

Milestones in international criminal justice
Chatham house & Doughty Street Chambers

16 October 2013 – Recent developments ICTY case-law

Ladies and Gentlemen,

I thank the organizers, Doughty Street Chambers and Chatham house, for inviting me and for hosting this seminar on recent developments in ICTY case law. It seems appropriate to hold the seminar here at Doughty Street since counsel at this set of chambers have been involved in some of the cases that we will be discussing tonight, cases that have been at the centre of controversy and fierce debate.

I want to follow on some of the things that have been said on Aiding & Abetting-liability (A&A-liability). I will dissect the enigmatic requirement of Specific Direction (SD) and discuss it the bigger context of criminal responsibility in international law.

I wish to make 5 observations

1. The first observation concerns the origin of SD as a component of A&A liability. The Appeals Chamber in *Perišić* traces SD back to the *Tadić* case. The *Tadić* Appeals Chamber in its 1999 judgment characterized A&A as assistance that is *specifically* directed to a *specific* crime with knowledge of that *specific* crime. The word 'specific' is used to mark the difference with another mode of liability: Joint Criminal Enterprise (JCE), which makes culpable, acts that in *some* way are directed to the furtherance of the common criminal design. By contrasting A&A to JCE the *Tadić* Appeals Chamber justified the need for JCE liability. This was pertinent because, unlike A&A, JCE is not codified in the Statute. JCE was read into the Statute and subsumed under the notion of "commission". Moreover, JCE

was the basis for convicting Tadić for crimes he had been acquitted of under A&A liability. No culpable link between Tadić and the crimes could be established.

So, the insistence on specificity, including the words “specific direction”, should be viewed in context. A&A was defined by contrasting it to JCE. Inevitably that came with a certain degree of exaggeration. In this respect it is interesting to note that in an earlier ruling – before *Tadić* - the ICTY had defined the *actus reus* of A&A as assistance that, “in *some way* has a substantial effect on the perpetration of the crime” (*Furundzija*, para 257(ii)). And in the cases after *Tadić*, the reference to SD was just boilerplate repetition. Moreover, the notion of ‘specific’ has been diluted over time. With regard to the *mens rea*: “knowledge of the specific crime” does not mean that the one who aids or abets must know the precise crime. What is required is that the aider and abettor is aware of the essential elements of the crime that was ultimately committed by the principal. And with regard to the *actus reus*: A&A-liability has come to cover assistance, not to a specific crime, but to a “programme of systemic violence”, a “specific (unlawful) policy” or the maintenance of a “system of unlawful arrest and detention”.

So, given the specific context of SD in *Tadić* and subsequent developments, we might want to question its broader applicability.

2. How come SD suddenly surfaces as a component of A&A-liability after so many years of settled jurisprudence? How is it that only now it makes a difference between guilt or innocence? (This is my second observation). According to the AC in *Perišić*, SD is an *actus reus* element of A&A-liability in situations of remote assistance; where an aider and abettor is remote in time and geographic location from actions of principal perpetrators. In such situations, SD should be applied to prevent over-inclusiveness.

I wonder if it is in cases of remote assistance that SD necessarily warrants application. Going back to the formulation of aiding and abetting liability in *Tadić*: the link of specificity is provided for by the causation-requirement, by requiring assistance that substantially affects the commission of a *specific* crime. Also in cases of remote assistance the culpable link can be ensured by proof of causation. Think of Dutch businessman Frans van Anraat who sold chemicals to the regime of Saddam Hussein. These chemicals were used to produce mustard gas that was subsequently used against the Kurds in Halabja. Van Anraat was convicted for A&A war crimes. His culpability was for a large part based on the fact that the chemicals he provided had indeed been used by Saddam Hussein.

Remote assistance is not necessarily where SD has added value in reigning in criminal responsibility; causation can do the job.

On a more general note, I find the Appeals Chamber's pronouncement that A&A-liability should be limited in situations of remote assistance somewhat misleading. Senior political and military leaders, often the architects of international crimes, are almost by definition far removed from the scene of the crimes. So apart from the fact that SD is not necessarily pertinent in situations of remote assistance, it also sends the wrong signal. No wonder the *Perišić* appellate ruling was so widely criticized.

3. Where the requirement of SD *does* have added value – this is my third observation – is in situations of 'neutral activity' or 'general assistance', i.e. where assistance does not necessarily result in unlawful conduct. This concerns situations where assistance or support is capable of dual use: of lawful and unlawful use. Thus, *Perišić* in providing weapons, financial support, training and personnel to the Army of the Republika Srpska (VRS) generally assisted in establishing and maintaining Serb control over certain areas. This support, however, was also used for murder, deportation and forcible transfer. And it is here that the *Perišić* and the *Van Anraat* cases differ. Dual use was explicitly excluded in the *Van*

Anraat case. Van Anraat's defence was that he sold these chemicals for the textile industry. The Court rejected his defence after having established that no such industry could be found in Iraq at the time of his trading. The Appeals Chamber in *Perisić*, on the other hand, could not exclude the possibility that the military and logistical aid he provided to the VRS was not also used in the general war effort. Here SD has added value in the sense that it will move decision-makers in the direction of an acquittal when it cannot be established that assistance was specifically directed to the commission of crimes.

It is indeed in general assistance or normal duty-cases where SD has surfaced in ICTY case law. Aside from *Perisić*, we can mention the *Blagojević & Jokić*-case and the *Stanisić & Simatović*-case. Jokic, Chief of Engineering in the VRS, whose subordinates dug graves and facilitated murder, argued that he merely performed his normal or routine duties in an organized structure; his acts were not "specifically directed" to assist the perpetration of a crime. His defence eventually was unsuccessful because the judges determined that he did more than his normal duties. Stanisić & Simatović two Serb intelligence officers who had been engaged in the formation, training, supporting and financing of Serb units *successfully* relied on SD. The majority of the Trial Chamber found that the acts were not specifically directed to the commission of murder, deportation, forcible transfer and persecution. It could not be excluded that the assistance was part of a lawful operation.

4. Fourth observation: I do not regard SD as an element of *actus reus*. SD, as applied by the ICTY in recent case-law, is essentially requiring assistance with a *purpose* to commit crimes. This is already in the term SD: assistance that is "*directed*" is deliberately or at least consciously steered towards criminal activities. One can infer *mens rea* from "direction". The *Tadić* Appeals Chamber may have categorized SD together with other *actus reus* elements; it is broader. Going back to my earlier point of putting into context SD and viewing it *vis-à-vis* JCE, SD is an overarching

qualification of culpable assistance that triggers A&A-liability (read the paragraphs in *Tadić* and you see what I mean) to contrast it to JCE. It is not just an *actus reus* element.

In this context it is interesting to look at the application of SD in *Perišić*. With regard to Perišić's assistance to personnel seconded to the VRS, the AC held that the assistance was not *tailored* to facilitate the commission of crimes. To me this essentially means that the Appeals Chamber concluded that there was lack of *mens rea*. The assistance had not been given with the purpose of facilitating the commission of crimes.

In general, also from a comparative law perspective, criminalizing complicity in situations of neutral activity comes with emphasizing the subjective or mental element. This makes sense. After all, causation is not the distinguishing feature between guilt and innocence. That the assistance caused the commission of crimes is impossible to establish because of the dual use. Causation will not point to culpability.

Recent ICTY case law aligns with this. In cases of general assistance or lawful activities, the subjective bar is emphasized or raised. With regard to A&A liability it goes from knowledge to purpose in *Perišić*. The insistence on *mens rea* can also be found in *Stanisić & Simatović* case, in the context of JCE. The majority found that with regard to JCE-liability there was no proof beyond reasonable doubt that the accused had shared the intent to commit crimes of deportation, persecution and murder. That the defendants "must have known" of these crimes was insufficient to convict them for these crimes, even under the broad JCE theory, JCE III.

5. My fifth and last point concerns the result of this case law. What to think of this development?

I do believe the ICTY has changed its position on A&A liability and that, also broader, its insistence on *mens rea* evidences a rigidity that is new. The question that arises, however, is: couldn't the Appeals Chamber have decided these cases by applying the ordinary *mens rea*-test for A&A: knowledge. If Perišić had *known* that his assistance facilitated the

commission of crimes by seconded personnel and he continued to provide this support nevertheless, doesn't that create a culpable link?

Apparently, SD - what to me is a veiled-purpose test - is more attractive in decreasing the risk of convictions for lawful activities. While some may argue that there is not much difference between purpose and knowledge - in some jurisdictions they both connote intent - purpose has a stronger volitional component and will make that conduct (from which we infer *mens rea*) is easier to identify as culpable assistance. The more tailored the assistance to the commission of crimes, the more "purposive" the attitude of the aider and abettor and the less likely that it concerns lawful activities.

How do we value this purpose-test for A&A? Should it be welcomed? This is where the real debate lies. On blogs, in scholarly articles, within Trial and Appeals Chambers, in and outside the ICTY the debate is about the desirability of what in essence is a purpose-test for A&A-liability. Reasoning from the principle of culpability, I am not opposed to a purpose-test. Over the years, the law on A&A liability has broadened to the extent that it put pressure on the principle of personal culpability. Also, the line between A&A and JCE liability has been blurred. Through the concept of SD the insistence on a specific link has returned to the theory of A&A. I would, however, not regard this development as a fundamental change to A&A-liability; its application is confined to cases of general assistance/neutral activity.

On the other hand, from a policy point of view, I can see why insisting on SD and requiring a purposive attitude for A&A, is undesirable. Certainly when it would apply to situations other than general assistance. For purposes of crime prevention, making sure that people like Frans van Anraat cannot go unpunished in supplying weapons and other material that fuels conflicts where crimes are committed, a lower *mens rea* threshold would be preferable.

So far these recent judgments have not had an impact on A&A liability outside the ICTY. The Appeals Chamber of the SCSL in the Charles Taylor case rejected the *Perišić*-ruling. It found that SD is not part of the law on A&A. This is interesting since the SCSL has committed itself to be guided

by ICTY law. According to the Appeals Chamber, SD and a purpose-test for A&A, has no basis in conventional and customary international law. I am not as critical as Kevin (Heller) on how the Chamber approached the question of customary law. What the Appeals Chamber seems to be saying is that domestic criminal law is divided, that there is no clear trend that points to the acceptance of a knowledge or a purpose-test. It reminded me of the survey on duress and murder charges (and the question whether duress can be a complete defence) in the *Erdemović* case, where the Appeals Chamber also determined that no clear rule emerged from national law on this issue. And it's true, there is no one rule: it depends on concerns of individual autonomy and crime prevention which test one applies. I for my part think a knowledge-test is most appropriate for A&A international crimes, it has a basis in written and customary international law and is the better test from a policy and "end of impunity"-point of view. It should, however, be a rigid test that establishes a culpable link between aider/abettor and the commission of a crime. After all, that is what A&A-liability is all about.

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