Armed conflict in Bosnia-Herzegovina—war crimes—aiding and abetting liability—specific direction—command responsibility—effective control

PROSECUTOR v. PERIŠIĆ. Case No. IT-04-81-A. *At* http://www.icty.org. International Criminal Tribunal for the Former Yugoslavia, February 28, 2013.

On February 28, 2013, the appeals chamber (Chamber) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) overturned the 2011 conviction of General Momčilo Perišić, the former head of the Yugoslav Army (VJ), for aiding and abetting war crimes in Bosnia-Herzegovina and Croatia.[1] By a 4-1 vote, the Chamber held that "specific direction" is an essential element of liability for the *actus reus* of aiding and abetting the crimes of murder, extermination, inhumane acts, attacks on civilians, and persecution as crimes against humanity and/or violations of the laws or customs of war. It also held that Perišić lacked the necessary "effective control" over his subordinates to subject him to command responsibility for their violations of the laws and customs of war.

Perišić's conviction in 2011 marked the ICTY's first judgment against an official of the former Yugoslav Army for crimes committed in Bosnia-Herzegovina.[2] Beginning in August 1993, Perišić served as the chief of the General Staff of the Yugoslav Army, the most senior VJ officer in the Federal Republic of Yugoslavia (Yugoslavia). Between 1993 and 1995, the VJ provided military and logistical assistance to the Army of Republika Srpska (VRS) in Bosnia-Herzegovina and to the Army of the Serbian Krajina (SVK) in Croatia.

The trial chamber, with one judge dissenting, found Perišić guilty, as an aider and abettor, of VRS crimes in Sarajevo and Srebrenica,[3] including murder, inhumane acts (injuring and wounding civilians, inflicting serious injuries, forcible transfer), and persecutions as crimes against humanity, as well as murder and attacks on civilians as violations of the laws or customs of war.[4] Again with one judge dissenting, it also found Perišić guilty, as a superior, for failing to punish SVK crimes in Zagreb, including murder and inhumane acts (injuring and wounding civilians) as crimes against humanity, and for murder and attacks on civilians as violations of the laws or customs of war.[5] The trial chamber sentenced Perišić to twenty-seven years' confinement.

On appeal, the majority largely followed the approach of the dissenting judge in the trial judgment.[6] One member of the appeals chamber dissented, arguing for Perišić's guilt along the

[1] Prosecutor v. Perišić, Case No. IT-04-81-A, Appeals Judgment (Int'l Crim. Trib. Former Yugo. Feb. 28, 2013) [hereinafter Appeals Judgment]. Documents of the ICTY cited herein are available at its website, http://www.icty.org.

[2] Prosecutor v. Perišić, Case No. IT-04-81-T (Sept. 6, 2011) [hereinafter Trial Judgment].

[3] *Id.*, paras. 1815, 1820. The 1995 VRS attack on Srebrenica led to the mass murder of some eight thousand Bosniaks, in what Kofi Annan labeled the worst crime to be committed on European soil since World War II. 'May We All Learn and Act on the Lessons of Srebrenica', Says Secretary-General, in Message to Anniversary Ceremony, UN Press Release SG/SM/9993 (Nov. 7, 2005), *at* http://www.un.org/News/Press/docs/2005/sgsm9993.doc.htm. The International Court of Justice later ruled that the attack constituted genocide. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 ICJ REP. 43, 199, para. 379 (Feb. 26), *available at* http://www.icj-cij.org. *See also* The Fall of Srebrenica, Report of the Secretary-General Pursuant to General Assembly Resolution 53/35, UN Doc. A/54/549 (Nov. 15, 1999), *available at* http://www.un.org/peace/srebrenica.pdf.

[4] Trial Judgment, para. 1838.

[5] *Id.*, paras. 1818, 1839.

[6] During the appeal, Perišić personally addressed the Chamber and asked how, given the dissenting opinion in the trial chamber, his responsibility could have been established beyond a reasonable doubt. Perišić also said that

lines taken by the majority in the trial chamber. The appeals chamber acquitted Perišić for the VRS offenses in Bosnia on a point of law, and for the SVK offenses in Croatia following a de novo factual review.

In terms of the offenses in Sarajevo and Srebrenica, the trial chamber had determined that the *actus reus* of aiding and abetting by Perišić was "proved based on the finding that VJ assistance 'had a substantial effect on the crimes perpetrated by the VRS.'"[7] Citing the 2009 ICTY appeals judgment in the *Mrkšić* case, the trial chamber ruled that "specific direction" is not a required element of the *actus reus* of aiding and abetting.[8] That is, the trial chamber did not require proof that the VJ's actions in providing military support were specifically directed toward assisting the VRS in committing crimes.

The appeals chamber disagreed, relying on *Tadić*, the first ICTY appeals judgment to address the scope of aiding and abetting liability some ten years prior to the *Mrkšić* ruling (para. 26). The *Tadić* appeals judgment had stated that "[t]he aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime . . . , and this support has a substantial effect upon the perpetration of the crime."[9] The appeals chamber claimed that "[t]o 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" (para. 28). The Chamber further claimed that while the *Mrkšić* appeals judgment did state that specific direction was not an essential ingredient of the *actus reus* of aiding and abetting, it did so "in passing" and not as the result of "the most careful consideration" required for the Chamber to depart from its holding in *Tadić* (paras. 33, 34).[10]

The appeals chamber also acknowledged that other ICTY appellate judgments addressing aiding and abetting liability had not analyzed the issue of specific direction, but it observed that those cases involved actions proximate to the crimes of the principal perpetrators. Where there is such proximity, the Chamber said, specific direction "may be demonstrated implicitly through discussion of other elements of aiding and abetting liability, such as substantial contribution" (para. 38). But the majority found that Perišić's acts of assistance to the VRS had been remote from its crimes, that the VRS and the VJ were independent of each other and located in different geographic regions, and that there was no evidence that Perišić had been present when the VRS planned or committed criminal acts.[11] As a result, the appeals chamber held that "explicit consideration of specific direction is required" (para. 39).

the "world did not prohibit the waging of war" and asked the appeals chamber to consider how his case would affect the chiefs of staff of armies around the world. He emphasized that "[n]ever before was a chief of the General Staff of an army indicted and convicted for crimes that were committed by members of another army in another country." Transcript of Appeals Hearing 84, 85 (Oct. 30, 2012).

[7] Appeals Judgment, para. 17 (quoting Trial Judgment, para. 1627).

[8] *Id.* (quoting Trial Judgment, para. 126, and citing Prosecutor v. Mrkšić, Case No. IT-95-13/1-A, Appeals Judgment, para. 159 (May 5, 2009)).

[9] Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment, para. 229(iii) (July 15, 1999), *quoted in* Appeals Judgment, para. 26 (emphasis added).

[10] Quoting, in the second instance, Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, para. 109 (Mar. 24, 2000).

[11] Referring to the trial records, the dissenting judge felt that Perišić had "facilitated the large-scale crimes of the VRS through the provision of considerable and comprehensive aid" constituting "a prime example of conduct to which aiding and abetting liability should attach." Appeals Judgment, Partially Dissenting Opinion of Judge Liu, para. 9 [hereinafter Liu Dissent]. Judge Liu persuasively referred to points from the trial judgment, including that Perišić had institutionalized the provision of assistance to the VRS, that he had the power to approve or deny requests, that the assistance "sustained the *very life line* of the VRS," that Perišić "did not believe that the VRS had

Accordingly, the Chamber proceeded to analyze

> (i) Perišić's role in shaping and implementing [Yugoslavia's] policy of supporting the VRS; (ii) whether [Yugoslavia's] policy of supporting the VRS was specifically directed towards the commission of crimes by the VRS; and (iii) whether Perišić either implemented the SDC [Supreme Defense Council] policy of assisting the VRS in a way that specifically directed aid to the VRS Crimes in Sarajevo and Srebrenica, or took action to provide such aid outside the context of SDC-approved assistance. (Para. 47)

The majority found that Perišić had furthered the Yugoslav policy of supporting the VRS war effort; however, providing general assistance that could be used for lawful and unlawful activities did not by itself suffice to prove that the assistance was specifically directed toward the commission of crimes by VRS perpetrators (para. 58).

In reaching that conclusion, the appeals chamber engaged in two lines of inquiry: whether the VRS was an organization "whose sole and exclusive purpose was the commission of crimes" and whether the SDC had "endorsed a policy of assisting VRS crimes" (para. 52). As to the first question, the Chamber concurred with the trial chamber's conclusion that "the VRS was not an organisation whose actions were criminal *per se*; instead, it was an army fighting a war" (para. 53). As to the second, it found "no basis for concluding that it was SDC policy to specifically direct aid towards VRS crimes" (para. 55).

The appeals chamber also reversed Perišić's conviction as a superior for failing to punish SVK members for the shelling of Zagreb in early May 1995. Perišić contended that he was not the de jure superior of the soldiers who perpetrated the atrocities in question since they were subject to a separate chain of command and that in any event he lacked the material ability to discipline them at the time in question. The appeals chamber found that the trial chamber, by neglecting the relevant portions of two witnesses' testimony in its analysis of Perišić's command responsibility, had "fail[ed] to provide a reasoned opinion" (para. 96). Reviewing the evidence de novo, the appeals chamber held that the evidence did not demonstrate Perišić's effective control beyond a reasonable doubt and concluded that "a reasonable alternative interpretation of the record is that Perišić could influence, but did not possess effective control over, the Zagreb Perpetrators at the time of the shelling of Zagreb" (para. 117). Because a finding that Perišić had exercised effective control was not the sole reasonable inference from the totality of the circumstantial evidence in this case, the appeals chamber held that his guilt had not been established beyond a reasonable doubt.

* * * *

While the ICTY has contributed immensely to the development of international criminal law, the decision serves as a reminder that the jurisprudence in this field is still unsettled, in that even threshold questions on the elements of forms of liability and the doctrine of command responsibility lack a coherent and consistent answer. More troubling is that the decision may lessen or confuse the ICTY's accomplishments in establishing a historical record of war crimes in the Balkans in the 1990s.

another significant source of assistance," and that from the early stages of the war Perišić was aware of "the VRS's propensity to commit criminal acts." *Id.*, paras. 7, 6 n.24, 8, respectively.

The appeals chamber's approach to aiding and abetting is problematic from several perspectives. On the one hand, it is far from clear whether (or when) any organization's "exclusive purpose" might be the commission of crimes.[12] On the other, framing the test for determining "specific direction" as endorsement unhelpfully blurs the lines between the *actus reus* and the *mens rea* of accomplice liability. At one point, the majority stated that "[t]he Appeals Chamber also underscores that its analysis of specific direction will exclusively address *actus reus*" and then "acknowledges that specific direction may involve considerations that are closely related to questions of *mens rea*" (para. 48). The result, according to the dissenting judge, is that "[i]f specific direction is indeed part of the *actus reus* of aiding and abetting liability, it could be argued that there is little difference between aiding and abetting and certain forms of commission."[13]

The majority concluded that "assistance from one army to another army's war efforts is insufficient, in itself, to trigger individual criminal liability for individual aid providers absent proof that the relevant assistance was specifically directed towards criminal activities" (para. 72). Perišić argued that where remote conduct is at issue, not requiring proof of specific direction is tantamount to a strict liability standard. Perišić's argument may be applied to NATO's assistance to Libyan "rebels" or Syrian opposition forces, but ultimately that reasoning is substantively hollow. *Perišić* did not concern a single instance of remotely provided military assistance that was used by third parties, unknowingly to the provider, to perpetrate crimes for which the provider was then held liable.[14] As Judge Liu stated in his dissent:

> Given that specific direction has not been applied in past cases with any rigor, to insist on such a requirement now effectively raises the threshold for aiding and abetting liability. This shift risks undermining the very purpose of aiding and abetting liability by allowing those responsible for knowingly facilitating the most grievous crimes to evade responsibility for their acts.[15]

The majority claimed that its ruling "should in no way be interpreted as enabling military leaders to deflect criminal liability by subcontracting the commission of criminal acts" (para. 72).

[12] As one commentator observed, members of the Gestapo and the Interahamwe followed the law at times over the course of their genocides, whether "dr[iving] on the correct side of the road [or] purchas[ing] food from local merchants." James G. Stewart, *The ICTY Loses Its Way on Complicity—Part 1*, OPINIO JURIS (Apr. 3, 2013, 9:00 AM).

[13] Liu Dissent, para. 3 n.9.

[14] During the closing arguments at Perišić's trial, one judge, Judge Moloto, engaged in an intriguing dialogue with a senior trial attorney from the Office of the Prosecutor. Judge Moloto compared the instances of aiding and abetting charged against Perišić with the operations of NATO commanders in Afghanistan and their continuing to supply the Afghan security forces despite being aware of crimes committed by those forces. But the comparison is only superficially analogous. While the Afghans have indeed committed offenses, these have not come close to the scale of the VRS's offenses. Moreover, the VRS "wag[ed] a war that encompassed systematic criminal actions against Bosnian Muslim civilians as a military strategy and objective." *Id.*, para. 4 (quoting Trial Judgment, para. 1621). There is no valid Afghanistan parallel to the VRS siege of Srebrenica over the course of two-plus years, and the subsequent massacre of thousands, which could not have occurred without VJ support. And at no point did Perišić challenge or criticize the VRS or stop supplying it.

[15] *Id.*, para. 3. One commentator, Creighton law professor Sean Watts, in agreeing with the *Perišić* decision, labeled the case a question of proof, not of difficulty determining the relevant standard of law. Watts claims that to impute liability to Perišić requires more than is provided for under current international criminal law. To fill this lacuna, Watts suggests that dereliction of duty be adopted as a criminal offense. See U.S. Uniform Code of Military Justice Article 92, which criminalizes dereliction of duty. The U.S. Manual for Courts-Martial (2008 ed.) defines an individual as derelict under Article 92 when he or she "willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner."

Yet given the considerable evidence of Perišić's role in, and level of providing support to, the VRS while knowing its members were committing atrocities, the ICTY's disclaimer about not allowing the subcontracting of grievous crimes is unconvincing.

As for command responsibility, while the appeals chamber properly labeled the trial chamber's handling of the two witnesses' testimony as an error of law, the resulting de novo review was not the required outcome. It afforded no deference to any of the trial chamber's factual findings regarding effective control, not just those stemming from the questioned witness testimony.

Consequently, an appeals judgment of fewer than fifty pages now serves as the factual record instead of a trial judgment of almost six hundred pages. The ICTY claims as one of its achievements establishing "beyond a reasonable doubt crucial facts related to crimes committed in the former Yugoslavia."[16] But substituting appellate factual findings so disproportionately inferior in scope and detail for the trial chamber's factual findings figuratively—and literally—lessens the ICTY historical record of the conflict in the former Yugoslavia.

Following on the heels of the *Gotovina* case,[17] *Perišić* is the latest in a series of high-profile ICTY appellate acquittals. And much like Croatia in responding to the exoneration of its generals, Serbia flew Perišić to Belgrade amid considerable fanfare. Prime Minister Ivica Dačić claimed Perišić's case was "of a tremendous importance for Serbia and the Serbian people because it proves that Serbia didn't carry out military aggression against Bosnia and Croatia."[18] This belief was only heightened in May 2013 when an ICTY trial chamber announced the acquittals of the former Serbian secret police chief and his deputy[19] for their role in forming, directing, and paying special units[20] that drove non-Serbs from portions of Bosnia and Croatia. Acquittals in a case where the prosecutor had sought life sentences further suggests dissonance within the ICTY.[21]

The larger effects of the decision remain to be seen. One cogent question, for example, is if and how the Special Court for Sierra Leone will refer to *Perišić* in the appellate case of former Liberian president Charles Taylor. Taylor was found guilty both for aiding and abetting, where *Perišić* might factor into the analysis, and for his role in planning war crimes, where *Perišić* would have no application.[22]

[16] ICTY, Achievements, *at* http://www.icty.org/sid/324.

[17] Prosecutor v. Gotovina, Case No. IT-06-90-A, Appeals Judgment (Nov. 16, 2012) (acquitting Ante Gotovina and Mladen Markač).

[18] Marija Ristic, *Serbia Welcomes Hague Decision to Clear Perisic*, BALKAN TRANSITIONAL JUSTICE (Mar. 1, 2013) (quoting Ivica Dačić), *at* http://www.balkaninsight.com/en/article/serbia-greets-perisic-s-icty-acquittal. Attention now turns to whether and how the acquittals of Serbians accused of war crimes in Croatia will affect the resolution of the ICJ case between the two countries, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia).

[19] Prosecutor v. Stanišić, Case No. IT-03-69-T (May 30, 2013) (acquitting Jovica Stanišić and Franko Simatović).

[20] Among these units were Arkan's Tigers, the Red Berets, and the Skorpions, which committed some of the greatest atrocities in the conflict.

[21] One expert contended that through recent ICTY cases "[t]he entire doctrine of command responsibility has been ditched" and "[s]o has the liability for aiding and abetting." Marlise Simons, *U.N. Court Acquits 2 Serbs of War Crimes*, N.Y. TIMES, May 31, 2013, at A4 (quoting Eric Gordy, University College London). For additional criticism of the recent decisions, see Marlise Simons, *Judge at War Crimes Tribunal Faults Acquittals of Serb and Croat Commanders*, N.Y. TIMES, June 15, 2013, at A4.

[22] For the trial chamber's judgments on the merits and on sentencing, see Triestino Mariniello, Case Report: Prosecutor v. Taylor, *in* 107 AJIL 424 (2013).

Assessing the efficacy and legitimacy of the ICTY cannot be outcome based. One may fear, however, that decisions that radically shift from trial judgment findings of guilt and the imposition of lengthy sentences to appellate judgments of outright acquittal and release might result in a lack of predictability and confidence in the tribunal writ large. Sixteen years into its jurisprudence, the ICTY should be more, not less, predictable. Yet in the wake of *Perišić*, the elements of aiding and abetting are murkier than ever. Sadly, the ICTY is undermining what would and should be the development of its own case law, and thus its contribution to developing international law. In issuing appellate acquittals like *Perišić*, the ICTY, whose stated goals and accomplishments include holding leaders accountable, bringing justice to victims, and giving them a voice,[23] may become "an instrument for collectivizing innocence rather than for individualizing guilt, . . . indeed the opposite of what many of us had hoped it would be."[24]

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State recognition—effect of unrecognized state's accession to multilateral treaty—obligations of universal value under general international law—copyright protection under Berne Convention

KOREAN FILM EXPORT & IMPORT CORP. v. FUJI TELEVISION NETWORK, INC. 65 Minshū 3275. Saikō Saibansho (Supreme Court of Japan), December 8, 2011.

On December 8, 2011, the Japanese Supreme Court decided that the accession to a multilateral treaty by a state not recognized by Japan cannot create obligations between Japan and that state except with respect to obligations of universal value under general international law.[1] The case arose in the specific context of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)[2] but has broader implications for the operation of multilateral treaties in general.

The Copyright Act of Japan protects, in addition to works of Japanese nationals and works first published in Japan, "works . . . with respect to which Japan has the obligation to grant protection under an international treaty" (Art. 6).[3] International treaties for the purpose of this provision include the Berne Convention, which Japan ratified in 1975.[4] Article 3 of that Convention provides that its protections shall apply to "authors who are nationals of one of the countries of the Union [that is, countries to which the Convention applies], for

[23] ICTY, Achievements, *supra* note 16.

[24] Marko Milanovic, *The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momcilo Perisic*, EJIL: TALK! (Mar. 11, 2013), *at* http://www.ejiltalk.org.

[1] Saikō Saibansho [Sup. Ct.] Dec. 8, 2011, Hei 21 (Ju) nos. 602, 603, 65 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 3275, *translated at* http://www.courts.go.jp/english/judgments/text/2011.12.08-2009.-Ju-.No..602%2C.603.html (provisional trans.). For the lower court judgments in this case, see Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Dec. 14, 2007, Hei 18 (wa) no. 6062, 65 MINSHŪ 3329 [hereinafter District Court judgment]; Chiteki Zaisan Kōtō Saibansho [Intellectual Prop. High Ct.] Dec. 24, 2008, Hei 20 (ne) no. 10011, 65 MINSHŪ 3363 [hereinafter High Court judgment], *available at* http://www.courts.go.jp. The translations in this report are by the author.

[2] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as amended* July 24, 1971, 1161 UNTS 3, *available at* http://www.wipo.int.

[3] Chosakukenhō [Copyright Act], Law No. 48 of 1970, Art. 6, *translated at* http://www.japaneselawtranslation.go.jp.

[4] Contracting Parties, Berne Convention, WIPO-Administered Treaties, *at* http://www.wipo.int/treaties/en/ip/berne/.