***Everything You Ever Wanted To Know About Specific Direction But Were Afraid To Ask***

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**INTRODUCTION**

As I’m sure everyone in this room knows, Judge Harhoff, the Danish judge at the Tribunal, has accused President Meron of engineering the acquittal in *Perisic* at the request of the US and Israel. Here is what he said in his “private” letter:

Have any American or Israeli officials ever exerted pressure on the American presiding judge (the presiding judge for the court that is) to ensure a change of direction? We will probably never know. But reports of the same American presiding judge’s tenacious pressure on his colleagues in the… Perisic case makes you think he was determined to achieve an acquittal… You may think this is just splitting hairs. But I am sitting here with a very uncomfortable feeling that the court has changed the direction of pressure from “the military establishments” in certain dominant countries.

In this presentation, I want to defend the SDR against Judge Harhoff – and against seemingly everyone else who has commented on the *Perisic* judgment. In particular, I will do four things:

1. Summarize what the majority held regarding specific direction.
2. Respond to two different claims that the SDR lacks an adequate legal foundation.
3. Argue that the SDR is justified by the normative structure of aiding and abetting.
4. Explore what the implications of the SDR might be for future cases at the ICC.

Before proceeding, one caveat: I am not going to discuss the majority’s application of the SDR in the case – whether Gen. Perisic did, in fact, specifically direct assistance to the VRS’s unlawful activities. Judge Moloto’s dissent in the TC and the majority’s judgment seem persuasive to me, but I do not know enough about the facts to venture an informed opinion. I will focus solely on the law.

**PERISIC**

In *Perisic*, the majority addressed a very specific type of aiding and abetting – namely, where the assistance that had a substantial effect on the commission of international crimes could have been used for either lawful or unlawful activities.

* This kind of assistance is often described in domestic criminal law as *“neutral assistance”* – the provision of fungible items such as money, weapons, personnel, etc.

In that context – and only in that context – the majority held that in order to establish the *actus reus* of aiding and abetting, the prosecution must explicitly prove that the defendant “specifically directed” his neutral assistance to unlawful activities. The key paragraph is paragraph 44:

[T]he Appeals Chamber observes that in most cases, the provision of general assistance which could be used for both lawful and unlawful activities will not be sufficient, alone, to prove that this aid was specifically directed to crimes of principal perpetrators. In such circumstances, in order to enter a conviction for aiding and abetting, evidence establishing a direct link between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators is necessary.

According to the majority, the prosecution can establish the requisite specific direction in two different ways. The first is the most straightforward: by proving that the D provided neutral assistance to *“an organisation whose sole and exclusive purpose was the commission of crimes.”* In such a situation, specific direction is established as a matter of law.

* As a brief aside, I think this is how the TC should have convicted Stanisic and Simatovic. I don’t think it’s much of a stretch to say that the Serbian Special Purpose Unit was an inherently criminal organization.

The majority also discussed a second situation – more relevant to Gen. Perisic – in which the D provided neutral assistance to an organization that was not solely criminal. In that situation, the Prosecution must prove that the D specifically directed his assistance to the organization’s unlawful activities.

The nature of the required proof will differ, of course, from case to case. The majority nevertheless mentioned four types of assistance that can normally be considered circumstantial evidence of specific direction:

1. The magnitude of the D’s assistance.
2. The kind of assistance provided by the D, particularly logistical assistance.
3. Evidence that the D deviated from his own organization’s policy of supporting only lawful activities.
4. D’s knowledge of the principal perpetrators’ unlawful activities.

**FOUNDATION**

I now want to turn to the legal foundation of the SDR. Judge Harhoff’s conspiracy theory depends on the idea that the requirement is radically new – that it represents, in his words, a *“step back”* from the ICTY’s *“set practice.”*

But that is simply not the case. First, and most obviously, the SDR was articulated in the very first Appeals Chamber judgment –*Tadic*, decided in 1999:

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

Second, as the majority in *Perisic* traces in detail, since *Tadic* only one ICTY or ICTR appeals judgment has ever questioned the SDR: *Mrkšić*. And that judgment is questionable:

* It dismissed the SDR in its discussion of the *mens rea* of aiding and abetting, not the *actus reus*.
* Its stray comment that specific direction was also not part of the *actus reus* of aiding and abetting cited only *Blagojevic and Jokic* – in which the Appeals Chamber had, in fact, specifically affirmed that the requirement was an element of *actus reus*.

Third, the majority did not even raise the SDR in the *Perisic* case *sua sponte*. On the contrary, its analysis basically reproduced Judge Moloto’s dissenting judgment in the Trial Chamber.

Fourth, and finally, the adoption of the SDR was also foreshadowed by the concurring opinions of Judge Guney and Judge Agius in *Lukic*. Both affirmed the SDR and criticized the Appeals Chamber’s earlier judgment in *Mrkšić* on exactly the same grounds as the majority in *Perisic*.

* And, of course, Judge Agius was a member of the *Perisic* majority.

Given all this, I think you would have to be something of a specific-direction truther to believe that President Meron invented the SDR and forced his fellow judges to adopt it.

Now let me turn to a more important challenge to the SDR’s legal foundation: namely, the claim that the requirement has no basis in customary international law. This was, of course, the position recently taken by the SCSL Appeals Chamber in the *Taylor* case. Here is the relevant paragraph:

The Perišić Appeals Chamber did not assert that specific direction is an element under customary international law. Its analysis was limited to its prior holdings and the holdings of the ICTR Appeals Chamber, which is the same body…. 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.

There are two problems with this argument. To begin with, it directly accuses the majority of deliberately ignoring its own mandate. As is well known, the ICTY is limited to applying *“rules of international humanitarian law which are beyond any doubt part of customary law.”*

The rationale for that limit is, of course, the need for the ICTY to respect the principle of non-retroactivity. The Secretary-General’s Report on SC Res. 808 makes that clear:

**The application of the principle *nullum crimen sine lege* requires** that the Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law.

And that leads the more fundamental criticism of the SCSL’s rationale for rejecting the SDR, one that I cannot emphasize more strongly: the ICTY does not need to find a customary basis for a doctrine that narrows, rather than expands, a D’s criminal responsibility. That is precisely what the SDR does – it makes it more difficult to convict a D of aiding and abetting; it does not make it easier. The *Perisic* majority’s decision to adopt the requirement thus does not implicate the *nullum crimen* principle, making it irrelevant whether the SDR has an adequate basis in customary international law.

Now, to be clear, the irrelevance of custom does not mean that the majority should have adopted the requirement. It simply means that the issue is one of criminal-law theory, not customary international law. In other words, the question we must answer is this: does the normative structure of aiding and abetting require adopting the SDR in the context of neutral assistance to an organization that is involved in both lawful and unlawful activities?

**JUSTIFICATION**

In my view – and obviously in the majority’s view, as well – the answer is yes.

The first thing to note is that this was an issue of first impression for the Appeals Chamber. As Judge Moloto pointed out in his TC dissent, no previous ICTY case involved allegations of a high-ranking military commander aiding and abetting the crimes of another state’s army.

That is a critical aspect of the case – because it explains why critics are wrong to assume that the SDR emerged out of nowhere in *Perisic*. As the majority emphasized, specific direction had always been implicit in the *actus reus* of aiding and abetting. Previous cases had simply involved the kind of geographically and temporally proximate assistance that made explicit proof of specific direction unnecessary.

Now let’s turn to the argument for the SDR. It begins by acknowledging the central normative assumption of the requirement: namely, that it should not be *per se* illegal for an individual to provide neutral assistance to an organization involved in both unlawful and unlawful activities simply because he is aware of the organization’s unlawful activities.

As we will see, that is precisely the effect of rejecting the SDR. Assume, for sake of argument, a genuinely well-intentioned military commander – one who takes IHL seriously and who has no desire to assist in the commission of international crimes. Without the SDR, as long as our responsible commander is aware that he is providing assistance to an organization involved in both lawful and unlawful activities, his criminal responsibility will depend on a factor largely, if not completely, beyond his control – namely, whether his assistance does, in fact, end up substantially contributing to unlawful activities. If it does, he is guilty:

* Regardless of whether the organization was predominantly engaged in lawful activities.
* Regardless of whether he intended to assist only the organization’s lawful activities.
* Regardless of whether he did everything in his power to prevent his assistance from being used for unlawful activities.

The mere fact of his knowing assistance, combined with the bad luck that his assistance was misused, will make him a war criminal – maybe even a *genocidaire*.

Now, perhaps that’s the right outcome. Perhaps we want to tell military commanders that they cannot engage in any way with any organization they know is engaged in any kind of unlawful activities.

But let’s assume for sake of argument that we don’t want to categorically prohibit assistance in that context. The question then becomes: how should the elements of aiding and abetting be structured to fairly and reliably distinguish between permissible and impermissible forms of neutral assistance?

There are, I would suggest, three potential limiting principles. The first would be to require the prosecution to prove that the D intended to assist an organization’s unlawful activities. The fact that assistance was neutral on its face is obviously irrelevant if the D subjectively desired to facilitate the commission of international crimes.

* That is the approach to aiding and abetting adopted by the Rome Statute in Art. 25(3)(c) and by many national systems – including Australia and the UK.

Interestingly, in their Joint Separate Opinion in *Perisic*, Judges Meron and Agius emphasized that they would have preferred this limiting principle to the SDR. But they rightly pointed out that the Appeals Chamber has always held that the *mens rea* of aiding and abetting is knowledge, not intent. So they concluded that affirming the SDR, which had been a part of aiding and abetting since *Tadic*, was more consistent with the ICTY’s jurisprudence.

The second potential limiting principle, which also operates at the level of *mens rea*, would be to require the defendant to know that his assistance will be used to commit a specific crime – not just be aware that it might be used for criminal activity in general. Even if a D does not intend to facilitate unlawful activity, there is no justification for him providing neutral assistance to an organization that he knows will use it to commit a specific crime.

This limiting principle is not inherently inconsistent with ICTY jurisprudence. Indeed, the Appeals Chamber’s early cases explicitly adopted it. Here is what it said in *Tadic*:

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.

That was a very high standard, because the *Oric* TC later defined “knowledge” for purposes of aiding-and-abetting in the sense of domestic criminal law – as “virtual certainty” or “practical certainty.” Under the *Tadic* approach, therefore, D acted with the necessary *mens rea* only if he was:

1. Virtually certain that the principal would commit a specific crime – call this the “criminal object” element.
2. Virtually certain that his acts would assist in that crime if it was, in fact, committed – call this the “assistance” element.

Unfortunately, the Appeals Chamber moved away from the *Tadic* approach in 2004, when it decided *Blaskic*. Since *Blaskic*, the Appeals Chamber has consistently adopted a much lower *mens rea* for aiding and abetting – including in *Perisic*. Here is the *Blaskic* formulation:

[I]t is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that **one of a number of crimes will probably be committed**, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.

Under this approach, D acted with the necessary *mens rea* as long as he was:

1. Aware that the principal would probably commit various unspecified crimes in the future.
2. Was virtually certain that his acts would assist those crimes if they were, in fact, committed.

The assistance element is presumably the same in the two standards. But the criminal-object element is much easier to satisfy in the new standard. There are two basic differences:

1. D does not have to know that a crime will be committed; awareness that it will “probably” be committed is enough.
2. D does not have to be aware that the principal will probably commit a specific crime; awareness of the probable commission of any kind of crime is enough.

The *Blaskic* standard, in other words, effectively lowers the criminal-object *mens rea* of aiding and abetting from knowledge to recklessness.

I think that standard is problematic in any context – but it is particularly problematic in the context of neutral assistance to organizations that are not inherently criminal. As long as our well-intentioned military commander knows someone in the organization will “probably” commit some kind of crime in the future, his neutral assistance will be criminal if it ends up – even despite his best efforts – having a substantial effect on whatever crime is actually committed.

And that brings us to the third and final possible limiting principle, this one operating at the level of *actus reus* – the SDR. That requirement provides a normatively satisfying solution to the dilemma the majority faced in *Perisic*. In the majority’s words, when dealing with neutral assistance to organizations that are not inherently criminal, the SDR provides the necessary *“culpable link between assistance provided by an accused individual and the crimes of principal perpetrators.”*

**THE FUTURE**

I want to end this presentation by briefly discussing the future of the SDR. There are very few cases remaining at the ICTY and the ICTR, and the SCSL has obviously already rejected the requirement. The real question, then, is whether the majority’s judgment in *Perisic* will have any effect on the jurisprudence of the ICC.

The relevant provision, of course, is Art. 25(3)(d), which criminalizes assistance to a group *“when made in the knowledge of the group to commit the crime.”* Here is the text of the provision:

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… (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:

1. 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
2. **Be made in the knowledge of the intention of the group to commit the crime.**

Would the ICC adopt the SDR in a future case? It’s difficult to know, because the Court’s aiding and abetting jurisprudence is in complete disarray. In terms of *actus reus*, two PTCs have disagreed with each other:

* In *Mbarushimana*, based on ICTY jurisprudence, PTC I adopted a *“significant contribution”* test.
* By contrast, in *Ruto and others*, PTC II specifically rejected the “significant contribution” test – but did not bother to identity the minimum contribution required.

If the Appeals Chamber ultimately follows *Ruto and others*, it will need to at least consider adopting something like the SDR. It is impossible to justify an *actus reus* of aiding and abetting that requires neither significant contribution nor specific direction.

The *mens rea* of aiding and abetting is similarly unsettled. Art. 30 of the Rome Statute defines knowledge as *“awareness that a circumstance exists or a consequence will occur in the ordinary course of events”* – which most scholars interpret to mean knowledge in the domestic criminal-law sense, as “virtual certainty.” The Appeals Chamber has yet to rule on the issue, however, and lower Chambers have disagreed with each other:

* In both *Bemba* and *Ruto and others*, PTC II specifically affirmed that knowledge does indeed require virtual certainty.
* By contrast, in both *Lubanga* and *Katanga & Ngudjolo*, PTC I held that *dolus eventualis* – common-law recklessness plus acceptance of the risk – satisfies Art. 30’s knowledge requirement. In *Lubanga*, the TC seems to have taken the same position.

If the Appeals Chamber ultimately adopts *dolus eventualis* in the context of contributions to group crimes, the SDR will be normatively necessary for all of the reasons I discussed earlier.

Interestingly – and I will end with this – at least one judge at the ICC seems to be aware of the SDR’s desirability. Here is what Judge Gurmendi said in her Separate Opinion in *Mbarushimana* with regard to the provision of neutral assistance to group crimes:

I am not persuaded that such contributions would be adequately addressed by adding the requirement that a contribution be significant. Depending on the circumstances of a case, providing food or utilities to an armed group might be a significant, a substantial or even an essential contribution to the commission of crimes by this group. In my view the real issue is that of the so-called "neutral" contributions. This problem is better addressed by analysing the normative and causal links between the contribution and the crime rather than requiring a minimum level of contribution.

By “normative and causal links,” I would suggest that Judge Gurmendi meant something closely akin to the SDR.

But then again, we should probably not put too much stock in what Judge Gurmendi has to say. President Meron no doubt got to her, too.