Article 25(3)(d) of the Rome Statute, and that under Article 25(3)(d) of the Rome Statute knowledge of the consequence is culpable *mens rea*.[1267]

410. The Defence replies that the post-Second World War cases relied upon by the Prosecution do not concern aiding and abetting or accessorial liability.[1268] It also submits that the Prosecution's

[1260] Taylor Appeal, paras 361-364, *citing* German Federal Court of Justice (BGH), Case No. 4 StR 453/00, Judgement of 8 March 2001, p. 10 (Germany); Stefani, G. *et al*., *Droit pénal génénal*, Dalloz (Paris, 2000), p. 290 (France); Cass. pen., sez. VI 12-06-2003 (21-03-2003), n. 25705 (Italy); Rejman Genowefa (ed.) *Kodeks karny część ogólna – Komentarz*, Wydawnictwo C.H. Beck (Warszawa 1999) (Poland); United States Model Penal Code, § 2.06(4) and *United States v. Peoni*, 100 F.2d 401, 402 (2nd Cir 1938) (United States); Criminal Code, R.S.C. 1985, c. C-46, s. 21(b) (Canada); *Gillick v. West Norfolk and Wisbech A.H.A.*, [1986] AC 112 (England); *R. v. Lam Kit*, [1988] 1 HKC 679, 680 and *R. v. Leung Tak-yin* [1987] 2 HKC 250 (Hong Kong) and Yeo, S., "India", in Heller, K. and Dubber, M., eds. *The Handbook of Comparative Criminal Law*, Stanford University Press (Stanford: 2011), p. 296, citing *Mohd Jamal v. Emperor*, A.I.R. 1953 All 668 (India).
[1261] Taylor Appeal, para. 365.
[1262] Prosecution Reponse, paras 282-290, *discussing* the United Nations General Assembly "Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal", the UNWCC Report XV, p. xvi., *Flick* Case, *Roechling* Case, *Einsatzgruppen* Case, *Furundžija* Trial Judgment, *Ministries* Case, *Tadić* Trial Judgment.
[1263] Prosecution Reponse, paras 300-305.
[1264] Prosecution Reponse, para. 301, *citing Orić* Appeal Judgment, Judge Shomburg Opinion, para. 20, *Exxon Mobil*, p. 42.
[1265] Prosecution Reponse, para. 302.
[1266] Prosecution Reponse, para. 303.
[1267] Prosecution Reponse, paras 303, 304.
[1268] Taylor Reply, para. 46, *discussing Roechling* and *Ministries* Cases.

reliance on Article 25(3)(d) of the Rome Statue is erroneous as this provision "does not concern aiding and abetting liability, but rather a fundamentally different and separate form of liability."[1269]

411. In addition to these submissions, the Defence argues that the Trial Chamber erred in law by adopting an "awareness of the substantial likelihood" standard for an accused's mental state regarding the consequence of his acts or conduct.[1270] In support, it contends that the ICTY's jurisprudence provides that an accused must have "actual knowledge" regarding the consequence of his acts or conduct.[1271] The Prosecution responds that the "substantial likelihood" standard has been correctly and consistently applied by this Appeals Chamber and therefore should not be disturbed.[1272] According to the Prosecution, the "actual knowledge" standard suggested by the Defence is incorrect as "[w]hen dealing with future events, no one can have absolute certainty."[1273] In addition, a certainty standard is not required for instigating, ordering and planning and it would make no sense to impose such a standard for aiding and abetting.[1274]

412. Finally, in Ground 16 the Defence argues that the *mens rea* "always requires as a minimum that the accused know the character of the *actus reus*,"[1275] and that the Trial Chamber erred in not requiring proof that Taylor knew that his acts would "substantially" assist the commission of crimes.[1276] The Prosecution responds that the Defence's argument that an accused not only needs to be aware that he was contributing to the crime but also needs to be "aware that his actions constituted a *substantial* contribution" contradicts all the jurisprudence defining the *mens rea* for aiding and abetting.[1277] The Defence replies that customary international law requires that the accused must have the requisite *mens rea* in relation to the consequence of the *actus reus*.[1278]

(b) Discussion

413. The Defence argues that the caselaw of the Special Court and the ICTY jurisprudence relied upon by the Trial Chamber in applying a "knowledge" standard to an accused's mental state regarding the consequence of his acts or conduct is manifestly incorrect and that Article 25(3) of the

[1269] Taylor Reply, para. 50.
[1270] Taylor Appeal, paras 368-376. *See* also Taylor Appeal, para. 385.
[1271] Taylor Appeal, paras 369-372, *citing Haradinaj* Appeal Judgment, para. 58, *Vasiljević* Appeal Judgment, para. 102, *Blaskic* Appeal Judgment, para. 49.
[1272] Prosecution Reponse, para. 306.
[1273] Prosecution Response, para. 313.
[1274] Prosecution Response, para. 313.
[1275] Taylor Appeal, para 395.
[1276] Taylor Appeal, paras 394-396. *See* also Taylor Appeal, para. 441.
[1277] Prosecution Response, para. 319 (emphasis added).
[1278] Taylor Reply, paras 55-58.

Rome Statute was not addressed in that caselaw.[1279] It further states that the Appeals Chamber has never been directly confronted with a challenge to its articulation of the *mens rea* elements of aiding and abetting, and that the issue now raised is "therefore a matter of first impression for this Court."[1280]

414. The Appeals Chamber does not accept that the *mens rea* of aiding and abetting liability is a matter of first impression for this Court.[1281] The Appeals Chamber, guided by the caselaw of the ICTY[1282] and ICTR[1283] Appeals Chambers, has consistently held that for aiding and abetting liability under Article 6(1) of the Statute and customary international law, the requisite standard for an accused's mental state regarding the consequence of his acts or conduct is as follows:

> the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator.[1284]

415. In broad terms, *mens rea* (subjective element) describes an accused's mental state at the time he performs the *actus reus* (objective element). While *mens rea* properly covers different elements,[1285] the only issue presented here concerns an accused's mental state regarding the

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[1279] Taylor Appeal, para. 348.
[1280] Taylor Appeal, para. 337.
[1281] *See*, *e.g.*, *Sesay et al.* Appeal Judgment, para. 546; *Brima et al.* Appeal Judgment, paras 242, 243; *Fofana and Kondewa* Appeal Judgment, para. 366.
[1282] *See Tadić* Appeal Judgment, para. 229(iv); *Aleksovski* Appeal Judgment, para. 163; *Vasiljevic* Appeal Judgment para. 102; *Krnojelac* Appeal Judgment, paras 33, 51; *Blaskic* Appeal Judgment, para. 49 (affirming *Vasiljevic* Appeal Judgment definition that *mens rea* of aiding and abetting does not require anything more than "knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime"); *Simić* Appeal Judgment, para. 86; *Brđanin* Appeal Judgment, para. 484; *Blagojević and Jokić* Appeal Judgment, para. 127 (reiterating that "[t]he requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator"); *Orić* Appeal Judgment, para. 43; *Mrksić* and *Šljivančanin* Appeal Judgment, paras 49, 159; *Haradinaj et al.* Appeal Judgment, para. 58; *Lukić and Lukić* Appeal Judgment, para. 428.
[1283] *See Ntagerura et al.* Appeal Judgment, para. 370; *Nahimana et al.* Appeal Judgment, para. 482; *Rukundo* Appeal Judgment, para. 53; *Ntawukulilyayo* Appeal Judgment, para. 222; *Kalimanzira* Appeal Judgment, para. 86; *Karera* Appeal Judgment, para. 321; *Muvunyi* Appeal Judgment, para. 79; *Seromba* Appeal Judgment, para. 56.
[1284] *Brima et al.* Appeal Judgment, para. 242, *quoting Brima et al.* Trial Judgment, para. 776. *See* also *Sesay et al.* Appeal Judgment, para. 546; *Fofana and Kondewa* Appeal Judgment, paras 366-367. Subsequently, the STL Appeals Chamber and an ECCC Trial Chamber articulated similar *mens rea* standards for aiding and abetting. *See* STL Applicable Law Decision, para. 227 ("[t]he *subjective element* of aiding and abetting resides in the accessory having *knowledge* that 'his actions will assist the perpetrator in the commission of the crime.'") (emphasis in original); *Duch* Trial Judgment, para. 535 ("[l]iability for aiding and abetting a crime requires proof that the accused knew that a crime would probably be committed, that the crime was in fact committed, and that the accused was aware that his conduct assisted the commission of that crime. This knowledge can be inferred from the circumstances.")
[1285] *Mens rea* relates, *inter alia*, to the conduct, the consequence and the context or factual circumstances forming part of the crime. The Appeals Chamber notes that certain civil law jurisdictions conceptualise *mens rea* as comprising a cognitive ("knowledge", "rappresentazione", "*Wissen*") and a volitional component ("intention", "volonta", "*Wiele*"). The Appeals Chamber further notes that Article 30(1) of the Rome Statute provides: "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with *intent* and *knowledge*." (emphasis added). For a detailed comparative discussion of the subjective element in domestic legal systems and international criminal law, see E. van Sliedregt, Individual Criminal Responsibility in International Law.

consequence of his acts or conduct.[1286] In this case, the Trial Chamber found that Taylor provided assistance, encouragement and moral support to the RUF/AFRC *knowing* that his acts and conduct would assist the commission of the crimes, that is, that he knew the consequence of his acts and conduct would be to have an effect on the commission of the crimes.[1287] The Defence contests this finding, arguing that the Trial Chamber was required to find that Taylor *willed, desired* or *had the conscious object* that his acts and conduct would assist the commission of the crime,[1288] that is, that he willed or had the conscious object that the consequence of his acts and conduct would be to have an effect on the commission of the crime. The specific question raised by the Defence here, then, is whether, in accordance with Article 6(1) of the Statute and customary international law, an accused can be held criminally liable if he volitionally (or willingly) performs the *actus reus* of aiding and abetting liability (providing assistance, encouragement or moral support) *knowing* (or being aware of the substantial likelihood) that his acts or conduct will have an effect on the commission of the crimes.[1289]

[1286] The Appeals Chamber notes the Trial Chamber's holding, consistent with the jurisprudence of other international tribunals, that for specific-intent crimes or underlying offences such as persecution as a crime against humanity, aiding and abetting liability can attach even where an accused does not have the requisite specific intent. The Defence does not challenge this holding, nor does it challenge in this regard Taylor's convictions for acts of terror under Count 1. As the Parties have not raised the issue, the Appeals Chamber does not address it. In respect of this issue, see, *inter alia, R. v. Woollin*, [1999] AC 82; G. Williams, *Oblique Intention*; J. Stewart, *The End of Modes of Liability*; *Hechingen* Case (the Appeals Court acquitted the accused of aiding and abetting persecutions because the accused did not have the specific intent for the crime, noting that Control Council Law No. 10 established personal culpability for the crime); Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-based Interpretation*; K. Ambos, *Some Preliminary Reflections on the Mens rea Requirements of the Crimes of the ICC Statute and of the Elements of Crimes*.

[1287] Trial Judgment, para. 6949.

[1288] *See* Appeal transcript, 22 January 2013, pp 49919, 49920 ("So what is purpose, at least as it is applied in some systems? Well, purpose in some systems is defined as intent to assist a crime. The intention to assist a crime, that's not the same as direct intent in respect of the crime of the perpetrator. It is *dolus directus* in respect of the assistance, not in respect of the ultimate crime. Now, whether or not those two might be very hard to distinguish in any particular case is not for me to say. There may be cases indeed where they are different, but in terms of topology, it's very clear what 'purpose' means. 'Purpose' means intent to assist.").

[1289] The Appeals Chamber has noted in its review of the jurisprudence, legal sources and the Parties' submissions that a variety of terminology is used to describe the standards for an accused's mental state regarding the consequence of his acts and conduct, as a component of *mens rea*. Jurisprudence on *mens rea* under customary international law recognises and discusses three such standards: direct intent, knowledge and awareness of the substantial likelihood. Collectively, these standards may be described as "*dolus*" or "*Wille*", and the ICRC has persuasively commented that these three standards are incorporated in the term "wilfully" as used in some international instruments. *See* ICRC Commentary, Additional Protocol I, para. 3474. The Appeals Chamber adopts the term "*dolus*" to describe the mental state regarding the consequence of acts or conduct that is generally required in customary international law. The Appeals Chamber uses the term "direct intent" – also described as "purpose", "*dol general*", "*dolo intenzionale*" and "*dolus directus* in the first degree" – to describe an accused's "will", "desire" or "conscious object" that his acts or conduct have an effect on the commission of a crime. This is the standard put forward by the Defence for aiding and abetting liability. The Appeals Chamber uses the term "knowledge" – also described as "general intent", "*dol special*", "*dolo diretto*" and "*dolus directus* in the second degree" – to describe the accused's knowledge that his acts or conduct have an effect on the commission of the crime. This is a standard articulated in this Court's jurisprudence, applied by the Trial Chamber here and the subject of the Defence's primary challenge. The Appeals Chamber uses the term "awareness of the substantial likelihood" – which *generally* corresponds to terms such as "conditional intent", "advertent recklessness", "indirect intent", "*bedingte Vorsatz*" and "*dolus eventualis*" – to describe an accused's awareness and acceptance of the substantial likelihood that his acts or conduct have an effect on the commission of the crime. This is a standard articulated in this Court's jurisprudence and the subject of the Defence's second challenge. These standards are framed

416. The Appeals Chamber will now address the Defence's contention that volitionally or willingly performing the *actus reus* of aiding and abetting liability with "knowledge" of the consequence of one's acts or conduct is not a culpable mental state for aiding and abetting liability under customary international law.

(i) "Knowledge"

a. Post-Second World War Jurisprudence

417. Like other international criminal tribunals[1290] as well as domestic courts[1291] ascertaining international law, this Appeals Chamber looks to the caselaw of post-Second World War tribunals as indicative of customary international law.

418. Article 6 of the Charter of the International Military Tribunal (IMT) established individual criminal liability for "[l]eaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit [the crimes]."[1292] The IMT found:

> Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had

as appropriate for aiding and abetting liability. Recalling that the issue is an accused's mental state in relation to the consequence of his acts or conduct, which in turn relates to the relevant *actus reus*, for commission liability the consequence of an accused's acts or conduct is to *commit* the crime. For planning, instigating, ordering and aiding and abetting liability, the consequence of the accused's acts or conduct is to *have an effect* on the commission of the crime. *See* further, U.S. Model Penal Code (MPC), section 2.02; J.S. Bell, Principles of French Law; G. Marinucci – E. Dolcini, Manuale di Diritto Penale, Parte Generale, pp. 188-191; E. van Sliedregt, Individual Criminal Responsibility in International Law, pp. 40-41; G. Williams, *Oblique Intention*; A. Cassese, International Criminal Law, pp 60-69.

[1290] At the ICTY, *see, e.g.*, *Tadić* Appeal Decision on Jurisdiction, paras 128, 138; *Tadić* Appeal Judgment, paras 194, 197-202, 205-220, 256-269; *Tadić* Trial Judgment, paras 661-692; *Hadžihasanović et al.* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility; *Furundžija* Trial Judgment, paras 193-249. *See* also Secretary-General's Report on ICTY, para. 55; Taylor Appeal, paras 334-336; Prosecution Response, paras 282-286.

[1291] *See, e.g., Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2nd Cir. 2009); *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254 (2nd Cir. 2007); *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002); *In re South African Apartheid Litigation*, 617 F.Supp. 2d 228 (S.D.N.Y. 2009); *Polyukhovich v. Commonwealth*, 172 CLR 501 (1991).

[1292] IMT Charter, Art. 6. The same provision can be found in Article 5 of the Charter of the International Military Tribunal for the Far East **(**IMTFE). The IMT held that the Charter only established conspiracy to commit aggressive war as a substantive crime; it did not accept that conspiracy to commit war crimes or crimes against humanity was a substantive crime. IMT Judgment, p. 226 ("Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit War Crimes and Crimes against Humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. … The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit War Crimes and Crimes against Humanity, and will consider only the common plan to prepare, initiate, and wage aggressive war."). As the IMT strictly limited its application of conspiracy and common plan liability to Count One, its findings on personal liability with respect to the other counts relied on and applied accomplice liability.

> initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing.[1293]

The IMT held accused personally liable for their knowing participation in the crimes. Von Schirach was found guilty in that "while he did not originate the policy of deporting Jews from Vienna, [he] participated in this deportation after he had become Gauleiter of Vienna. He knew that the best the Jews could hope for was a miserable existence in the ghettos of the East. Bulletins describing the Jewish extermination were in his office."[1294] Seyss-Inquart was held responsible for being "a knowing and voluntary participant in War Crimes and Crimes against Humanity which were committed in the occupation of the Netherlands."[1295] In relation to Speer, the IMT found that "[t]he system of blocked industries played only a small part in the over-all slave labour program, *although Speer urged its cooperation with the slave labour program, knowing the way in which it was actually being administered*. In an official sense, he was its principal beneficiary and he constantly urged its extension."[1296] Other convictions relied on similar findings.[1297]

419. Control Council Law No. 10,[1298] the legal basis for further prosecution of crimes against peace, crimes against humanity and war crimes, established individual criminal liability in Article II(2).[1299] Applying that law,[1300] the Nuremberg Military Tribunals[1301] (NMTs) consistently

[1293] IMT Judgment, p. 226.
[1294] IMT Judgment, p. 319.
[1295] IMT Judgment, p. 330.
[1296] IMT Judgment, p. 332 (emphasis added).
[1297] Frick was found guilty because he "had knowledge that insane, sick, and aged people, 'useless eaters', were being systematically put to death." IMT Judgment, p. 301 ("Complaints of these murders reached him, but he did nothing to stop them. A report of the Czechoslovak War Crimes Commission estimated that 275,000 mentally deficient and aged people, for whose welfare he was responsible, fell victim to it"). Rosenberg was convicted because he "had knowledge of and took an active part in stripping the Eastern Territories of raw materials and food-stuffs, which were all sent to Germany." IMT Judgment, p. 295 ("Upon occasion Rosenberg objected to the excesses and atrocities committed by his subordinates, notably in the case of Koch, but these excesses continued and he stayed in office until the end."). In finding Donitz guilty, the IMT noted that the accused admitted "he knew of concentration camps. A man in his position must necessarily have known that citizens of occupied countries in large numbers were confined in the concentration camps." IMT Judgment, p. 314. In relation to Speer, the IMT found that "[t]he system of blocked industries played only a small part in the over-all slave labour program, although Speer urged its cooperation with the slave labour program, knowing the way in which it was actually being administered. In an official sense, he was its principal beneficiary and he constantly urged its extension." The Tribunal rejected Funk's defence of lack of knowledge on the basis that he "either knew what was being received or was deliberately closing his eyes to what was being done." IMT Judgment, p. 306. *See* also IMT Judgment, p. 336. Acquittals were entered because the evidence did not establish the requisite knowledge in relation to some defendants. IMT Judgment, pp 310, 339.
[1298] The Allied Powers adopted Control Council Law No. 10, which incorporated the London Agreement and the IMT Charter, "in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders." C.C. Law No. 10, Preamble. Ordinance No. 7, implementing Control Council Law No. 10 in the U.S. Zone of Occupation, further provided that the IMT's findings that the crimes were committed were binding upon the C.C. Law No. 10 military tribunals "except insofar as the *participation* therein or *knowledge* thereof by any particular person may be concerned." Ordinance No. 7 was enacted on 18 October 1946 with the purpose "to provide for the establishment of military tribunals which shall have the power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10." Ordinance No. 7, Article I, X (emphasis added).
[1299] C.C. Law No. 10, Art. II(2): "Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was

held that an accused's knowledge that he was participating in the commission of the crime – that is, an accused's knowledge of the consequence of his acts or conduct – established the *mens rea* for personal liability. The NMTs did not require that an accused directly intended that the consequence of his acts or conduct were to contribute to the commission of the crimes.[1302]

420. Tribunal III held in the *Justice* Case:

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connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1(a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country." The Appeals Chamber recalls that the post-Second World War jurisprudence and, in particular, the NMT judgments applied accomplice liability based on the inclusive nature of Article II of Control Council Law No. 10. *Contra* Taylor Reply, para. 46. *See supra* para. 377, fn. 1193.

[1300] In the *Justice* Case, Tribunal III held that "[t]he tribunals authorized by Ordinance No. 7 are dependent upon the substantive jurisdictional provisions of C.C. Law 10 and are thus based upon international authority and retain international characteristics." *Justice* Case, p. 958. In the *Ministries* Case, the Tribunal held that "[t]his is not a tribunal of the United States of America, but is an International Military Tribunal, established and exercising jurisdiction pursuant to authority given for such establishment and jurisdiction by Control Council Law No. 10, enacted 20 December 1945 by the Control Council, the highest legislative branch of the four Allied Powers now controlling Germany." *Ministries* Case, Order, p. 325. In the *Flick* Case, Tribunal IV explained: "[a]s to the Tribunal, its nature, and competence: The Tribunal is not a court of the United States as that term is used in the Constitution of the United States. It is not a court martial. It is not a military commission. It is an international tribunal established by the International Control Council, the high legislative branch of the four Allied Powers now controlling Germany. The judges were legally appointed by the Military Governor and the later act of the President of the United States in respect to this was nothing more than a confirmation of the appointments by the Military Governor. The Tribunal administers international law. It is not bound by the general statutes of the United States or even by those parts of its Constitution which relate to courts of the United States."

[1301] As international tribunals applying an international agreement for the prosecution of crimes against humanity and war crimes, the NMTs' jurisprudence is indicative of customary international law. *Accord* ECCC Appeals Decision on Joint Criminal Enterprise, para. 60 (the NMTs "offer an authoritative interpretation of their constitutive instruments and can be relied upon to determine the state of customary international law"); *Brdjanin* Appeal Judgment, paras 393 *et seq.*; *Rwamakuba* Decision on Interlocutory Appeal, para. 14 ("tribunals operating under CC Law No. 10 are indicative of principles of international law"); *Milutinović et al.* JCE Jurisdiction Decision, Separate Opinion of Judge Hunt, para. 18; *Milutinović* Decision on Indirect Co-perpetration, Separate Opinion of Judge Bonomy; *Furundžija* Trial Judgment, paras 193-195 (NMTs applied international instruments, in comparison with British Military Tribunals); *Erdemović* Separate and Dissenting Opinion of Judge Cassese, para. 27 (decided on other grounds) ("as Control Council Law No. 10 can be regarded as an international agreement among the four Occupying Powers (subsequently transformed, to a large extent, into customary law), the action of the courts established or acting under that Law acquires an international relevance."); *Doe v. Unocal* (the Court "should apply international law as developed in the decisions of international criminal tribunals such as the Nuremberg Military Tribunals for the applicable substantive law."). The French Superior Military Government Court in *Roechling* also referenced and relied on the NMTs Judgments. *Roechling* Appeal Judgment, p. 1123. *But see Polyukhovich v. Commonwealth* (Brennan J and Toohey J, in the course of discussing whether crimes against humanity were independent crimes under customary international law before 1945, noted that the IMT and NMTs had reached different conclusions on this question, based on differences in their respective charters. Both resolved the issue in favour of the IMTs conclusion that under customary international law at the relevant time, crimes against humanity required a connection with war crimes or crimes against peace. Both suggested in passing that the different conclusions could be attributed to the fact that the NMTs were arguably local courts administering municipal law. With the greatest respect to the learned Judges, a thorough review of the NMTs jurisprudence and Control Council Law No. 10 clearly demonstrates that this characterisation is unsustainable as a general statement, and the Appeals Chamber does not consider that Brennan J and Toohey J were making such a general statement.). For a detailed discussion of the NMTs, their jurisdiction and the cases before them, *see* K. J. Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law.

[1302] *See infra* para. 424.

> the essential elements to prove a defendant guilty under the indictment in this case are that a defendant had knowledge of an offense charged in the indictment and established by the evidence, and that he was connected with the commission of that offense.[1303]

Applying this holding, the Tribunal entered convictions where it was satisfied that an accused had knowledge of the crime and of his participation in its commission.[1304] It found Rothaug guilty because he "was the knowing and willing instrument in that program of persecution and extermination."[1305] Klemm was convicted because, among other facts, he "knew of abuses in concentration camps. He knew of the practice of severe interrogations. He knew of the persecution and oppression of the Jews and Poles and gypsies. He must be assumed to have known, from the evidence, the general basis of Nacht und Nebel procedure under the Department of Justice."[1306] The Tribunal convicted Joel because he was "chargeable with knowledge that the Night and Fog program from its inception to its final conclusion constituted a violation of the laws and customs of war."[1307] The United Nations War Crimes Commission (UNWCC) Commentary to the *Justice* Case noted:

> The question of knowledge was treated by the Tribunal as one of the highest importance, and repeated reference was made in the Judgment to the fact that various accused had knowledge, or must be assumed to have had knowledge, of the use made of the German legal system by Hitler and his associates, of the Nacht und Nebel plan and of the schemes for racial persecution.[1308]

421. Tribunal IV convicted Flick, a businessman who became a member of Himmler's Circle of Friends and contributed money to Himmler, for being an accessory to crimes against humanity and war crimes perpetrated by the SS.[1309] In assessing his *mens rea*, the Tribunal considered decisive the fact that Flick supported Himmler at a time when the criminal activities of the SS were common knowledge.[1310] The Tribunal held:

[1303] *Justice* Case, p. 1093.
[1304] Regarding Rothenberger, the Tribunal found that he, "contrary to his sworn testimony, must have known that the inmates of the Mauthausen concentration camp were there by reason of the 'correction of sentences' by the police, for the inmates were in the camp either without trial, or after acquittal, or after the expiration of their term of imprisonment." *Justice* Case, p. 1116. Similarly, Von Ammon was found guilty because of his "actual knowledge concerning the systematic abuse of the judicial process." *Justice* Case, p. 1134.
[1305] *Justice* Case, p. 1155.
[1306] *Justice* Case, p. 1094.
[1307] *Justice* Case, p. 1138. In relation to Joel, the Commentary to the *Justice* case highlighted that "[i]n the second place, the Tribunal clearly regarded as important not only evidence of positive action on the part of Joel but also proof of *knowledge* of acts on the part of others which were done in furtherance of the Nacht und Nebel plan." UNWCC Law Reports, Vol. VI, p. 87 (emphasis added).
[1308] UNWCC Law Reports, Vol. XV, p. 55.
[1309] *Flick* Case, para. 1216, p. 26.
[1310] *Flick* Case, para. 1219, p. 29.

> One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.[1311]

422. Tribunal VI held in the *Farben* Case:

> no individual defendant may be held guilty of the war crimes, or any aspect thereof, charged under count two, unless the competent proof establishes beyond reasonable doubt that he *knowingly participated* in an act of plunder or spoliation….[1312]

The defendants in that case were charged with war crimes and crimes against humanity through participation in the plunder of public and private property in countries and territories which came under the belligerent occupation of Germany.[1313] The Tribunal held that "[r]esponsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the Vorstand. …[T]he evidence must establish action of the character we have indicated, with knowledge of the essential elements of the crime."[1314] In respect of Schmitz, chairman of the Vorstand and the chief financial officer of Farben, the Tribunal found:

> The information coming to his attention in this manner was sufficient to apprise him of the pressure tactics being employed to force the French to consent to Farben's majority participation in the French dyestuffs industry. He was in a position to influence policy and effectively to alter the course of events. *We, therefore, find that Schmitz bore a responsibility for, and knew of, Farben's program to take part in the spoliation of the French dyestuffs industry and, with this knowledge, expressly and impliedly authorized and approved it.* Schmitz must be held Guilty on this aspect of count two of the indictment.[1315]

423. The *Ministries* Case, involving senior government and business officials, is particularly instructive. Tribunal IV found the requisite *mens rea* where an accused had knowledge that his acts had an effect on the crimes and thus he knowingly participated in the commission of crimes. Under Count Five, charging crimes against humanity, the Tribunal found that Keppler "knew the [agency's] functions and he knew what part it played in the general scheme of resettlement. If the [agency] had an important part in a crime cognizable by this Tribunal, he bears a part in the criminal responsibility thereto."[1316] Likewise, Kehrl was found guilty because "he was thoroughly

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[1311] *Flick* Case, para. 1216, p. 26.
[1312] *Farben* Case, p. 1137 (emphasis added). On that basis, the Tribunal concluded that "[a]s the action of Farben in proceeding to acquire permanently property interests in the manner generally outlined is in violation of the Hague Regulations, any individual who *knowingly* participated in any such act of plunder or spoliation with the degree of connection outlined in Article II, paragraph 2 of Control Council Law No. 10, is criminally responsible therefore." *Farben* Case, p. 1141.
[1313] *Farben* Case, p. 1128.
[1314] *Farben* Case, p. 1153.
[1315] *Farben* Case, p. 1155 (emphasis added).
[1316] *Ministries* Case, p. 584. The Tribunal concluded: "There is no doubt, and we so find, that the defendant Keppler knew the plan, knew what it entailed, and was one of the prime factors in its [the agency's] successful organization and operation." *Ministries* Case, p. 586.

aware of what the [agency] was expected to do, what its policies were, and what it in fact did."[1317] While Puhl, a *Reichsbank* senior official, "had no part in the actual extermination of Jews and other concentration camp inmates,"[1318] he was found guilty because he "knew that what was to be received and disposed of was stolen property and loot taken from the inmates of concentration camps,"[1319] although "[i]t is to be said in his favor that he neither originated the matter and that it was probably repugnant to him."[1320] Stuckart[1321] and Schellenberg,[1322] among others, were likewise convicted of crimes against humanity because they had knowledge of the criminal consequence of their acts. Similarly, Koerner[1323] and Pleiger[1324] were found guilty of the crime of slave labour charged in Count Seven because they had knowledge of their participation in the crime. Rasche was convicted on Count Six for participating in the spoliation and plunder in Czechoslovakia, and in relation to his *mens rea* the Tribunal found:

> The fact remains that it is credible evidence of the extent of the Dresdner Bank participation in the Aryanization program during the period mentioned. …There can be little question but that defendant, as active head of the Vorstand of the BEB, was conversant with such an extensive activity of such bank.[1325]

424. The Tribunal in the *Ministries* Case was further clear that it did not require as a matter of law that an accused must have willed or desired the consequence of his acts or conduct, and that an accused's knowledge of the criminal consequence was sufficient to establish the *mens rea* for

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[1317] *Ministries* Case, p. 588.
[1318] *Ministries* Case, p. 621.
[1319] *Ministries* Case, p. 620.
[1320] *Ministries* Case, p. 621.
[1321] As the Tribunal put it, "[w]e are convinced that Stuckart was fully aware of the fate which awaited Jews deported to the East." *Ministries* Case, p. 620.
[1322] The Tribunal found: "We hold that Schellenberg in fact knew of these practices and is guilty of the crimes as set forth." *Ministries* Case, p. 671.
[1323] The Tribunal explained: "[t]he foregoing evidence would seem to establish beyond doubt Koerner's knowledge of and participation in the slave-labour program." *Ministries* Case, p. 828.
[1324] The Tribunal found that "[a]s to the employment of slave laborers in the concerns coming within the sphere of the RVK and in the plants of the Hermann Goering Works, there can be no question but that such objectionable labor conditions and treatment were within the knowledge of the defendant Pleiger…. In view of the evidence and in view of the positions held by Pleiger we cannot believe that he was not aware of the objectionable and inhumane conditions under which the laborers in some of the mines and some of the plants were forced to labor." *Ministries* Case, p. 843.
[1325] *Ministries* Case, pp 775-777. Karl Rasche was one of the executive officers of the Dresdner Bank. The Defence's contention that Rasche was acquitted of Count Five because the Tribunal applied a standard different from knowledge cannot be sustained. It is clear from the Tribunal's reasoning that Rasche could not be found guilty because his acts did not satisfy the *actus reus*, whatever his *mens rea*. The Tribunal found: "It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did. The real question is, is it a crime *to make a loan*, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law? …Our duty is to try and punish those guilty of violating international law, and *we are not prepared to state that such loans constitute a violation of that law*, nor has our attention been drawn to any ruling to the contrary." *Ministries* Case, p. 622 (emphasis added). The Tribunal restated and clarified its reasoning on this in respect of Count Six as well. *Ministries* Case, p. 784 ("As hereinbefore indicated, on this question in discussions in our treatment of count five, and *in view of the evidence generally with respect to the credits here involved*, we do not find adequate basis for a holding of guilty *on account of such loans*.") (emphasis added). *Contra* Taylor Appeal, para. 353; *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 259 (2nd Cir. 2009).

personal culpability. Von Weizsaecker and Woermann, senior officials in the Foreign Ministry, were convicted for crimes against humanity under Count Five. The Tribunal found that even though they neither willed nor desired the commission of the crimes, their knowledge that they were participating in the crimes was sufficient to establish the requisite *mens rea*:

> The mass deportation of Jews to the East which resulted in the extermination of many millions of them found its expression in the celebrated Wannsee conference of 20 January 1942. The Foreign Office played an important part in these negotiations and in the actions thereafter taken to implement and assist the program. *Von Weizsaecker or Woermann neither originated it, gave it enthusiastic support, nor in their hearts approved of it. The question is whether they knew of the program and whether in any substantial manner they aided, abetted, or implemented it*.[1326]

It is valuable to further quote at length the Tribunal's findings regarding Schwerin von Krosigk's guilt for crimes against humanity under Count Five:

> The evidence clearly shows that he was not a member of Hitler's inner circle, that he was not one of his confidants, and that he came in touch with him but seldom before the war, and even less often afterward. During the course of the years he suffered many conflicts of conscience and was fully aware that measures to which he put his name and programs in which he played a part were contrary and abhorrent to what he believed and knew to be right. It is difficult to understand what motives or what weaknesses impelled or permitted him to remain and play a part, in many respects an important one, in the Hitler regime. It is one of the human tragedies which are so often found in life.[1327] …
>
> *It is clear, however, that notwithstanding the conflicts of conscience which he suffered, and of them we have no doubt, he actively and consciously participated in the crimes charged in count five*. Neither the desire to be of service nor the desire to help individuals nor the demands of patriotism constitute a justification or an excuse for that which the evidence clearly establishes he did, although they may be considered in mitigation of punishment. We find the defendant Schwerin von Krosigk guilty under count five in the particulars set forth.[1328]

425. In the *Pohl* Case, Tribunal II found the requisite *mens rea* where an accused had knowledge of his participation in the commission of the crimes.[1329] In assessing the responsibility of Max Kiefer, an architect in charge of planning and constructing concentration camps,[1330] the Tribunal concluded that "the very nature of such installations and their continued maintenance constituted knowledge of the purposes for which they were to be used."[1331] Tribunal II in the

[1326] *Ministries* Case, p. 478 (emphasis added).
[1327] *Ministries* Case, p. 672.
[1328] *Ministries* Case, p. 680 (emphasis added).
[1329] *See, e.g.*, *Pohl* Case, p. 989 (Oswald Pohl, chief of the SS Economic Administrative Main Office ("WVHA"), was convicted of crimes committed during Operation Reinhart because "[h]aving knowledge of the illegal purposes of the action and of the crimes which accompanied it, his active participation even in the after phases of the action make him *particeps criminis* in the whole affair."); p. 994 (The Tribunal found that August Frank "must conclusively be convicted of knowledge of and active and direct participation in the slave labour program.").
[1330] *Pohl* Case, p. 1019.
[1331] *Pohl* Case, p. 1020. With respect to Heinz Karl Fanslau, the Tribunal found "Fanslau knew of the slavery in the concentration camps and took an important part in promoting and administering it. This being true, he is guilty of war

Einsatzgruppen Case found that an accused's knowledge of the crimes and his participation therein established the *mens rea* for culpability. The Tribunal held that Klingelhoefer's role as an interpreter did "not exonerate him from guilt because *in locating, evaluating and turning over lists of Communist party functionaries to the executive department of his organization he was aware that the people listed would be executed when found*. In this function, therefore, he served as an accessory to the crime."[1332]

426. Like the NMTs, British tribunals found that knowledge of the crimes and the accused's participation therein established personal responsibility. The three accused in *Zyklon B* were charged with knowingly supplying poison gas used for the extermination of allied nationals interned in concentration camps.[1333] The Judge Advocate emphasised the Prosecution's contention that the accused must have known that the large deliveries of Zyklon B could not have been made for the purpose of disinfecting buildings.[1334] In the *Rhode* Case, the Judge Advocate explained that:

> if he was taking part with the other man with the knowledge that that other man was going to put the killing into effect then he was just as guilty as the person who fired the shot or delivered the blow.[1335]

427. In *Roechling*, the French Superior Military Government Court, applying C.C. Law No. 10, convicted Ernest Roechling for war crimes of spoliation because "[h]e was fully aware of the significance of his own role" in the commission of the crimes.[1336] In the *Holstein* case[1337] and

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crimes and crimes against humanity." *Pohl* Case, p. 998. Georg Loerner was found guilty because he "knew of the underlying program of OSTI [Eastern Industries] to fully utilize Jewish slave labour in its enterprises." *Pohl* Case, p. 1006.

[1332] *Einsatzgruppen* Case p. 569 (emphasis added). *See* also *Einsatzgruppen* Case, p. 577 (In convicting von Radezky, the Tribunal held that "the defendant *knew* that Jews were executed by Sonderkommando 4a because they were Jews, and … von Radetzky took a consenting part in these executions."). *Contra* Taylor Appeal, para. 352.

[1333] *Zyklon B* Case, para. 2. Bruno Tesch was the owner of the firm "Tesch and Stabenow" which had the exclusive agency for the supply of poison gas "Zyklon B" intended for the extermination of vermin. Karl Weinbacher was Tesch's Procurist or second-in-command and Joachim Drosihn was the firm's first gassing technician.

[1334] *Zyklon B* Case, para. 9. The Appeals Chamber approvingly notes the Judge Advocate's instructions to the Court, which clarified that it was necessary to find first, that the crimes were committed, second, that the accused's acts and conduct had a substantial effect on the commission of the crimes, and third, that the accused knew of the causal relationship between their acts and conduct and the commission of the crimes. The Judge Advocate pointed out that the Court "*must be sure of three facts*, first, that Allied nationals had been gassed by means of Zyklon B; secondly, that this gas had been supplied by Tesch and Stabenow; thirdly, that the accused *knew* that the gas was to be used for the purpose of killing human beings." *Zyklon B* Case, para. 9 (emphasis added). This was a matter of fact to be assessed based upon the evidence. In the *Farben* Case, the Tribunal found that the defendants did not know that a similar gas, Cyclon-B, was to be used in the commission of crimes. *Farben* Case, p. 1169. *Zyklon B* and *Farben* are consistent in that, as a matter of law, knowledge of the consequence of one's acts and conduct is culpable *mens rea*, although different factual conclusions were reached based on the evidence in the cases. *Contra* Taylor Appeal, para. 352.

[1335] *Rhode* Case, p. 56.

[1336] *Roechling* Appeal Judgment, p. 1119. *See* also *Roechling* Appeal Judgment, p. 1120 ("Furthermore Ernst Roechling acknowledged in the course of the first trial that he was never subjected to coercion, that he was well aware of the fact that Hermann Roechling had set himself the task of increasing the war potential of the Reich, and that he assisted him voluntarily in this task in France.").

[1337] *Franz Holstein and Twenty-Three Others* Case.

Wagner case[1338] before French military tribunals applying French military and domestic law, the accused were found guilty as accomplices under Article 60 of the French Criminal Code:

> any person who has supplied the arms, tools or any other means that have been used in the commission of the crime or offence, knowing that they would be so used; or who has *wittingly aided or assisted the author or authors of the crime or offence in any acts preparatory to, or facilitating its perpetration, or in its execution*....[1339]

United States military tribunals in the Far East also found *mens rea* established by an accused's knowledge of his participation in the crime.[1340]

b. The 1996 ILC Draft Code

428. The Appeals Chamber accepts that the International Law Commission's[1341] 1996 Draft Code of Crimes against the Peace and Security of Mankind is generally regarded as an authoritative international legal instrument that, although non-binding, may "(i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain contents or are in the process of formation, or, at the very least, (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world."[1342] Article 2(3)(d) of the 1996 Draft Code provides:

> 3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:
>
> (d) knowingly aids, abets or otherwise assists, directly and substantially,[1343] in the commission of such a crime, including providing the means for its commission.

[1338] *Robert Wagner and Six Others* Case, p 23.
[1339] UNWCC Law Reports, Vol. VIII, pp. 32-33 (emphasis added).
[1340] In the *Jaluit Atoll* Case, the defendant Tasaki admitted to having released prisoners to the actual executioners, knowing that the prisoners were to be executed. Although he argued the defence of superior orders, he was convicted of the charges. *Jaluit Atoll* Case, pp 73-76.
[1341] The Appeals Chamber notes that "[t]he International Law Commission shall have for its object the promotion of the progressive development of international law and its codification." Statute of the International Law Commission, Art. 1(1). Article 15 further provides: "In the following articles the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine."
[1342] *Furundžija* Trial Judgment, para. 227.
[1343] The Commentary notes: "Thus, the form of participation of an accomplice *must entail assistance which facilitates the commission of a crime in some significant way*. In such a situation, an individual is held responsible for his own conduct which contributed to the commission of the crime notwithstanding the fact that the criminal act was carried out by another individual." It further notes regarding Article 2(3)(e): "The term 'directly' is used to indicate that the individual must in fact participate in some meaningful way in formulating the criminal plan or policy, including endorsing such a plan or policy proposed by another." Report of the International Law Commission, paras 11 and 13, p. 21 (emphasis added). *See* also *Furundžija* Trial Judgment, para. 232 ("In view of this, the Trial Chamber believes the use of the term 'direct' in qualifying the proximity of the assistance and the principal act to be misleading as it may

The Commentary states that "[t]he accomplice must *knowingly* provide assistance to the perpetrator of the crime. Thus, an individual who provides some type of assistance to another individual *without knowing* that this assistance will facilitate the commission of a crime would not be held accountable under subparagraph (d)."[1344]

c. Domestic jurisdictions

429. Domestic law, even if consistent and continuous in all States, is not necessarily indicative of customary international law. This is particularly true in defining legal elements and determining forms of criminal participation in domestic jurisdictions, which may base their concepts of criminality on differing values and principles. Therefore, the reliance by the Defence on examples of domestic jurisdictions requiring or applying a "purpose" standard to an accused's mental state regarding the consequence of his acts or conduct[1345] is misplaced.

430. Nor is such practice consistent among all States. The Appeals Chamber equally identifies a number of States that explicitly provide that an accused's knowledge of the consequence of his acts or conduct is culpable *mens rea* for aiding and abetting liability. In South Africa "[a]n accomplice is someone who knowingly associates himself or herself with the commission of the crime by the perpetrator and furthers the commission of the crime."[1346] Article 121-7 of the French Penal Code establishes individual criminal liability for "the person who knowingly, by aiding and abetting, facilitates its preparation or commission."[1347] Under the United States Military Regulations, the elements of aiding and abetting are defined as:

> (A) The accused committed an act that aided or abetted another person or entity in the commission of a substantive offense triable by military commission;

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imply that assistance needs to be tangible, or to have a causal effect on the crime. This may explain why the word 'direct' was not used in the Rome Statute's provision on aiding and abetting.").

[1344] Report of the International Law Commission, para. 11 , p. 21 (emphasis added).

[1345] Taylor Appeal, paras 361-364, *citing* German Federal Court of Justice (BGH), Case No. 4 StR 453/00, Judgement of 8 March 2001, p. 10 (Germany); Stefani, G. *et al*., *Droit pénal génénal*, Dalloz (Paris, 2000), p. 290 (France); Cass. pen., sez. VI 12-06-2003 (21-03-2003), n. 25705 (Italy); Rejman Genowefa (ed.) *Kodeks karny część ogólna – Komentarz*, Wydawnictwo C.H. Beck (Warszawa 1999) (Poland); United States Model Penal Code, § 2.06(4) and *United States v. Peoni*, 100 F.2d 401, 402 (2nd Cir 1938); Criminal Code, R.S.C. 1985, c. C-46, s. 21(b) (Canada); *Gillick v. West Norfolk and Wisbech A.H.A.*, [1986] AC 112 (England); *R. v. Lam Kit*, [1988] 1 HKC 679, 680 and *R. v. Leung Tak-yin* [1987] 2 HKC 250 (Hong Kong) and Yeo, S., "India", in Heller, K. and Dubber, M., eds. *The Handbook of Comparative Criminal Law*, Stanford University Press (Stanford: 2011), p. 296, citing *Mohd Jamal v. Emperor*, A.I.R. 1953 All 668 (India).

[1346] K.J. Heller and M. D. Dubber, The Handbook of Comparative Criminal Law, p. 466.

[1347] Article 121-7 establishes: "*Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation. Est également complice la personne qui par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre*." Article 121-6 of the French Criminal Code provides that the accomplice to an offence is punishable as a perpetrator. Article 121-6 reads: "[s]*era puni comme auteur le complice de l'infraction, au sens de l'article 121-7*."

> (B) Such other person or entity committed or attempted to commit the substantive offense; and
>
> (C) The accused *intended to* or *knew* that the act would aid or abet such other person or entity in the commission of the substantive offense or an associated criminal purpose or enterprise.[1348]

d. The Jurisprudence of International Criminal Tribunals

431. In its review of the relevant jurisprudence, the Appeals Chamber has found the reasoning and holdings of the following ICTY Trial Chambers persuasive and consistent with its conclusions. While the Defence challenges the analysis performed by the ICTY Trial Chamber in *Furundžija*, these Trial Chambers independently assessed customary international law as established in the post-Second World War jurisprudence and their holdings are unchallenged by the Defence.

432. Having reviewed post-Second World War cases,[1349] the *Tadić* Trial Chamber concluded that the Nuremberg war crimes trials showed a clear pattern in requiring what it termed "intent", by which, in this Chamber's view, it meant knowledge, not direct intent, as its description makes clear: "there is a requirement of intent, which involves *awareness* of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime."[1350] The *Tadić* Trial Chamber thus established that "aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present,"[1351] and concluded that

> the accused will be found criminally culpable for any conduct where it is determined that he *knowingly* participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.[1352]

[1348] U.S. Military Regulations, 32 C.F.R. 11.6 (emphasis added).
[1349] *Tadić* Trial Judgment, paras 675-677, discussing the *Rhode*, *Justice*, *Hostage* and *Mathausen* cases. The Appeals Chamber notes with approval the *Tadić* Trial Chamber's reading of the *Hostage* case: "[s]imilarly, in the United States of America v. Wilhelm List ("Hostage case"), the court noted that to find the accused guilty, 'we shall require proof of a causative, overt act or omission from which a guilty intent can be inferred before a verdict of guilty will be pronounced. Unless this be true, a crime could not be said to have been committed unlawfully, wilfully, and knowingly as charged in the Indictment." *Tadić* Trial Judgment, para. 675, *quoting Hostage* Case, p. 1261.
[1350] *Tadić* Trial Judgment, para. 674 (emphasis added).
[1351] *Tadić* Trial Judgment, para. 689. The *Tadić* Trial Chamber also expressed this concept by saying that "intent founded on inherent knowledge, proved or inferred, is required for a finding of guilt…." *Tadić* Trial Judgment, para. 677.
[1352] *Tadić* Trial Judgment, para. 692, adopted by *Čelebići* Trial Judgment, at para. 329. The *Tadić* Appeals Chamber confirmed that "in the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal." *Tadić* Appeal Judgment, para. 229.

433. The *Čelebići* Trial Chamber adopted the *Tadić* formulation as sound,[1353] holding that under Article 7(1) of the ICTY Statute:

> [t]he corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act. Thus, there must be "awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime."[1354]

434. The Trial Chamber in *Aleksovski* also approvingly relied on the *Tadić* Trial Chamber's articulation when analyzing individual criminal responsibility under Article 7(1) of the ICTY Statute for "having contributed to the perpetration of the crime without, however, having … committed the unlawful act."[1355] As to the accused's mental state regarding the consequence of his acts or conduct, the Trial Chamber held:

> The accused must also have participated in the illegal act *in full knowledge of what he was doing*. This intent was defined by Trial Chamber II as "awareness of the act of participation coupled with a conscious decision to participate".[1356]

e. Article 25(3) of the Rome Statute[1357]

435. The Appeals Chamber holds that Article 6(1) of the Special Court Statute has no direct equivalent in the Rome Statute.[1358] The Appeals Chamber is also of the view that Article 25(3) does

[1353] *Čelebići* Trial Judgment, para. 325.
[1354] *Čelebići* Trial Judgment, para. 326. The ICTY Appeals Chamber did not disturb this articulation on appeal. *Čelebići* Appeal Judgment, para. 352.
[1355] *See Aleksovski* Trial Judgment, para. 59: "it should be noted from the outset that the accused was held responsible under Article 7(1) not for the crimes that he allegedly committed himself but for those committed by others which he is said to have personally ordered, instigated or otherwise aided and abetted."
[1356] *Aleksovski* Trial Judgment, para. 61 (emphasis added), *citing Tadić* Trial Judgment, para. 674. The *Aleksovski* Appeals Chamber confirmed this definition (*see Aleksovski* Appeal Judgment, para. 164) and also held that "[i]n relation to the Trial Chamber's factual findings regarding *mens rea* in the present case, the Appeals Chamber is satisfied that the Trial Chamber found that the Appellant *deliberately participated in* or *accepted the acts* which gave rise to his liability under Articles 7(1) and 7(3) of the Statute for outrages upon personal dignity and was therefore guilty of these offences." *Aleksovski* Appeal Judgment, para. 27 (emphasis added).
[1357] Which reads in relevant parts: "3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
(ii) Be made in the knowledge of the intention of the group to commit the crime…"
[1358] Article 6(1) of the Special Court Statute establishes individual criminal liability for planning the commission of crimes. Article 25(3) does not expressly establish such liability, yet the Defence does not challenge Taylor's conviction for planning crimes on the basis that Article 25(3) demonstrates that planning liability is not part of customary international law.

not represent or purport to represent a complete statement of personal culpability under customary international law.[1359] Accordingly, the Appeals Chamber finds that the Rome Statute has no bearing on the *mens rea* elements of aiding and abetting liability under customary international law applicable during the Indictment Period.[1360]

f. Conclusion

436. The Appeals Chamber's review of the post-Second World War jurisprudence demonstrates that under customary international law, an accused's knowledge of the consequence of his acts or conduct – that is, an accused's "knowing participation" in the crimes – is a culpable *mens rea* standard for individual criminal liability. Similarly, the post-Second World War jurisprudence was found in early ICTY Judgments other than *Furundžija*[1361] to establish that under customary international law, "awareness of the act of participation coupled with a conscious decision to participate" in the commission of a crime entails individual criminal responsibility.[1362] The 1996 ILC Draft Code supports this conclusion, and Article 25(3)(c) of the Rome Statute is not evidence of state practice to the contrary. Whether this standard is termed "knowledge", "general intent", "*dol special*", "*dolo diretto*" or "*dolus directus* in the second degree", the concept is the same.

437. In light of the foregoing, the Appeals Chamber reaffirms that knowledge is a culpable *mens rea* standard for aiding and abetting liability under Article 6(1) of the Statute and customary international law.

(ii) "Awareness of the Substantial Likelihood"

[1359] The Appeals Chamber notes in this respect that ICC Chambers have not reached such a holding and that ICC Chambers do not look to customary international law in interpreting Article 25(3). *See, e.g.*, *Katanga* Confirmation of Charges Decision, para. 508.

[1360] *Contra* Taylor Appeal, paras 338, 339. Accordingly, the Appeals Chamber need not address the Parties' submissions as to the *actus reus* and *mens rea* elements of individual criminal liability under Article 25(3)(c),(d), which, in this Chamber's view, is within the competence of the ICC Appeals Chamber and on which the ICC Appeals Chamber has not yet ruled. In this regard, it should be noted that the Defence did not make submissions regarding the ICC Appeals Chamber's holdings that the aim of the Rome Statute is to "put an end to impunity." *Lubanga OA 15 OA 16* Judgment, para. 77, *reaffirmed by Katanga* Regulation 55 Appeal Decision, para. 22.

[1361] In *Furundžija*, the Trial Chamber framed the legal question to be addressed in the following terms: "whether it is necessary for the accomplice to share the *mens rea* of the principal or whether mere knowledge that his actions assist the perpetrator in the commission of the crime is sufficient to constitute *mens rea* in aiding and abetting the crime." *Furundžija* Trial Judgment, para. 236. The Trial Chamber concluded that "it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime." *Furundžija* Trial Judgment, para. 245. It appears that, in its analysis, the Trial Chamber was motivated by a concern to distinguish between principals and accessories to the crime based primarily on the subjective element of personal culpability. Interestingly, the Trial Chamber also found that "knowledge" was the standard adopted in the *Tadić* Trial Judgment, although it stated that the *Tadić* Trial Chamber "sometimes somewhat misleadingly expressed as 'intent.'" *Furundžija* Trial Judgment, para. 247.

[1362] *Tadić* Trial Judgment, para. 674.

438. This Appeals Chamber and the Special Court Trial Chambers have consistently held that "awareness of the substantial likelihood"[1363] is a culpable mental state for aiding and abetting under customary international law.[1364] The Defence has not provided cogent reasons to depart from this jurisprudence, which is consistent with the principle that awareness and acceptance of the substantially likely consequence of one's acts and conduct constitutes culpability.[1365] In finding Taylor criminally responsible for aiding and abetting, the Trial Chamber found beyond a reasonable doubt that Taylor *knew* that his acts assisted the commission of the crimes.[1366] Accordingly, the Appeals Chamber concludes that the Defence has not shown an error that would occasion a miscarriage of justice and finds it unnecessary to further consider the Defence submissions.

(iii) Knowledge of a "Substantial" Effect

439. The Defence argues that the Trial Chamber erred in not requiring proof that Taylor knew that the effect his acts would have on the commission of the crimes would be "substantial".[1367] The

[1363] Under customary international law, the appropriate standard is "awareness of the substantial likelihood," as an accused who participates in the commission of a crime with such awareness accepts the commission of the crime. Plain language is given its plain meaning: "awareness of the substantial likelihood" is clearly distinct from "awareness of a probability."

[1364] *See Brima et al.* Appeal Judgment, para. 242: "[t]he *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator." (*quoting Brima et al.* Trial Judgment, para. 776); *Sesay et al.* Appeal Judgment, para. 546. The STL Appeals Chamber subsequently endorsed this Court's jurisprudence that awareness of a substantial likelihood is a culpable *mens rea* for aiding and abetting liability in customary international law. STL Applicable Law Decision, para. 227. The Appeals Chamber notes that in certain domestic legal systems this mental state ranges from "being 'indifferent' to the result, to 'being reconciled' with the result as a possible cost of attaining one's goal". E. van Sliedregt, *Individual Criminal Responsibility in International Law*, p. 41.

[1365] As the Defence submissions are limited to reliance on ICTY jurisprudence that it challenges in the first instance, it fails to put forward sufficient submissions so as to lead the Appeals Chamber to reconsider its prior holding. The STL Appeals Chamber subsequently endorsed this Court's jurisprudence that awareness of the substantial likelihood is a culpable *mens rea* for aiding and abetting liability in customary international law. STL Applicable Law Decision, para. 227. In addition, the Appeals Chamber notes the ICTY Appeals Chamber held in *Kordić and Čerkez* that an accused who performs the *actus reus* of ordering, planning or instigating liability with the awareness of the substantial likelihood that he will have an effect on the commission of the crime "has to be regarded as accepting that crime." It further held that this awareness and acceptance of the criminal consequence of one's acts or conduct is culpable *mens rea* in customary international law. *Kordić and Čerkez* Appeal Judgment, paras 30-32. *See* also ICRC Commentary, Additional Protocol I, para. 3474. The Appeals Chamber further notes that the *Blaškić* Trial Chamber, discussing the *mens rea* of aiding and abetting liability, opined that there was a distinction between "knowledge" and "intent" and that both elements must be present to establish *mens rea*. It held that "intent" encompassed both "direct" and "indirect" intent, the latter describing the accused's acceptance of the "possible and foreseeable consequence" of his conduct. *See Blaškić* Trial Judgment, para. 286. On appeal, the Appeals Chamber found that the *Blaškić* Trial Chamber erred in articulating an element additional to "knowledge" for the *mens rea* of aiding and abetting liability. *See Blaškić* Appeal Judgment, para. 49, *citing Vasiljević* Appeal Judgment, para. 102. However, as the ICTY Appeals Chamber itself later held, acting with awareness and acceptance of the criminal consequence of one's acts or conduct is a culpable *mens rea* in customary international law. The ICTY Appeals Chamber did not identify a principled legal basis for distinguishing aiding and abetting liability from ordering, planning or instigating liability in this respect. The Appeals Chamber further notes that the *Furundžija* Trial Judgment, which is the origin of the ICTY's jurisprudence on the *mens rea* for aiding and abetting liability, only considered whether knowledge was a culpable *mens rea*, not whether it was the *only* culpable *mens rea*. *See Furundžija* Trial Judgment, para. 249.

[1366] Trial Judgment, para. 6949 (emphasis added).

[1367] Taylor Appeal, paras 394-396. *See* also Taylor Appeal, para. 441.

consistent jurisprudence of this Court does not require such proof. Whether an accused's acts and conduct have a "substantial" effect on the commission of the crime is an ultimate issue to be decided by the trier of fact in light of the law and the facts established. It is not a requisite element of the accused's *mens rea* because as a general principle of criminal law, it is the task of judges, not an accused, to determine the correct legal characterisation of an accused's conduct (*iura novit curia*).[1368] In light of these considerations, the Defence submission is dismissed.

(c) Conclusion

440. The Appeals Chamber finds no error in the Trial Chamber's articulation of the law.

2. Alleged Violation of the Principle of Personal Culpability

(a) The Trial Chamber's Findings

441. The Trial Chamber found that Taylor "knew of the AFRC/RUF's operational strategy and intent to commit crimes."[1369] The Trial Chamber further found that Taylor "was also aware of the 'essential elements' of the crimes committed by RUF and RUF/AFRC troops, including the state of mind of the perpetrators."[1370]

(b) Submissions of the Parties

442. In Grounds 16, 19 and 21, the Defence posits that crimes are committed in any armed conflict. It asserts that the *mens rea* standard applied by the Trial Chamber is satisfied where the accused is aware of a mere "probability" that some crime may be committed.[1371] On that basis, it submits that the law as articulated by the Trial Chamber is always satisfied in the context of armed conflict, as at least some crime will always be committed during an armed conflict, and thus criminalises assistance to any party to an armed conflict.[1372] It contends accordingly that the law applied by the Trial Chamber is not consistent with fundamental principles of individual criminal responsibility.[1373]

[1368] *Accord Naletilic and Martinovic* Appeal Judgment, para. 119, *citing Kordic and Cerkez* Appeal Judgment, para. 311.
[1369] Trial Judgment, para. 6885.
[1370] Trial Judgment, para. 6951.
[1371] Taylor Appeal, paras 320, 390, 448, 449.
[1372] Taylor Appeal, paras 448, 449, 459.
[1373] Taylor Appeal, para. 459.

443. The Prosecution responds that the Trial Chamber properly assessed Taylor's *mens rea* in accordance with the established jurisprudence.[1374] It further argues that the Trial Chamber found that the RUF/AFRC's Operational Strategy was to terrorise civilians, "of which Taylor himself was well aware when he gave the group guns and ammunition that fuelled its terror campaign."[1375]

444. In reply, the Defence contends that the Trial Chamber improperly applied a probability standard to Taylor's awareness that his acts and conduct assisted the commission of the crimes.[1376]

(c) Discussion

445. There is, of course, always a possibility that serious violations of international humanitarian law will occur in an armed conflict. Mere awareness of this possibility does not, however, suffice for the imposition of criminal responsibility.[1377] The crux of the Defence submission is that in an armed conflict, the commission of crimes is not simply a probability, but a virtual certainty.[1378] Whether, in the abstract, the commission of crimes in armed conflicts is possible, probable or certain is not relevant to and does not establish individual criminal liability under the law. The Defence submission fails to address the *mens rea* requirements as established in the law. The law requires that an accused must be aware, *inter alia*, of the consequence of his conduct, the essential elements of the crime, the concrete factual circumstances and the criminal intent, and it requires concrete knowledge or awareness on the part of the accused, not just an abstract awareness that crimes will be committed in the course of any armed conflict.[1379] The specifics of this awareness will depend on the factual circumstances of each particular case. The Trial Chamber did not rely on abstract awareness, either in its articulation or its application of the law. It applied the law in keeping with the specific facts that it found.[1380] As its reasoning and conclusions demonstrate, the Trial Chamber found that Taylor knew of the RUF/AFRC's Operational Strategy, knew of its intent to commit crimes and was aware of the essential elements of the crimes in light of specific and concrete information of which Taylor was aware.[1381] The Defence fails to show any error. The

[1374] Prosecution Response, para. 397, 398.
[1375] Prosecution Response, para. 308.
[1376] Taylor Reply, para. 54.
[1377] *Accord Blaškić* Appeal Judgment, para. 41.
[1378] Taylor Appeal, para. 448.
[1379] *Contra* Appeal transcript, 23 January 2013, pp 50005, 50006 ("[I]f you analyze consequence, if you analyze knowledge, knowledge of consequences in the aggregate, then it is virtually impossible not to extend liability to all kinds of activities that are widely regarded as not criminal. Why is it that Wal-Mart is not guilty of aiding and abetting gun violence in the United States even though it is quite clear they are the number one seller of ammunition and guns in the United States? *And statistically there's no doubt that guns are being used every day and will continue to be used every day in very serious violence*. There can't be any doubt in the minds of anyone working or running Wal-Mart that that ammunition is being used for that purpose.").
[1380] *See infra* paras 533-540, 564-566.
[1381] Trial Judgment, paras 6788 *et seq*.

Appeals Chamber concludes that the *mens rea* standard articulated by the Trial Chamber is in accordance with principles of personal culpability.

3. "Purpose"

446. For the reasons previously stated, the Appeals Chamber concludes that, contrary to the Defence submission, the *mens rea* standard for aiding and abetting liability under customary international law is not limited to "direct intent" or "purpose".[1382] Having considered the issue in detail in the course of assessing the Defence submissions, the Appeals Chamber makes the following observations.

447. The Defence submits that it is well-known that the "purpose" standard as used in Article 25(3)(c) of the Rome Statute is taken from the United States Model Penal Code.[1383] Even if this were to be accepted, the dangers of transplanting municipal law from its complete domestic framework are apparent in this situation. The Model Penal Code reflects a particular construction of the *actus reus* and *mens rea* elements for aiding and abetting liability. Under the Model Penal Code, the *actus reus* for personal culpability is established through *any* act of facilitating the crime; there is no requirement that the act must "substantially" assist the crime, as under customary international law.[1384] The drafters of the Model Penal Code specifically considered but ultimately did not adopt such a requirement, favouring the use of the "purpose" standard alone to distinguish culpable and innocent conduct.[1385] Finally, many jurisdictions utilizing the Model Penal Code have created "criminal facilitation" offenses to address the gap created by the Model Penal Code's limitation of aiding and abetting liability to those who act with "purpose".[1386] In light of these considerations, and particularly as customary international law requires that an accused's acts and conduct of assistance, encouragement or moral support have a substantial effect on the commission of the crime, the liability schemes under the United States Model Penal Code and customary international law are fundamentally distinct.

[1382] While "purpose" relates to an accused's *mens rea*, in particular to the aider and abettor's attitude towards the consequence of his acts, "motive" concerns the extraneous reasons and motivations that triggered an accused to engage in criminal conduct.
[1383] Taylor Appeal, para. 342.
[1384] U.S. Model Penal Code, Art. 2.06(3).
[1385] U.S. Model Penal Code and Commentaries, p. 318, fn.58. The drafters of the Model Penal Code did not adopt this alternative standard because it was considered that "the need for stating a general principle in this section pointed toward a narrow formulation in order not to include situations where liability was inappropriate."
[1386] Model Penal Code and Commentaries, p. 319. The Commentary states that "[t]his approach may well constitute a sensible accommodation of the competing considerations advanced at the Institute meeting." The Statute does not establish such offences.

448. This conclusion is strengthened by the overlap between customary international law and the decisions of Courts applying a "purpose" standard. The Defence highlights the decisions in *R. v. Lam Kit*, *R. v. Leung Tak-yin* and *R. v. Clarkson*, arguing that these suggest State practice in support of the "purpose" standard articulated in Article 25(3)(c) of the Rome Statute.[1387] These decisions concern the culpability of bystanders to the crime, and all apply a "purpose" standard in order to distinguish between culpable and innocent bystanders. Customary international law draws the same distinction between innocent and culpable presence at the scene of the crime, but by directing the attention of the trier of fact to the substantiality of the contribution and the accused's awareness of the circumstances and consequence of his "approving" presence.[1388]

449. Further, while the Defence submits that the "purpose" standard is distinct from the "knowledge" standard in this Court's jurisprudence, it cites the Canadian Criminal Code in support,[1389] which in fact does not support that proposition. Under Section 21(1)(b) of the Canadian Criminal Code, a party to the offence includes any person who "does or omits to do anything for the purpose of aiding any person to commit" the offence. The Canadian Supreme Court in *R. v. Briscoe* held:

> The *mens rea* requirement reflected in the word "purpose" under s. 21(1)(b) has two components: intent and knowledge. For the intent component, it was settled in R. v. Hibbert, [1995] 2 S.C.R. 973, that "purpose" in s. 21(1)(b) should be understood as essentially synonymous with "intention". The Crown must prove that the accused intended to assist the principal in the commission of the offence. The Court emphasized that "purpose" should not be interpreted as incorporating the notion of "desire" into the fault requirement for party liability. It is therefore not required that the accused desired that the offence be successfully committed (Hibbert, at para. 35). The Court held, at para. 32, that the perverse consequences … would flow from a "purpose equals desire" interpretation of s. 21(1)(b)….[1390]

This definition of "purpose", provided by the Supreme Court of Canada interpreting its Criminal Code, comports with the knowledge standard as defined in this Court's jurisprudence and discussed above.

[1387] Taylor Appeal, paras 361-364, *citing R. v. Lam Kit*, [1988] 1 HKC 679, 680, *R. v. Leung Tak-yin* [1987] 2 HKC 250 and *R. v. Clarkson*, 1971 55 Cr. App. R. 445.
[1388] *Tadić* Trial Judgment, para. 689.
[1389] Taylor Appeal, paras 361-364, *citing* Criminal Code, R.S.C. 1985, c. C-46, s. 21(b) (Canada).
[1390] *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, para. 16. The example provided in *Hibbert* to illustrate the "perverse consequences" was as follows: "If a man is approached by a friend who tells him that he is going to rob a bank and would like to use his car as the getaway vehicle for which he will pay him $100, when that person is . . . charged under s. 21 for doing something for the purpose of aiding his friend to commit the offence, can he say "My purpose was not to aid the robbery but to make $100"? His argument would be that while he knew that he was helping the robbery, his desire was to obtain $100 and he did not care one way or the other whether the robbery was successful or not." The Court further held: "As for knowledge, in order to have the intention to assist in the commission of an offence, the aider must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed. That sufficient knowledge is a prerequisite for intention is simply a matter of common sense."

450. The Appeals Chamber notes that much of the Defence's discussion in this case about Article 25(3)(c) has proceeded on unsupported assumptions. The Defence case was that aiding and abetting liability as established in this Court's and the *ad hoc* Tribunals' jurisprudence is not in accordance with customary international law and the principle of personal culpability. On that basis it argued that the Appeals Chamber should reject the established caselaw and find that the *mens rea* standard for aiding and abetting liability is direct intent. However, the Appeals Chamber has found that these submissions are without foundation.

451. The final responsibility to interpret the Rome Statute rests with the ICC Appeals Chamber. As noted, in this Appeals Chamber's view, the individual criminal liability scheme under Article 25(3) of the Rome Statute differs in significant measure from Article 6(1) of the Special Court Statute. Interpreting its own constitutive documents and considering the plain language in context, and in light of the object and purpose of the Rome Statute, the ICC Appeals Chamber may conclude that "purpose" as used in Article 25(3)(c) has the same meaning as "purpose" under Section 21(1)(b) of the Canadian Criminal Code, ensuring that Article 25(3)(c) liability is aligned with Article 30 of the Rome Statute. It may conclude that "perverse consequences" would follow from importing the United States Model Penal Code's definition of "purpose" into the liability scheme in the Rome Statute, such as requiring a higher *mens rea* standard for Article 25(3)(c) than for Article 25(3)(a), (b) and (d). It may adopt the position put forward by the Defence here. Until it has made its views known, speculative exercises do not assist in the identification of the law, and established customary international law, as consistently articulated and applied in the jurisprudence of international criminal tribunals from the Second World War to today, must bear more weight than suppositions as to what Article 25(3)(c) does or does not mean.

D. Alleged Contrary State Practice

(a) Submissions of the Parties

452. In Grounds 16 and 21, the Defence submits that the Trial Chamber's articulation of the law is inconsistent with and contradicted by state practice, as it criminalises behaviour that States do not consider criminal.[1391]

453. The Defence identifies certain activities by States that it asserts the States concerned consider lawful and within their sovereign rights, and claims that the law as articulated by the Trial

[1391] Taylor Appeal, paras 314, 315, 317, 388-393, 451.

Chamber would criminalise these activities.[1392] It asserts that States have the right to supply materiel to parties to an armed conflict even if there is evidence that those parties are engaged in the regular commission of crimes.[1393] It further argues that the law articulated by the Trial Chamber would in practice overturn the limits of State responsibility as established by the International Court of Justice.[1394]

454. The Prosecution responds that the Trial Chamber properly applied the law, consistent with customary international law and fundamental principles of criminal law.[1395] It contends that the Defence submissions are based on a misconceived premise that States assert a prerogative to aid and abet armed groups knowing that the group uses an operational strategy of terror against the civilian population, to aid and abet atrocities and to assist the commission of crimes against humanity and war crimes.[1396] It further submits that it cannot be the law that the behaviour of an individual cannot be criminalised because a State could engage in the same behaviour.[1397] Finally, it argues that the Defence submissions are arguments for impunity.[1398]

455. In reply, the Defence contends that the examples it has identified are State practice that would be criminalised under the law articulated by the Trial Chamber.[1399]

(b) Discussion

456. The "examples" offered by the Defence remain at the level of mere assertion, and the "law" on which the Defence relies does not bear any resemblance to the law as actually articulated and applied by the Trial Chamber. It is not within the jurisdiction of this Court to determine the obligations of States and characterise State action as "criminal". This Chamber leaves those bodies and tribunals which properly have authority over States to interpret the law on state responsibility.[1400]

457. States have consistently and repeatedly undertaken obligations to prevent and punish individuals for serious violations of international humanitarian law through treaties that have ripened into customary law establishing individual criminal liability for such violations. Customary international law is clear as to the *actus reus* and *mens rea* elements of aiding and abetting liability

[1392] Taylor Appeal, paras 314, 315, 390, 391, 450, 451.
[1393] Taylor Appeal, para. 315.
[1394] Taylor Appeal, paras 388-393.
[1395] Prosecution Response, paras 272, 276.
[1396] Prosecution Response, paras 276, 314, 315, 317.
[1397] Prosecution Response, para. 318.
[1398] Prosecution Response, para. 408.
[1399] Taylor Reply, para. 69.
[1400] *See, e.g., Netherlands v. Nuhanovic* Supreme Court Judgment.

for such crimes. Although existing customary international law can be modified if the combination of *opinio juris* and state practice show a continuing and consistent adherence to the new custom by the international community, the Defence has failed to identify any examples of such *opinio juris* and state practice, much less a continuing and consistent adherence.

458. The examples offered concern activities by persons in official positions that are alleged to violate international criminal law. Article 6(2) of the Statute makes it clear that the official position of an accused or the fact that an accused acted pursuant to orders of a Government shall not relieve him of criminal responsibility. The doctrine of "act of State" is no defence under international criminal law, and individuals are bound to abide by the law regardless of possible authorisation by a State. As the IMT long ago held, "individuals have international duties which transcend the national obligations of obedience imposed by the individual State."[1401]

459. Further, the examples offered do not indicate the attitudes of States. They are not evidence of a State's claim that it has the right to engage in conduct found to be criminal by an impartial tribunal applying customary international law. No statement by a State that it has the right to assist the commission of widespread and systematic crimes against a civilian population has ever been offered.

460. Finally, the submission is that the examples represent state practice, yet only a few are offered. As the ICTY Appeals Chamber held, "[n]o matter how powerful or influential a country is, its practice does not automatically become customary international law."[1402] This is even more true where fundamental principles such as the prohibitions on participation in the commission of serious violations of international law and attacks on civilians are at stake.

461. The Appeals Chamber accepts the Prosecution's submission that some States have expressly indicated in their domestic legislation that they do not consider it lawful to assist those engaged in serious violations of international humanitarian law.[1403] The "Leahy Law" in the United States prohibits funding to governments and foreign military units if they are "engaged in a consistent pattern of gross violations of internationally recognised human rights" or have "committed a gross violation of human rights, unless all necessary corrective steps have been taken."[1404] The European Union Common Position on Exports of Military Technology and Equipment provides that Member

[1401] IMT Judgment, p. 223.
[1402] *Brđanin* Appeal Judgment, para. 247.
[1403] Appeal transcript, 23 January 2013, pp. 49999, 50000.
[1404] Foreign Operations, Export Financing, and Related Programs Appropriations, 2001, Section 563 of Pub.L. No. 106–429, 114 Stat. 1900A-17, (2000); Department of Defence Appropriations Act, 2001, Pub.L. No. 106–259, § 8092, 114 Stat. 656 (2000).

States shall "deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law."[1405] These are concrete indications of States' attitudes contrary to the Defence's assertions.

462. Similarly, the Appeals Chamber also notes the recent adoption by the United Nations General Assembly of the Arms Trade Treaty.[1406] This treaty has not yet entered into force nor been widely ratified, but its adoption and provisions do not support the claimed *opinio juris* and state practice modifying existing customary law. Article 6(3) provides:

> A State Party shall not authorize any transfer of conventional arms covered under Article 2(1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

Contrary to the Defence claim that there is significant State practice that is contrary to existing customary international law, the Appeals Chamber notes that there are indications of developing attitudes among some States that the international community has an obligation to ensure that civilian populations are protected from genocide, war crimes, ethnic cleansing and crimes against humanity.[1407]

463. In the Appeals Chamber's view, international tribunals, in prosecuting those responsible for serious violations of international humanitarian law, act as the instruments of States. States have created international tribunals to prosecute war crimes, crimes against humanity and genocide. This Court is a demonstrable example, created by the Government of Sierra Leone and the United Nations to prosecute serious violations of international humanitarian law in the territory of Sierra Leone. Similarly, the ICTY and ICTR were created by the United Nations Security Council to prosecute such violations in the territories of the former Yugoslavia and Rwanda, respectively. In discharging their mandates, international tribunals carry out the will of the community of States and indeed humanity as a whole.

464. States have further mandated international criminal tribunals to perform their mandates impartially and apply customary international law as it stands. States, acting as "legislator", provide international courts with Statutes, and mandate judges, as impartial adjudicators, to apply those

[1405] EU Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, art. 2(2)(c).
[1406] G.A. Res. 67/234 (2013).
[1407] S.C. Res. 1265 (1999); S.C. Res. 1296 (2000); S.C. Res. 1674 (2006); S.C. Res. 1706 (2006); S.C. Res. 1894 (2009); A/RES/63/308 (2009); S.C. Res. 1973 (2011); S.C. Res. 1975 (2011). *See* also African Union, Ext/EX.CL/2 (VII).

Statutes and customary international law to the cases before them. Performing this role, the Appeals Chamber has duly identified customary international law as it is mandated to do. The issue having been raised that contrary state practice exists, the Appeals Chamber has considered the submissions and found no evidence of state practice indicating a change in customary international law from the existing parameters of personal culpability for aiding and abetting the commission of serious violations of international humanitarian law. The Appeals Chamber is accordingly obliged to apply existing customary international law. As Judge Shahabuddeen aptly noted, "[t]he danger of legislating arises not only where a court essays to make law where there is none, but also where it fails to apply such law as exists; the failure may well be regarded as amounting to judicial legislation directed to repealing the existing law."[1408]

465. As the Special Court Agreement is a treaty to which the Statute is annexed and incorporated, the Parties are at any time free to amend Article 6 of the Statute to expressly define aiding and abetting liability in a different way than under customary international law or to redefine individual criminal liability on account of policy considerations. The United Nations and the Government of Sierra Leone have not done so. This Chamber declines to usurp that role.

E. Specific Direction

1. The Trial Chamber's Finding

466. The Trial Chamber, in articulating the *actus reus* elements of aiding and abetting liability, held that "[t]he *actus reus* of aiding and abetting does not require 'specific direction.'"[1409]

2. Submissions of the Parties

467. In Ground 16, in support of its contention that the Trial Chamber erred in articulating a "knowledge" standard for the *mens rea* of aiding and abetting liability, the Defence submits that the "purpose" standard, which it proposes as the *mens rea* standard for aiding and abetting liability, is analogous to the concept of "specific direction", as recognised in the ICTY and ICTR jurisprudence for the *actus reus* of aiding and abetting liability.[1410] It contends that the "similarity of 'specifically directed' or 'specifically aimed' and 'purpose' is evident," and that "[r]egardless of whether the concept is formally categorized as part of *actus reus* rather than *mens rea*, there is no gainsaying its

[1408] ICJ Advisory Opinion on Nuclear Weapons, Dissenting Opinion of Judge Shahabuddeen, p. 203
[1409] Trial Judgment, para. 484.
[1410] Taylor Appeal, para. 358.

resemblance to 'for the purpose of facilitating.'"[1411] It accordingly argues that the "knowledge" standard is inconsistent with the concept of "specific direction".

468. The Defence notes that "there's never really been a clear discussion or explanation by any Trial Chamber or Appeals Chamber at the ICTY or ICTR clearly explaining what they consider ["specific direction"] to mean."[1412] It submits, however, that the concept may be understood in two alternative ways, one of which involves the accused's mental state and intention, and the other of which does not. First, it submits, "specific direction" could be understood as limiting an accused's acts and conduct that can constitute "practical assistance, encouragement, or moral support" to the crime; if the accused's acts and conduct were not "specifically directed" to the commission of the crime, they would not, as a matter of law, constitute "practical assistance, encouragement or moral support". It proposes that this assessment would involve considering the mental state and intention of the accused.[1413] Second, it submits, if "specific direction" is narrowly interpreted such that it does not involve the accused's intent and mental state, "specific direction" would be a "weak" concept, and the *actus reus* of aiding and abetting liability would be established when the accused's acts and conduct have a substantial effect on the commission of the crimes, regardless of "specific direction".[1414]

469. The Prosecution responds that the consistent jurisprudence of the ICTY and ICTR establishes that knowledge is a culpable *mens rea* standard for aiding and abetting liability.[1415] It further argues that the ICTY Appeals Chamber held in *Blagojević and Jokić* and *Mrkšić and Sljivančanin* that "specific direction" is not a separate element of the *actus reus* of aiding and abetting liability.[1416] It contends that "specific direction", as used in the *Tadić* Appeal Judgment, clarifies that the *actus reus* of aiding and abetting liability is more strict than the *actus reus* of joint criminal enterprise, since for aiding and abetting liability, "it is not enough that you contribute to the enterprise. [The accused's acts and conduct] have to contribute to the crime."[1417] It submits that this was the understanding expressed by the ICTY Appeals Chamber held in *Blagojević and Jokić* and *Mrkšić and Sljivančanin*.[1418]

[1411] Taylor Appeal, para. 355.
[1412] Appeal transcript, 22 January 2013, p. 49908.
[1413] Appeal transcript, 22 January 2013, p. 49908.
[1414] Appeal transcript, 22 January 2013, pp. 49908, 49909.
[1415] Prosecution Response, paras 295-299.
[1416] Prosecution Response, paras 294, 295.
[1417] Appeal transcript, 22 January 2013, pp 49849-49851.
[1418] Appeal transcript, 22 January 2013, p. 49851.

470. The Defence replies that the questions posed by the ICTY Appeals Chamber in the oral hearing for *Perišić* demonstrate that "specific direction" remains a component of the *actus reus* of aiding and abetting liability, whether as a separate element or a part of the "substantial effect" element.[1419]

3. Discussion

471. The Defence did not argue on appeal that the Trial Chamber erred in concluding that "[t]he *actus reus* of aiding and abetting does not require 'specific direction,'"[1420] although it made a number of submissions regarding the notion in Ground 16 (alleged error in *mens rea* standard).[1421] After the pronouncement of the ICTY Appeals Chamber's Judgment in *Perišić*, which followed completion of the pre-appeal proceedings in this case, the Defence sought leave to amend its Notice of Appeal to add that complaint.[1422] The Prosecution also sought leave to file further submissions on the *Perišić* Appeal Judgment,[1423] but for reasons conveyed to both Parties, those motions were denied.[1424] Nonetheless, as the Appeals Chamber noted in its orders denying the motions, it is aware of and considers current relevant jurisprudence.[1425]

472. In applying the Statute and customary international law, the Appeals Chamber is guided by the decisions of the ICTY and ICTR Appeals Chamber.[1426] The Chamber looks as well to the decisions of the Appeals Chamber of the ECCC and STL and other sources of authority.[1427] The Appeals Chamber, however, is 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.

[1419] Taylor Reply, para. 52.
[1420] Trial Judgment, para. 484.
[1421] *See* Taylor Appeal, paras 354-359. Ground 16 states: "The Trial Chamber erred in law in defining the *mens rea* of aiding and abetting as requiring no more than that an action is performed with an awareness of a substantial likelihood that the action would provide some 'practical assistance' to a crime."
[1422] Defence Request to Amend Notice of Appeal. The Defence submitted that it "had 'good reason' not to have been in the position to make arguments on the basis of an unforeseeable reversal of the law." Para. 12.
[1423] Prosecution Motion Regarding the ICTY *Perišić* Appeals Judgment.
[1424] Decision on Prosecution Motion Regarding the ICTY *Perišić* Appeals Judgment; Order Denying Defence Motion to Amend Notice of Appeal.
[1425] In its Request, the Defence submitted that "[t]he Appeals Chamber ought to have the freedom to directly consider the correctness of the Trial Judgment in light of the *Perišić* Appeal Judgment." Defence Request to Amend Notice of Appeal, para. 15. The Appeals Chamber requested that the Parties provide submissions on "specific direction" during the oral hearing. *See* Oral Hearing Scheduling Order ("(iii) Whether acts of assistance not 'specifically directed' to the perpetration of a crime can substantially contribute to the commission of the crime for aiding and abetting liability. Whether the Trial Chamber's findings meet the 'specific direction' standard.").
[1426] Statute, Art. 20(3).
[1427] Rule 72*bis*(ii).

473. There is nothing in the Statute to indicate that "specific direction" is an element of the *actus reus* of aiding and abetting liability.[1428] In the *Perišić* Appeal Judgment, the ICTY Appeals Chamber held that "specific direction" must be proved beyond a reasonable doubt in order to establish the *actus reus* of aiding and abetting liability.[1429] The issue raised in respect of "specific direction" then is whether it is an element of the *actus reus* of aiding and abetting liability under customary international law prevailing during the Indictment Period in this case.

474. The Appeals Chamber has independently reviewed the post-Second World War jurisprudence, and is satisfied that those cases did not require an *actus reus* element of "specific direction" in addition to proof that the accused's acts and conduct had a substantial effect on the commission of the crimes.[1430] Similarly, the Appeals Chamber has examined the ILC Draft Code of Crimes[1431] and state practice,[1432] and is satisfied that they do not require such an element.

475. For the reasons discussed above, the Appeals Chamber concludes that the *actus reus* of aiding and abetting liability under Article 6(1) of the Statute and customary international law is that an accused's acts and conduct of assistance, encouragement and/or moral support had a substantial effect on the commission of each charged crime for which he is to be held responsible.[1433] This requirement ensures that there is a sufficient causal, a "culpable",[1434] link between the accused and the commission of the crime before an accused's acts and conduct may be adjudged criminal.[1435] The principle articulated by this and other Appeals Chambers is that the *actus reus* of aiding and abetting liability is established by assistance that has a substantial effect on the crimes, not the particular manner in which such assistance is provided.[1436] As the Appeals Chamber, as well as the ICTY and ICTR Appeals Chambers, have consistently emphasised, whether the accused's acts and

[1428] *See supra* paras 365-367.
[1429] *Perišić* Appeal Judgment, para. 36 ("The Appeals Chamber, Judge Liu dissenting, thus reaffirms that no conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt, either explicitly or implicitly.").
[1430] *See supra* paras 362-385, 413-437. *Accord* STL Decision on Applicable Law, paras 225-227; *Čelibići* Appeal Judgment, para. 352; *Kayishema and Ruzindana* Appeal Judgment, paras 186, 198; *Duch* Trial Judgment, paras 478, 532-535; *Tadić* Trial Judgment, paras 661-692; *Aleksovski* Trial Judgment, paras 58-65; *Čelibići* Trial Judgment, paras 319-329.
[1431] *See supra* para. 428.
[1432] *See supra* paras 462-465.
[1433] *See supra* paras 362-385.
[1434] *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.").
[1435] *See supra* paras 390-392.
[1436] *See supra* paras 362-385.

conduct had a substantial effect on the commission of the crime "is to be assessed on a case-by-case basis in light of the evidence as a whole."[1437]

476. The *Perišić* Appeals Chamber did not assert that "specific direction" is an element under customary international law.[1438] Its analysis was limited to its prior holdings and the holdings of the ICTR Appeals Chamber, which is the same body.[1439] Rather than determining whether "specific direction" is an element under customary international law, the *Perišić* Appeals Chamber specifically and only inquired whether the ICTY Appeals Chamber had previously departed from its prior holding that "specific direction" is an element of the *actus reus* of aiding and abetting liability.[1440] In the absence of any discussion of customary international law, it is presumed that the ICTY Appeals Chamber in *Perišić* was only identifying and applying internally binding precedent.

477. In holding that the ICTY Appeals Chamber had not departed from its prior precedent, the *Perišić* Appeals Chamber stated that "[h]ad the Appeals Chamber [in *Blagojević and Jokić*, *Mrkšić and Sljivančanin* and *Lukić and Lukić*] found cogent reasons to depart from its relevant precedent, and intended to do so, it would have performed a clear, detailed analysis of the issue, discussing both past jurisprudence and the authorities supporting an alternative approach."[1441] In examining this reasoning in terms of its persuasive value, however, this Appeals Chamber notes that the ICTY Appeals Chamber's jurisprudence does not contain a clear, detailed analysis of the authorities supporting the conclusion that "specific direction" *is* an element of the *actus reus* of aiding and abetting liability under customary international law.[1442]

[1437] *Sesay et al*. Appeal Judgment, para. 769; *Fofana and Kondewa* Appeal Judgment, para. 75. *Accord Ntawukulilyayo* Appeal Judgment, para. 214; *Lukić and Lukić* Appeal Judgment, para. 468; *Blagojević and Jokić* Appeal Judgment, para. 134.

[1438] The phrase "customary international law" does not appear in the Majority's reasoning or conclusions.

[1439] *Perišić* Appeal Judgment, paras 25-36 (discussing only ICTY and ICTR jurisprudence).

[1440] *Perišić* Appeal Judgment, para. 34. *See* also *Perišić* Appeal Judgment, paras 25 ("Before turning to Perišić's contention, the Appeals Chamber considers it appropriate to review its prior aiding and abetting jurisprudence."), 28 ("To date, no judgement of the Appeals Chamber has found cogent reasons to depart from the definition of aiding and abetting liability adopted in the *Tadić* Appeal Judgement.").

[1441] *Perišić* Appeal Judgment, para. 34. The ICTY Appeals Chamber further stated in relation to the *Mrkšić and Sljivančanin* Appeal Judgment: "Instead, the relevant reference to specific direction: was made in a section and paragraph dealing with *mens rea* rather than *actus reus*; was limited to a single sentence not relevant to the Appeals Chamber's holding; did not explicitly acknowledge a departure from prior precedent; and, most tellingly, cited to only one previous appeal judgement, which in fact confirmed that specific direction does constitute an element of aiding and abetting liability."

[1442] *See Tadić* Appeal Judgment; *Blagojević and Jokić* Appeal Judgment; *Kvočka et al.* Appeal Judgment; *Blaškić* Appeal Judgment; *Vasiljević* Appeal Judgment; *Krnojelac* Appeal Judgment; *Kupreškić et al.* Appeal Judgment; *Aleksovski* Appeal Judgment; *Simić* Appeal Judgment; *Orić* Appeal Judgment; *Haradinaj et al.* Appeal Judgment; *Limaj et al.* Appeal Judgment; *Čelibići* Appeal Judgment; *Krstić* Appeal Judgment; *Brđanin* Appeal Judgment; *Krajišnik* Appeal Judgment; *Gotovina and Markač* Appeal Judgment; *Mrkšić and Sljivančanin* Appeal Judgment; *Lukić and Lukić* Appeal Judgment.

478. The ultimate precedent identified by the *Perišić* Appeals Chamber was the *Tadić* Appeal Judgment.[1443] That Judgment did not, however, canvas customary international law regarding the elements for aiding and abetting liability, and its discussion of aiding and abetting was limited to explaining the differences between aiding and abetting liability and joint criminal enterprise liability.[1444] The Appeals Chamber is further not persuaded by the *Perišić* Appeal Chamber's analysis of the ICTY Appeals Chamber's jurisprudence on "specific direction".[1445] The *Mrkšić and Sljivančanin* Appeals Chamber held that "the Appeals Chamber has confirmed that 'specific direction' is not an essential ingredient of the *actus reus* of aiding and abetting."[1446] The *Lukić and Lukić* Appeals Chamber then held that there were no cogent reasons to deviate from the holding of the *Mrkšić and Sljivančanin* Appeal Judgement that specific direction is not essential to the *actus reus* of aiding and abetting liability.[1447]

479. The Appeals Chamber is further not persuaded by the *Perišić* Appeals Chamber's holding 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."[1448] That a finding necessary to a conviction and one that must be proved beyond a reasonable doubt can be "implicit"[1449] or "self-

[1443] *Perišić* Appeal Judgment, paras 26, 27.
[1444] *Tadić* Appeal Judgment, paras 185-229. *Accord Aleksovski* Appeal Judgment, para. 163 ("Subsequently, in the *Tadic* Judgement, the Appeals Chamber briefly considered the liability of one person for the acts of another person where the first person has been charged with aiding and abetting that other person in the commission of a crime. This was in the context of contrasting that liability with the liability of a person charged with acting pursuant to a common purpose or design with another person to commit a crime, and for that reason that judgement does not purport to be a complete statement of the liability of the person charged with aiding and abetting."). *Contra Perišić* Appeal Judgment, para. 27 ("The Appeals Chamber recalls that the first appeal judgement setting out the parameters of aiding and abetting liability was the *Tadić* Appeal Judgment…. In *defining the elements of aiding and abetting liability*, the *Tadić* Appeal Judgment contrasted aiding and abetting with JCE….") (emphasis added). This Appeals Chamber understands that in noting that aiders and abettors "specifically direct" their acts and conduct *to the commission of the crime*, as opposed *to the furtherance of the common purpose*, the *Tadić* Appeals Chamber was emphasising this fundamental distinction between joint criminal enterprise and other forms of liability, including aiding and abetting.
[1445] *Perišić* Appeal Judgment, paras 28-36.
[1446] *Mrkšić and Sljivančanin* Appeal Judgment, para. 32.
[1447] *Lukić and Lukić* Appeal Judgment, para. 35.
[1448] *Perišić* Appeal Judgment, para. 36.
[1449] *Perišić* Appeal Judgment, para. 36. *See* also *Perišić* Appeal Judgment, paras 31 ("Moreover, the *Blagojević and Jokić* Appeal Judgement expressly considered the [*Čelebići*] Appeal Judgement in both its analysis of cases that did not explicitly refer to specific direction, and *its conclusion that such cases included an implicit analysis of specific direction*.") (emphasis added), 34 ("These indicia suggest that the formula "not an essential ingredient" was an attempt to summarise, in passing, the *Blagojević and Jokić* Appeal Judgement's holding that *specific direction can often be demonstrated implicitly* through analysis of substantial contribution, rather than abjure previous jurisprudence establishing that specific direction is an element of aiding and abetting liability.") (emphasis added), 35 ("The 2012 *Lukić and Lukić* Appeal Judgement approvingly quoted the *Blagojević and Jokić* Appeal Judgement's conclusion that a finding of specific direction can be *implicit* in an analysis of substantial contribution.") (emphasis added), 38 ("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.") (emphasis added). *See* further *Perišić* Appeal Judgment, para. 39, fn 102 ("The Appeals Chamber underscores that the requirement of explicit consideration of specific direction does not foreclose the possibility of convictions in case of remoteness, but only means that such convictions require explicit discussion of how evidence on the record proves specific direction.").

evident",[1450] would appear to be inconsistent with the standard of proof beyond a reasonable doubt[1451] and the presumption of innocence.[1452]

480. Although the *Perišić* Appeal Judgment introduces novel elements in its articulation of "specific direction", which may perhaps be developed in time, this Appeals Chamber is not persuaded that there is good reason to depart from settled principles of law at this time.[1453] As the Appeals Chamber has concluded, the requirement that the accused's acts and conduct have a substantial effect on the commission of the crime ensures that there is a sufficient causal link between the accused and the commission of the crime.[1454] The Appeals Chamber has further concluded that this requirement is sufficient to ensure that the innocent are not unjustly held liable for the acts of others.[1455] Accordingly, the Appeals Chamber does not agree with the *Perišić* Appeals Chamber's treatment of the accused's physical proximity to the crime as a decisive consideration distinguishing between culpable and innocent conduct.[1456] This Appeals Chamber has previously held, consistent with the holdings of all other appellate chambers, that "acts of aiding and abetting can be made at a time and place removed from the actual crime."[1457] Whether the accused is geographically close to the scene of the crime may be relevant depending on the facts of the case, particularly where that presence is alleged to have contributed to the commission of the crime,[1458] but it is not a legal requirement. While an accused may be physically distant from the commission of the crime, he may in fact be in proximity to and interact with those ordering and directing the commission of crimes.

4. Conclusion

481. The Appeals Chamber is not persuaded that there are cogent reasons to depart from its holding that the *actus reus* of aiding and abetting liability under Article 6(1) of the Statute and customary international law is that the accused's acts and conduct of assistance, encouragement and/or moral support had a substantial effect on the commission of each charged crime for which he is to be held responsible. Accordingly, the Appeals Chamber concludes that "specific direction" is

[1450] *Perišić* Appeal Judgment, para. 38 ("In such a case, *the existence of specific direction, which demonstrates the culpable link between the accused aider and abettor's assistance and the crimes of principal perpetrators, will be self-evident*.") (emphasis added).
[1451] Rule 87(A).
[1452] Statute, Art. 17(3).
[1453] *Supra* paras 362-385.
[1454] *Supra* paras 390-392.
[1455] *Supra* paras 390-392.
[1456] *Perišić* Appeal Judgment, paras 40, 42.
[1457] *Fofana and Kondewa* Appeal Judgment, para. 72. *Accord Kalimanzira* Appeal Judgment, para. 87, fn 238; *Ntagerura et al.* Appeal Judgment, para. 372; *Mrkšić and Sljivančanin* Appeal Judgment, para. 81; *Simić* Appeal Judgment, para. 85; *Blaškić* Appeal Judgment, para. 48; *Čelebići* Appeal Judgment, para. 352.
[1458] *See, e.g., Sesay et al.* Appeal Judgment, para. 541.

not an element of the *actus reus* of aiding and abetting liability under Article 6(1) of the Statute or customary international law.

F. Conclusion on the Law of Aiding and Abetting

482. Having considered the Statute and customary international law, the Appeals Chamber finds that the *actus reus* of aiding and abetting liability is established by assistance that has a substantial effect on the crime, not by the particular manner in which such assistance is provided. The Appeals Chamber rejects the Defence submission that the Trial Chamber was required to find that Taylor provided assistance to the specific physical actor who committed the *actus reus* of each underlying crime. The Appeals Chamber accordingly affirms its prior holding that the *actus reus* of aiding and abetting liability under Article 6(1) of the Statute and customary international law is that an accused's acts and conduct of assistance, encouragement and/or moral support had a substantial effect on the commission of the crimes charged for which he is to be held responsible.

483. The Appeals Chamber's review of the post-Second World War jurisprudence and subsequent caselaw demonstrates that under customary international law, an accused's knowledge of the consequence of his acts or conduct – that is, an accused's "knowing participation" in the crimes – is a culpable *mens rea* standard for individual criminal liability. In light of the foregoing, the Appeals Chamber reaffirms that knowledge is a culpable *mens rea* standard for aiding and abetting liability under Article 6(1) of the Statute and customary international law.

484. Although existing customary international law can be modified if the combination of *opinio juris* and state practice show a continuing and consistent adherence to the new custom by the international community, the Defence has failed to identify any examples of such *opinio juris* and state practice, much less a continuing and consistent adherence. The issue having been raised that contrary state practice exists, the Appeals Chamber has considered the submissions and found no evidence of state practice indicating a change in customary international law from the existing parameters of personal culpability for aiding and abetting the commission of serious violations of international humanitarian law.

485. The Appeals Chamber further concludes that the law articulated and applied by the Trial Chamber is in accordance with the principle of personal culpability.

486. Finally, the Appeals Chamber concludes that "specific direction" is not an element of the *actus reus* of aiding and abetting liability under Article 6(1) of the Statute or customary international law. Although the *Perišić* Appeal Judgment introduces novel elements in its articulation of "specific direction", which may perhaps be developed in time, this Appeals Chamber

is not persuaded that there are cogent reasons to depart from its holding regarding the *actus reus* and *mens rea* of aiding and abetting liability under Article 6(1) of the Statute and customary international law.

G. Planning – *Actus Reus*

1. The Trial Chamber's Findings

487. The Trial Chamber articulated the *actus reus* (objective) and *mens rea* (mental) elements of planning liability as follows:

> i. The accused, alone or with others, intentionally designed an act or omission constituting the crimes charged;
>
> ii. With the intent that a crime or underlying offence be committed in the execution of that design, or with the awareness of the substantial likelihood that a crime or underlying offence would be committed in the execution of that design.

The Trial Chamber further explained:

> While the Prosecution need not prove that the crime or underlying offence with which the accused is charged would not have been perpetrated but for the Accused's plan, the plan must have been a factor "substantially contributing to criminal conduct constituting one or more statutory crimes that are later perpetrated.[1459]

2. Submissions of the Parties

488. In Ground 11, the Defence submits that the Trial Chamber erred as a matter of law by failing to require that Taylor planned the commission of "concrete crimes" in order to be satisfied that the *actus reus* of planning liability was proved.[1460] It contends that the *actus reus* of planning liability is "one or more persons formulate a method of design or action, procedure or arrangement of the accomplishment of *a particular crime*."[1461] It further relies on the ICTY Trial Chamber's articulation of the law on planning liability in *Brđanin*.[1462] It argues that planning liability cannot

[1459] Trial Judgment, paras 469, 470 (alterations in original omitted).
[1460] Taylor Appeal, paras 209-211.
[1461] Taylor Appeal, para. 209 (emphasis in original), *citing Semanza* Trial Judgment, para. 380.
[1462] Taylor Appeal, para. 210, *citing Brđanin* Trial Judgment, paras 357, 358 ("When there is evidence of an accused having formulated a plan that does not constitute a plan to commit concrete crimes, this does not give rise to liability through the mode of liability of 'planning.'"). The ICTY Trial Chamber further stated that "[r]esponsibility for 'planning' a crime could thus, according to the above definition, only incur if it was demonstrated that the Accused was substantially involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance. ...This requirement of specificity distinguishes 'planning' from other modes of liability." On the facts, the Trial Chamber found: "Although the Accused espoused the Strategic Plan, it has not been established that he personally devised it. The Accused participated in its implementation mainly by virtue of his authority as President of the ARK Crisis Staff and through his public utterances. Although these acts may have set the wider framework in which crimes were committed, the Trial Chamber finds the evidence before it insufficient to conclude that the Accused was involved in the immediate preparation of the *concrete crimes*." (emphasis in original).