Complicity in international criminal law: A fragmented law in need of a new approach

By

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Abstract

Since the advent of the concept of complicity in international crimes in the years following the end of World War 2, the international jurisprudence has had difficulties in conclusively establishing the content of this concept. To that effect, the ICTY, ICTR, SCSL, STL, and the ICC’s jurisprudence contain complicated, unresolved issues that need to be addressed in order to safeguard coherence in ICL. An example of the results of these issues is the discrepancy between the outcome in the cases of Charles Taylor and of Momcilo Perisic where, for essentially the same conduct, the former was convicted and sentenced to 50 years in prison while the latter was acquitted of all charges. In the current situation of on-going legitimacy deficit of international criminal law, this problem must be tackled efficiently. To do so, in this paper, I identified the issues of complicity in ICL and tried to find solutions for them through a proposed definition of the concept of complicity which could be incorporated in the statutes of international criminal tribunals or in the international jurisprudence. According to my proposition, an aid, assistance, or support that has a substantial effect on the commission of the crime by the perpetrator given while the accomplice knew or was wilfully blind that the crime was being committed or that the perpetrator wanted to commit the crime and that, in the normal course of events, it was almost inevitable that the crime would be committed would be the new legal standard for complicity in ICL. I argue that this definition would settle many grave problems currently afflicting complicity such as the lack of legal certainty and the discrepancies in the outcomes among ICL judgments. I conclude the thesis by observing that, given that we are at the outset of a new world order, the international
community should take this opportunity to set out clearly the content of complicity, a concept which is likely to receive increasingly widespread application in the future.
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICL</td>
<td>International Criminal Law</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>IMT</td>
<td>International Military Tribunal (Nuremberg)</td>
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<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<tr>
<td>STL</td>
<td>Special Tribunal for Lebanon</td>
</tr>
<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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“Vice is a monster of so frightful a mien,
    As to be hated needs but to be seen;
Yet seen too oft, familiar with her face,
We first endure, then pity, then embrace”.

- Alexander Pope
Complicity in international criminal law: A fragmented law in need of a new approach

1. CHAPTER 1: INTRODUCTION

“Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men”.¹ This quotation encapsulates the importance of the notion of complicity² in international criminal law (ICL): large scale crimes require the assistance of many to succeed. But assistance can be given to perpetrators³ in many ways and in varying degrees. Of course, each person who paid taxes to the German government from 1933 to 1945 cannot be labelled an accomplice to the crimes perpetrated by the Nazi Regime. The question then becomes: in ICL, what type of assistance should render its giver criminally liable for the crime perpetrated by the principal? That is the question that this thesis will strive to answer.

Since the time when languages and societies were born, men and women have enlisted the help of others to carry out various types of activities. Whether it be to govern populations, construct buildings, plan and carry out military actions, humanity soon discovered that to realize any project of significant scope the assistance of others was almost always a *sine qua non* condition. History provides countless examples of this assertion. How can the Gizeh pyramids could have been been built without the relentless

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¹ United States of America v Hermann Wilhelm Göring (*The Trial of the German Major War Criminals*), Judgment of 1 October 1946 (1 October 1946) at 448 (International Military Tribunal (Nuremberg)), online: <http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf> [Göring].

² In this paper, I will use the expressions complicity, aiding and abetting liability, and accomplice liability interchangeably.

³ In this paper, I will use the words perpetrator and principal interchangeably.
toiling of the slaves? Could Christiany have been that successful without the apostles and all who wrote about and otherwise spread Jesus’ message after his death? What about the conquests and territorial extensions obtained by Alexander the Great or Julius Caesar, would they have been possible without the assistance of thousands to fulfill the ruler’s vision? Theoretically, each of these phenomena evinces a similar pattern: a handful of people has ideas and the rest furnishes assistance to fulfill them.

As indicated above, one activity in which stakeholders need to assist one another to achieve success is definitely war-making. Indeed, wars throughout history, especially since the end of the Middle Ages when the armies of the world became more and more organized, the military tactics more complicated, and the battles fought on distant battlefields, have included a strong component of collaboration among all involved to ensure the success of the military campaigns. These wars without a doubt also encompassed acts which are today labelled as war crimes, crimes against humanity, and even genocide. With the advent of industrialization, new technologies were invented that increased the fighting capacities of the belligerents so that casualties and destruction

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4 Estimates of their number vary from a few thousand to 100,000. See Mark Lehner, *The complete pyramids*, (New York: Thames and Hudson, 1997).

5 The Battle of the Plains of Abraham in Quebec City, Quebec, Canada which took place on 13 September 1759 between the French and the British armies is but one example of this evolution. Both countries had sent thousands of soldiers by boat to the New World, which was thousands of kilometres away from their shores. More specifically, for this particular battle, both armies were composed of around 4,500 servicemen. On the French side, this number was made up of 2,000 regular French soldiers and 2,500 militiamen and Amerindians. On the British side, the entire force was made of regular soldiers. See The National Battlefields Commission: Plains of Abraham, *Battle of the Plains of Abraham*, online: National Battlefields Commission <http://bataille.ccbn-nbc.gc.ca/en/bataille-des-plaines-d-abraham/les-deux-armees-face-a-face/les-forces-en-presence.php>; Guy Frégault, *Canada: The War of the Conquest*, (Toronto: Oxford University Press, 1969); Christopher Lloyd, *The capture of Quebec*, (London: Batsford, 1959).

6 Only one example of that reality is the genocide perpetrated against the Amerindians by the Europeans from their arrival in the Americas in the 1500’s. See Ward Churchill, *A little matter of genocide: holocaust and denial in the Americas, 1492 to the present*, (San Francisco, California: City Lights Books, 1997); Eric Robinson & Henry Bird Quinney, *The infested blanket: Canada's constitution, genocide of Indian nations*, (Winnipeg, Manitoba: Queenston House Publishers, 1985).
were always higher than those of the past war. In the same time, ideas such as evolutionism, racism, and nationalism emerged and became widely accepted by the political elite of countries with the most potent militaries. During the 20th century, these historical developments lead to two military conflicts of never-seen-before proportions in which the great collaboration inside and between the warring parties and the full force of the aforesaid ideas were deployed to achieve various war aims. In the First World War, many war crimes and crimes against humanity were committed, but few people were

7 I here refer to technological developments such as guns, machineguns, cannons, ammunitions and, subsequently, to tanks, fighter and bomber planes, artillery pieces, ballistic missiles, and the different types of atomic bombs. These always-more-efficient weapons of course wreaked ever-growing havoc on the other side. For example, in World War 2, the overall number of deaths was 60 million up from the 17 million dead of World War 1. Only in the Soviet Union, it is estimated that around 22 million died during the Second World War (“Viewpoint: 10 big myths about World War One debunked”, BBC News (25 February 2014), online: BBC <http://www.bbc.com/news/magazine-25776836>; Second World War, Fatalities, online: Second World War <http://secondworldwar.co.uk/index.php/fatalities>.

8 Among these societies were notably found that of Germany, France, and the United Kingdom. None of these countries can meaningfully claim that, in the 19th century, the beliefs associated with these ideas were not widespread among their society, including their elite. Ample evidence of the truth of that assertion is found notably in the fact that these powers vied to build empires through colonization and the populations subjected to this endeavour were not treated without discrimination in nearly all cases.

9 Are included in the list: The Rape of Belgium, the employment of poison gas, the Baralong Incidents, and, of course, the Armenian genocide. With regards to the Rape of Belgium, it designates the atrocities perpetrated by the German Army against civilians of some towns in central and Eastern Belgium in the first months of the outbreak of World War I. Around 6,000 Belgians lost their lives and 25,000 buildings in some 850 communities were destroyed in the incidents. See Larry Zuckerman, The rape of Belgium: the untold story of World War I, (New York: New York University Press, 2004). Concerning the employment of poison gas, it was used by all belligerents on the field despite being forbidden at the time by the article 23 paragraph 2 of the 1907 Hague Convention on Laws and Customs of War on Land: “In addition to the prohibitions provided by special Conventions, it is especially forbidden to employ poison or poisoned weapons” (Convention Respecting the Laws and Customs on the War on Land, 18 October 1907, (entered into force on 26 January 1910), online: Yale Law School <http://avalon.law.yale.edu/20th_century/hague04.asp>). See Ludwig Fritz Haber, The poisonous cloud: chemical warfare in the First World War, (New York: Oxford University Press, 1985). With respect to the Baralong Incidents, it concerns a British ship, The Baralong, which, in 1915, transgressed in two separate occasions the rules of war applicable at the time. In the first incident, the Baralong crew killed survivors of a German submarine they had just sunk although they were defenceless prisoners of war. In the other incident, the Baralong used the American flag, a country which was neutral at the time, to approach a German surfaced submarine and sink it. See Paul G. Halpern, A Naval History of World War I, (United States of America: Routledge, 1995). Finally, as to the Armenian genocide, it is estimated that one to one and a half million Armenians who lived in eastern and southeastern part of what is today Turkey died at the hands of the Ottoman Empire authorities during and in the years following the First World War. It is generally considered by historians as the first genocide of the 20th century. See Taner Akçam, A shameful act: the Armenian genocide and the question of Turkish responsibility, translated by Paul Bessemer (London, UK: Constable, 2007); Raymond H. Kévorkian, The Armenian genocide: a complete history, (New York: Palgrave Macmillan, 2011).
prosecuted as a result of their commission.\textsuperscript{10} The Second World War saw the real amalgamation between warfare and international crimes.\textsuperscript{11} On both sides, but much more significantly on the Axis side,\textsuperscript{12} international crimes were committed, including of course the Jewish genocide perpetrated by Germany.\textsuperscript{13} This conflict was the real awakening with regards to the importance of punishing all those directly and indirectly involved in atrocities during armed conflicts. The trials that took place after that war assessed the culpability of the alleged war criminals and their accomplices, but, as it will be shown in chapter two below, the fate of the latter was decided on legal principles that could have been more clearly defined. Thus, the incertitude continued to the next rounds of atrocities that shocked the conscience of the world, namely the interstate and civil wars occurring when Yugoslavia disintegrated in 1990’s\textsuperscript{14} and the genocide in Rwanda in 1994.\textsuperscript{15} In each

\textsuperscript{10} Among the trials that were held, there are the Turkish Court Martials of 1919-1920 for the alleged Ottoman war criminals and the Leipzig Trials for the alleged German war criminals, but the results of these proceedings were not satisfactory for the stakeholders. More often than not, the accuseds were either acquitted or received light sentences given the facts disclosed before the court. See Vahakn N. Dadrian, \textit{Judgment at Istanbul: the Armenian genocide trials}, (New York: Berghahn Books, 2011); Claud Mullins, \textit{The Leipzig trials: an account of the war criminals’ trials and a study of German mentality}, (London: H. F. & G. Witherby, 1921).

\textsuperscript{11} Listing all these crimes here would be out of proportion given the substance of this thesis, but only taking into account events such as the Jewish genocide, the atrocities committed by the German killing units (\textit{einsatzgruppen}) in the Soviet Union, the killings and other atrocities committed by Japan against China from 1937 onwards, and the Allied bombing of the German city of Dresden in 1945 makes it evident that World War 2 is by far the most international-crime-ridden military conflicts of modern history, if not of all times.

\textsuperscript{12} Most of the crimes were committed by Germany (notably the Jewish genocide, crime of aggression against many European countries, killing of millions of Soviet prisoners of war, the setting up of the concentration camps, the killings in the Soviet Union by the \textit{Einsatzgruppen}) and by Japan (notably crime of aggression against many countries in Asia and the United States, the killings and mistreatment of prisoners of war, the Nanking Massacre in which hundreds of thousands of civilians lost their lives). The Allies have also committed crimes, but they cannot be compared in scale and quality to the above.

\textsuperscript{13} As is well known, through slave labour outside and in the concentration camps, the killings perpetrated by the \textit{Einsatzgruppen} in the Soviet Union, and the gas chambers and other means of killing established in the various death camps, six million Jews lost their lives at the hands of Nazi Germany during World War 2. See Doris Bergen, \textit{War & Genocide: A Concise History of the Holocaust}, (Lanham, Maryland: Rowman & Littlefield, 2003).

\textsuperscript{14} From 1991 to 2001, with the collapse of the Soviet Union and the resurgence of nationalism in the Balkans, a series of military conflicts erupted in what was then called Yugoslavia leading to the independence of countries which had been hitherto part of the said country. In the course of these conflicts, many international crimes were committed and the UNSC put in place the International Criminal Tribunal
case, the tribunals tried to deal fairly and reasonably with the accomplices, but, as chapter two will illustrate, the jurisprudence handed down was not completely free from ambiguity. In short, despite the laudable efforts made by the international tribunals since 1945, even to this day, the concept of complicity in ICL is still fragmented and lacking coherence. In this context, this research will propose a refurbished definition of complicity applicable throughout ICL aimed at putting values of clarity, fairness for the accuseds, and deterrence at the forefront.

The historical perspective being laid down, let us now turn to the importance of the concept of complicity in today ICL. Many factors account for the great significance of complicity in today international criminal justice system. First, the accomplice liability is important because international crimes, given their magnitude, are often committed by groups of people which are likely to need and receive aid and support to ensure maximum efficiency in their operations. 16 This was the case in Rwanda with the

for the former Yugoslavia to prosecute those associated with their commission. As a result of these wars, Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Kosovo, Montenegro, and Macedonia emerged as independent countries. See Alastair Finlan, The Collapse of Yugoslavia 1991–1999, (Oxford, UK: Osprey, 2004).

15 From April to July 1994, following the death of the country’s president, Juvenal Habyarimana, on 6 April 1994, the Hutu-extremists-composed Rwandan government, along with the civilian militia Interhamwe, proceeded to kill 800,000 to 1,000,000 of their fellow countrymen, mostly Tutsis and moderate Hutus. During these three months, the world community did not take steps to halt the killings despite being advised of the course of events unfolding in Rwanda. See Linda Melvern, Conspiracy to murder: The Rwandan genocide, revised ed (London, New York: Verso, 2006).

16 This idea of international criminality as being mostly committed by groups is put forward in Prosecutor v Dusko Tadic, IT-94-1-A, Appeal Judgment (15 July 1999) at para 191 (International Criminal Tribunal for the former Yugoslavia), online: ICTY website <http://www.icty.org/x/cases/tadic/acjug/en/tadic-aj990715e.pdf> [Tadic] where the court said that “[m]ost of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design”; Also, Gerhard Werle points out that “[t]ypically, a large number of persons cooperate in committing crimes under international law. This generally occurs by way of a more or less established network, which is often part of the state or the military, but is in any case organized” (Gerhard Werle, Principles of International Criminal Law, 2d ed (West Nyack, NY: Cambridge University Press, 2009) at 166).
Interahamwe militias, with the Bosnian Serb Army in Bosnia-Herzegovina, with the SS manning the Nazi death camps in Poland during the Second World War, and with the Einsatzgruppen operating in Soviet Union during the same period. The aid provided inevitably played a role in the extent and brutality of the atrocities perpetrated by these entities so that it is logical to think that, without the support these criminal groups received, the savagery of the crimes committed in these four situations would have been

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17 In Prosecutor v Theoneste Bagosora, ICTR-98-41-T, Judgment (18 December 2008) (International Criminal Tribunal for Rwanda), online: ICTR <http://www.unictr.org/sites/unictr.org/files/case-documents/ictr-98-41/trial-j judgements/en/081218.pdf>, the court details the assistance given by and the collaboration existing between the Civil Defence Force, of which was part notably the Interahamwe, and the Rwandan government and Rwandan Armed Forces before and during the Rwandan civil war, see notably paras 454-495.

18 In Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment, [2007] ICJ Rep 43 [Bosnia v Serbia], the International Court of Justice describes how Serbia and Montenegro and its army provided financial and military assistance to the Bosnian Serbs and notes at paragraph 241 that "had it [Serbia and Montenegro] withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities".

19 Without the delivery of gas, as described in Trial of Bruno Tesch and Two Others (Zyklon B Case), Case no. 9, Judgment (8 March 1946) (British Military Court, Hamburg), online: <http://www.loc.gov/rr/frd/Military_Law/pdf/Law- Reports_Vol-1.pdf> [Zyklon B], the slaughter in the death camps might not have reached such high proportions.

20 The Einsatzgruppen were military and police squads operating from June 1941 onwards within territories conquered by the German Army in the Soviet Union. Their role consisted of eradicating all opposition, potential and actual, present and future, to the establishment of the German authority on these lands and all who the Nazi leadership deemed racially inferior, notably Jews, “asiatic inferiors”, and Gypsies. From 1941 to 1945, approximately two million people died at the hands of this organization. To reach this figure, the Einsatzgruppen were aided notably by the German Army and Romania who furnished troops to conduct the operations and handed down Jews for extermination respectively. See United States of America v Otto Ohlendorf (The einsatzgruppen case), Case No 9, Judgment, (April 1948) at 413-414, 429-430 (United States Military Tribunal Nuremberg), online: <http://werle.rewi.hu-berlin.de/Einsatzgruppen.pdf> [Einsatzgruppen]; See also Göring, supra note 1, where the court said at page 465 “[n]or did these special units [the Einsatzgruppen] operate completely independantly of the German armed forces. There is clear evidence that leaders of the Einsatzgruppen obtained the cooperation of the army commanders. In one case the relations between an Einsatzgruppe and the military authorities was described at the being as being “very close, almost cordial”; in another case the smoothness of an Einsatzcommando’s operation was attributed to the “understanding of this procedure” shown by the Army authorities". In that case, the IMT also determined at page 466 that “[e]vidence has also been given of the evacuation of 110,000 Jews from part of R[omania for “liquidation”]; See also Interview of Heinrich Wulfes, Fegelein SS Cavalerie Brigade in Byelorussia, shown during the documentary Einsatzgruppen: The Death Brigades Part 1 [nd], online: Youtube <http://www.youtube.com/watch?v=S9_L4xii0wRY> in which Mr. Wulfes explains that while he was operating in the Soviet Union in July 1941, the German Army was helping in the rounding up of Jews and even hunting them on the front.
significantly diminished and probably halted earlier.\textsuperscript{21} Second, the current world order is one marked by a transition from a unipolar world dominated by the United States of America to a multipolar one with the rise of China, India, and other heavily populated countries.\textsuperscript{22} These old and new powers will compete to augment their capacities in every field to obtain a better position than their rival. This quest for power will inevitably include gaining access to resources from the African Continent where they remain largely unharvested, but sometimes in the hands of armed groups or governments with a poor

\textsuperscript{21} Although counterfactual analyses are hypothetical, and thus debatable, it is logical to think that, without their machetes and axes, the \textit{Interahamwe} militias would have killed at a lesser rate, that, without Serbian money and equipment, the Bosnian Serb authorities would have had more difficulty in realizing their ethnic cleansing project, that, without the Zyklon B, the SS would have killed inmates at lesser rate, and that, without the gas vans and support from the \textit{Wehrmacht}, the \textit{Einsatzgruppen} would not have killed as many people as they did.

\textsuperscript{22} It is undeniable that heavily populated countries such as Russia, China, India, Brazil, and others, are growing stronger on almost every aspect since the beginning of the 2000’s. In effect, a working paper submitted to the European Central Bank in December 2013 noted that “[l]arge emerging countries have become a powerhouse of the world economy in the last two decades. The BRIC (Brazil, Russia, India and China) account for about 25\% of the world economy, a quarter of world’s land and more than 40\% of the world’s population. Manufacturing powerhouses such as China and India, in particular, have reshaped the world trade. The world export share of China and India has increased dramatically between 1970 and 2012, and over one tenth of all world exports are now coming from China. This has correspondingly changed the global allocation of income. The weight of China and India in the world GDP increased from little above 4 per cent in 1980 to over 20 per cent in aggregate in 2012. The boom in emerging markets has been particularly visible starting in particular from the late 1990’s, in the aftermath of the Asian Crisis, as visible in the acceleration of the export share. Trade between the world’s two largest economies, the US and China, has also boomed with the US now importing goods for close to 500 billions US dollars from China each year, or about 3\% of its GDP” (Livio Stracca, “The Rise of China and India: Blessing or Curse for the Advanced Countries”, at 3, Working Papers Series, No. 1620 December 2013, online: <http://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1620.pdf>). In the same vein, in June 2010, a report from the Canadian Senate declared that “[t]he rise of China, India and Russia is a key element in how quickly and profoundly they have changed as well have been changed by the transformations evident in the new global economy. Indeed, as their economies have embraced the opportunities associated with global value chains, they have experienced almost unprecedented economic growth. For instance, their total share of world GDP has grown from 13.17\% in 2000 to 19.47\% in 2008, an increase of 45.67\%” (Canadian Senate, Standing Senate Committee on Foreign Affairs and International Trade, \textit{A workplan for Canada in the new global economy: Responding to the rise of Russia, India and China}, (June 2010) at 33, online: Parliament of Canada <http://www.parl.gc.ca/Content/SEN/Committee/403/fore/rep/rep07jun10-e.pdf>). Also, in 2014, Russia, China, and India have been ranked second, third, and fourth in the world respectively in a chart evaluating the military resources (personel, tanks, aircrafts, and so on) for each country (Amanda Macias, Jeremy Bender & Skye Gould, “The 35 Most Powerful Militaries In The World”, \textit{Business Insider} (10 July 2014), online: Business Insider <http://www.businessinsider.com/35-most-powerful-militaries-in-the-world-2014-7>). As far as the economy is concerned, the American news organization CNN ranked China, Brazil, Russia, and India as the second, seventh, ninth, and tenth largest economies in the world respectively for the year 2014 (“World’s largest economies”, \textit{CNN}, online: CNN <http://money.cnn.com/news/economy/world_economies_gdp/>).
human rights record.\textsuperscript{23} The rules regarding complicity in international crimes take a tremendous importance in this race for raw materials to make sure so that none of these powers become complicit in these groups or governments’ excesses. Third, with the advent of democratic ideas in many countries governed by authoritarian regimes, civil wars have increased chances of breaking out between these new democratic movements and old the status quo forces.\textsuperscript{24} The regulation of the assistance that will be awarded to the belligerents in these wars must be tailored to ensure that the aid does not flow to organizations with criminal activities and aims. In this setting, punishing and deterring complicity with a coherent, principled, and predictable approach becomes a priority.

The ICL notion of complicity is also important because of the question of the universal jurisdiction of states on ICL crimes. Indeed, irrespective of any factors connecting the state and the crime, under customary international law, states are entitled to assert jurisdiction over war crimes, crimes against humanity, genocide, and torture as those crimes are defined by customary international law.\textsuperscript{25} The persons suspected of these crimes can therefore be prosecuted at national level.\textsuperscript{26} In this context, the interpretation of

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\textsuperscript{24} Entities such as Ukraine, Syria, Hong Kong, and Thailand are telling examples of that reality.


\textsuperscript{26} This has been done for the first and only time so far in Canada in Munyaneza v R, 2014 QCCA 906, Dalphond, Hilton, Doyon JA, leave to appeal to the SCC refused, 35993 (18 December 2014) [Munyaneza] and is currently being done in Germany in the case of Oskar Groening, who faces 300,000 charges of having aided murder in connection with the deaths of Hungarian Jews killed in Auschwitz in 1944. This
concepts like complicity by international criminal courts will impact on the national trials grappling with the same concepts. The importance of international *dicta* is even stronger in the states in which ICL is, according to their national law, automatically integrated to their domestic criminal law. What’s more, states must take into account the wording of the complicity provision in international criminal statutes and their interpretation by international criminal tribunals to obtain the application of the *non bis in idem* principle in favor of their nationals suspected of being accomplice in international crimes. In effect, if the state prosecutes an accused with a complicity provision incongruous with ICL, then it is not impossible, in appropriate circumstances, that the accused be tried again for the same conduct before an international criminal tribunal without the possibility of raising the *non bis in idem* defence.

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27 To that effect, Cryer et al., *supra* note 25, underlined that “[i]n [s]tates which have incorporated international crimes into domestic law, national courts will normally be under an obligation to interpret the domestic provisions in accordance with the interpretation of equivalent international provisions, including that made by international criminal tribunals” (Cryer et al., *supra* note 25 at 82-83).

28 *Ibid* at 79.

29 This principle is, generally speaking, to the effect that if a person suspected of international crimes has been tried impartially and independently in a fair trial at the national level, he cannot be retried for the same conduct by international criminal tribunals. More or less to the same effect is the complementarity principle embedded in article 17 of the *Rome Statute of the International Criminal Court*, 17 July 1998, UNTS vol. 2187 no. 38544, (entered into force on 1 July 2002), online: International Criminal Court <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AE69-4757-ABE7-9C7CF02886/283503/RomeStatuteEng1.pdf> [Rome Statute] which will be discussed at the beginning of the section dealing with the ICC’s jurisprudence. In that regard, it is interesting to note that the Canadian *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, the statute implementing the *Rome Statute*, *supra* note 29, in Canadian legislation, does not include complicity as a mode of liability for the offences described in the act. Also worth noting, in Munyaneza, *supra* note 26, the accused was charged of the offences only as a perpetrator.
In view of the foregoing, complicity has been, is, and will remain a very important mode of liability in this field of law. But what is exactly “complicity”? The Oxford English Dictionary defines complicity as “[t]he fact or condition of being involved with others in an activity that is unlawful or morally wrong” and cites synonyms such as involvement, collaboration, and abetment. From a criminal law perspective, this definition is too large to be useful and vindicates the need for a deeper analysis. Among the main issues underlying this mode of liability in ICL, two will receive increased attention in the context of this research: 1) the absence of a coherent and clear approach to complicity, and 2) the culpable link requirement.

As to the first idea, the paper will show that not only are there disagreements among benches of the same court and between the different international tribunals with regards to the elements of the accomplice liability, but disputes also exist concerning the prescriptions of customary international law. On that latter point, the same customary judgments are interpreted by the various courts as yielding different legal elements which in turn serve to justify their different juridical reasoning. In other words, the same precedents have been held to be saying different things by subsequent courts. Even at the International Criminal Court (ICC), the nascent jurisprudence interpreting the provisions of the Rome Statute has not yet managed to be exempt of uncertainties and controversies. Even more disquieting are the conflicting outcomes between two recent

32 *Ibid*.
33 *Rome Statute*, *supra* note 29.
ICL judgments: Prosecutor v Momcilo Perisic\textsuperscript{34} and Prosecutor v Charles Ghankay Taylor\textsuperscript{35}. In the former, taking place before the International Criminal Tribunal for the former Yugoslavia (ICTY), the accused, Momcilo Perisic, chief of the general staff of the Yugoslav army from 1993 to 1998, was charged with war crimes and crimes against humanity by reason of the support provided by the Yugoslav army to the Serb armies in Croatia and Bosnia and Herzegovina between 1993 and 1995. More specifically, it was proved that he oversaw the Yugoslav army’s provision of extensive assistance to these armies in terms notably of paid military officers, ammunition of all sorts, fuel, spare parts, training, and technical assistance while being aware of the crimes committed by the aided entities. On 6 September 2011, the ICTY Trial Chamber found him guilty of aiding and abetting the crimes perpetrated by these entities and sentenced him to 27 years in prison;\textsuperscript{36} he appealed the ruling. The ICTY Appeals Chamber reversed the trial judgment and acquitted him of all charges on the grounds that the aid furnished, although provided knowingly, was not specifically directed towards the commission of the crimes of the aided entities.\textsuperscript{37} In the latter, held before the Special Court for Sierra Leone (SCSL), the accused, Charles Ghankay Taylor, president of Liberia from 1997 to 2003, was charged with crimes against humanity and violations of international humanitarian law in virtue of the aid provided by Liberia from 1996 to 2002 notably to the Revolutionary United Front (RUF) in the civil war the RUF was waging against the Sierra Leonean government in

\textsuperscript{34} Prosecutor v Momcilo Perisic, IT-04-81-A, Appeal Judgment (28 February 2013) (International Criminal Tribunal for the former Yugoslavia), online: ICTY <http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf> [Perisic].

\textsuperscript{35} Prosecutor v Charles Ghankay Taylor, SCSL-03-01-A, Appeal Judgment (26 September 2013) (Special Court for Sierra Leone), online: SCSL <http://www.scs-l.org/LinkClick.aspx?fileticket=t14fjFP4jJ8%3d&tabid=107> [Taylor].


\textsuperscript{37} Supra note 34.
Sierra Leone. More specifically, the accused, through his organization, provided, *inter alia*, weapons, ammunition, tactical assistance, army personnel and soldiers, financial support, communication devices, logistical support, and military training to the RUF while being aware of the crimes committed by the aided entity. On 26 April 2012, the accused was found guilty notably of having aided and abetted the RUF’s crimes and was sentenced to 50 years in prison;\(^{38}\) he appealed the ruling. On 26 September 2013, that verdict and the sentence were affirmed by the SCSL Appeals Chamber, which specifically stated that the aiding and abetting liability did not require the assistance to be specifically directed towards the commission of the crime.\(^{39}\) From a legal perspective, these two cases were the same: a person knowingly furnishes assistance to entities that commit crimes on a distant battlefield. Yet, in one case, the accused is acquitted of all charges while, in the other, the accused is sentenced to 50 years in prison.

This reality highlights the need to rethink the notion of complicity in ICL which involves a reflection about the culpable link requirement, the second idea. Indeed, the culpable link refers the relation that needs to exist between the acts of the aider and the perpetrator’s\(^{40}\) crime to render the assistance given criminal. Establishing the presence of that link involves asking questions such as: what are the elements that must be found in the aider’s behaviour that would render his acts criminal instead of being simply morally condemnable? Should these elements put the emphasis on the objective or subjective elements of the mode of liability? Should the criminal link be provided for only through

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\(^{39}\) Supra note 35.
elements on which the accused has complete control? The whole point is to be able to draw the line somewhere that is fair and reasonable for the accused while ensuring that the selected threshold furthers values of deterrence and prevention. In some situations, the culpable link will be obvious and self-evident and will not require lengthy consideration as in the case of the provider of weapons to blood-thirsty militias with the intent of allowing them to commit massacres while being aware of their murderous aims. Other cases, like that of the general, away from the battlefields, furnishing troops and equipment to a group with lawful and unlawful activities without intending to further the atrocities, but knowing that the help might be used in that fashion, will require a more careful analysis. In both cases, the culpable link will be used to assess whether the assistance is worthy of criminal punishment. In short, thinking about the culpable link requirement is identifying what legal elements must be included in the definition of complicity in ICL so that a maximum number of issues present in the same concept are efficiently tackled.

The connecting thread running through the research will be that the concept of complicity needs to be clarified and a robust and principled approach should be adopted to do so. The philosophical underpinnings of the proposed notion should inform the definition of the legal elements forming the accomplice liability. In view of the foregoing, this paper will describe and criticize the various definitions of complicity currently put forward in ICL and will articulate a coherent approach that addresses the concerns and shortcomings identified. To achieve this objective, the sources of article 38 of the Statute of the
International Court of Justice\textsuperscript{41} are important. Indeed, as pointed out by authors Robert Cryer et al. “international criminal law is a subset of international law, its sources are those of international law. These are usually considered to be enumerated in Article 38(1)(a)-(d) of the Statute of the International Court of Justice (…)
\textsuperscript{42} . These sources are 1) the international conventions, 2) the international custom, 3) the general principles of law recognized by civilized nations\textsuperscript{43}, and 4) judicial decisions and the teachings of the most qualified publicists of the various nations.\textsuperscript{44} In this thesis, I will review the content of each source, except the third one,\textsuperscript{45} with respect to their articulation of the concept of complicity. The second chapter will discuss the content of the international conventions, the international custom, and the judicial decisions while the third chapter will explore the teachings of the most qualified publicists of the various nations. Although it might have been interesting to delve into the content of the general principles of law recognized by civilized nations in relation to the concept of complicity in ICL, I do not think that, in the context of this thesis, the efforts to do so would be worthwhile. In effect, the long and painstaking inquiry in national legislations needed to discover these principles would probably only reveal principles already included in the ICL concept of complicity such as the principle that complicity requires a contribution to the commission of the crime with some form of mental element connecting the accomplice to the perpetrator’s crime. As

\textsuperscript{41} \textit{Statute of the International Court of Justice}. 26 June 1945, CAN TS 1945 No 7 (annexed to the United Nations Charter), online: International Court of Justice \textlangle http://www.icj-cij.org/documents/index.php?p1=4&p2=1&p3=0#Chapter14 \textrangle [ICJ Statute].

\textsuperscript{42} Supra note 25 at 8.

\textsuperscript{43} The expression “recognized by civilized nations” has practically no effect in modern international law. It is only found in the article because the provision was copied from the \textit{Statute of the Permanent Court of International Justice}, 16 December 1920, online: Refworld \textlangle http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=40421d5e4\rangle (the predecessor of the current ICJ Statute) that was established in 1920 at the outset of the Society of Nations’ era. Today, the civilized nations are at least all those that are member of the United Nations (Jean-Maurice Arbour & Geneviève Parent, \textit{Droit International Public}, 5th ed, (Cowansville : Yvon Blais, 2006) at 137-138).

\textsuperscript{44} ICJ Statute, supra note 41, art 38(1).
suggested by Arbour and Pelletier, this source of law is more relevant in the domains of contracts law, international liability, and principles governing the administration of justice.\textsuperscript{46} Also, generally speaking, “[i]n relation to criminal law, general principles of law are not ideal. After all, they are, by their nature, general, and thus tend to be of last resort”.\textsuperscript{47}

In view of the above, this thesis will be separated in three chapters. In the second chapter, I will elucidate the meaning and content ascribed to the accomplice liability by the customary international law and by the contemporary international criminal tribunals. Therefore, I will thoroughly review the content of the jurisprudence of the post-WW2-era tribunals, of the ICTY, of the International Criminal Tribunal for Rwanda (ICTR), of the SCSL, of the Special Tribunal for Lebanon (STL), and of the ICC. This chapter will not only be descriptive; I will criticize the legal elements of the definition of complicity given by each tribunal and pinpoint and analyze the issues and controversies arising out of the dicta of the courts. In the third chapter, I will start by laying out and commenting the views of some important institutions about their opinion on complicity. Then, I will detail the positions adopted by the main authors in the field about complicity. After, I intend to describe and analyze the solutions brought forward by some authors to the underlying issues and problems plaguing complicity. I will explain why their solutions, although thoughtful and efficient to tackle some particular problems in the law of complicity, do not constitute the appropriate approach to complicity in ICL. In the fourth chapter, I will

\textsuperscript{46} Supra note 43 at 141; As examples of general principles of law recognized by civilized nations, they cite the principles of good faith, of natural justice, of the complete compensation of damages, of due diligence, of the force majeure and the fortuitous event, of the estoppel, and of the prohibition on the abuse of rights.\textsuperscript{47} Cryer et al., supra note 25 at 11.
provide the reader with my analysis of the concept of complicity in ICL, its controversies and philosophical underpinnings. In so doing, I will argue for a reorientation on how the law of complicity should be interpreted and applied throughout the whole system of ICL. In choosing this particular format, I am aware that the route taken is one seldom adopted by articles, books, and other publications in the field. In spite of that, this structure is appropriate because it is particularly apt at doing what this thesis aims to achieve: 1) explain and analyze the current state of the law, 2) expose and discuss the academic literature examining the issues identified, 3) argue for a renovated approach addressing efficiently the same. A possible objection to this approach is that it is compartmentalized and that a more appropriate format would be to organize the thesis around the core concepts rather than the sources of law. I reply that the selected format is logical, linear, easy to understand, and allows the reader to concentrate on the theory being advanced. What’s more, it is not because the content of all sources of law are not discussed under core concepts or governing questions that these concepts and questions were not pondered about. To the contrary, chapter four is a synthesis of the analysis elaborated in the second and third chapters and integrates the pertinent ideas discussed.
2. CHAPTER 2: THE LAW ON COMPLICITY IN ICL

2.1. COMPLICITY IN CUSTOMARY INTERNATIONAL LAW

2.1.1. Preliminary observations

This section will deal with the customary foundation of complicity in ICL which dates back to the years immediately following the end of WW2. Understanding the customary rule on complicity is paramount since it is the socle on which the modern international tribunals base their legal interpretation and analysis. To that effect, one of the leading international law books in Canada declares, “[t]he international custom constitutes the common legal foundation [fond commun du droit] and towards which the research must be oriented when the treaties in force do not afford a solution to a particular problem”.48

In other words, the international custom is to international law what the jurisprudence of the courts is to the common law and the civil code to the civil law. It is the basic foundation of the whole legal structure. The validity of this reasoning in ICL has been demonstrated in many judicial decisions notably in Göring49 and in the Einsatzgruppen50 case. In the former case, speaking of the Convention Respecting the Laws and Customs of War on Land51 signed in 1907, the International Military Tribunal (IMT) said “[t]his provision imposed obligations on Germany not only because Germany signed the Hague Convention on Land Warfare, but because it had become international law binding on all nations”.52 In the latter case, regarding the legal maxim nullem crimen sine lege, nulla peona sine lege invoked by the accuseds, the court said:

48 Arbour & Parent, supra note 43 at 65 [translated by author].
49 Supra note 1.
50 Supra note 20.
51 Supra note 9.
52 Supra note 1 at 458.
But it must be understood that the “lex” referred to is not restricted to statutory law. Law does, in fact, come into being as the result of formal written enactment and thus we have codes, treaties, conventions, and the like, but it may also develop effectively through custom and usage and through the application of common law. The latter methods are no less binding than the former.\(^{53}\)

In the same vein, the crime of genocide was created as a principle of customary international law by the United Nations General Assembly (UNGA) in resolution 96 (I)\(^{54}\) which says:

The General Assembly, therefore, [a]ffirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable.\(^{55}\)

Mindful of the above, it is appropriate to set out what is “customary international law”. Section 38 paragraph 1 subparagh b of the *Statute of the International Court of Justice*\(^{56}\) reads:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

b. *international custom, as evidence of a general practice accepted as law*.\(^{57}\)

Section 38(1)b. contains two elements: 1) a general practice (the objective element), 2) which is accepted as being the law (the subjective element). The practice can notably be constituted of any state acts with an international scope such as bilateral and multilateral treaties, national legislation and acts, and general practice and judicial decisions of international organizations.\(^{58}\) Generally speaking, in ICL, customary international law has been adapted by the modern courts as referring to the *dicta* expounded by courts of the post-WW2-era and to the prescriptions found in some treaties and other important

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\(^{53}\) *Supra* note 20 at 457 [emphasis added].

\(^{54}\) *The Crime of Genocide*, GA Res 96 (I), UNGAOR, 5\(^{th}\) Plenary Meeting, (1946) 189.

\(^{55}\) *Ibid*.

\(^{56}\) *Supra* note 41.

\(^{57}\) *Ibid*, art 38(1)b.

international documents. In conformity with that approach, the goal of this section will be to dig down methodically into the post-WW2-era courts (IMT judgment and other post-WW2-era court judgments), international treaties, and other international documents’ interpretation of the concept of complicity and, then, to draw the legal portrait arising out of all these legal sources. This exercise will ultimately lead to a general assessment of the customary international law on complicity in international crimes as of 2015.

2.1.2. Jurisprudence of the post-WW2-era tribunals

2.1.2.1. Before WW2

Complicity in international crimes was not addressed by international instruments aimed at punishing war criminals until the end of the Second World War. Before 1945, the only mode of liability envisaged by these instruments was that of the actual perpetrator of the crime as shown by article 228 of the 1919 Treaty of Versailles which reads:

228. The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.


60 Ibid, art 228 [emphasis added]; This article was never applied given the firm opposition of the then-German government which argued that the alleged criminals were to be tried by a so-called Imperial Tribunal located in the German city of Leipzig. The trials that took place before this tribunal all generated either acquittals or quite light sentences in view of the evidence adduced in court. It was said afterwards that these judgments showed the limits of national jurisdictions in their ability to effectively try international crimes committed by their nationals. Nevertheless, the Leipzig Imperial Tribunal experience was mentioned as a precedent by the American Chief Prosecutor, Mr. Justice Robert Jackson, at the
It should also be noted that article 226 of the Treaty of Sèvres\(^61\) signed on 10 August 1920 by Turkey and the Allied Powers provided for the punishment of Turkish war criminals in the very same terms as article 228 of the Treaty of Versailles\(^62\).

2.1.2.2. After WW2

As enunciated above, the concept of complicity in international crimes dates back to the years after WW2. To better understand the court decisions of this era, it is apposite to briefly explain the historical context prevailing immediately after WW2. During the war, countless international crimes of gigantic proportions were committed by the Axis Powers, mainly Germany. Apart from the Jewish Holocaust perpetrated in the concentration and the death camps,\(^63\) in the territories east of Germany, notably in Poland and the Soviet Union, not only did Germany attempt the complete annihilation of the Jews through mass shootings, but also tried to eradicate other ethnic groups such as the Gypsies and the Krimchaks and other groups of people like the insane and incurably ill, “asiatic inferiors”, “asocial people, politically tainted persons, and racially and mentally

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\(^61\) The Peace Treaty of Sèvres, 10 August 1920, (replaced in 1923 by the Treaty of Lausanne), online: <http://spol.unica.it/didattica/Melis/Storia%20e%20Istituzioni%20della%20Turchia%20contemporanea/The%20Peace%20Treaty%20of%20S%C3%A8vres.pdf>.

\(^62\) Supra note 59.

\(^63\) According to the United States Holocaust Memorial Museum, six million Jews perished in the Holocaust, see United States Holocaust Memorial Museum, “What Was the Holocaust”, online: United States Holocaust Memorial Museum <http://www.ushmm.org/learn/introduction-to-the-holocaust>; The same number is arrived at by the IMT. Only at the Auschwitz death camp, the camp commander, Rudolf Hoess, testifying before the IMT, estimated that from 1 May 1940 to 1 December 1943 2.5 million persons were exterminated and 500,000 more died from disease and starvation, see Göring, supra note 1 at 466.
inferior elements”, and communist functionaries. These atrocities combined with other various inhumane abuses committed by Germany all throughout Europe during the conflict such as the liquidation of the Polish intelligentsia, the extermination and ill-treatment of millions of Soviet prisoners of war, the wipping out of the French village of Oradour-sur-Glane made the implementation of accountability measures at the end of the war inevitable. Thus, while these massacres were being committed in the field, the decision was taken among the Allied leaders that the perpetrators be tried for these abuses. The reflection lead to the 1943 Moscow Declaration in which the allies separated German war criminals in two categories: 1) those whose offences have no particular geographical locations, which were to be punished “by joint decision of the government of the Allies”, 2) those who committed offences at particular locations, which were to be “brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged”. For the reasons elaborated below, the jurisprudence yielded by the second category is far more important for our purposes. Consequently, before analyzing

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64 This homicidal plan was carried out by the Einsatzgruppen from 1941 onwards and the total of deaths arising out of that endeavour was estimated in Einsatzgruppen, supra note 20 at 430 at around two million people.
65 In Göring, supra note 1 at 456, the IMT quotes the diary of the defendant Hans Frank, who was made Governor General of the Occupied Polish Territory on 12 October 1939, as saying “taking advantage of the focusing of the world interest on the Western Front, by wholesale liquidation of thousands of Poles, first leading representatives of the Polish intelligentsia”.
66 The United States Holocaust Memorial Museum calculates that about 57 percent of the Soviet prisoners of war taken by Germany during the war were killed which represents 3.3 million people, see United States Holocaust Memorial Museum, “Nazi Persecution of Soviet Prisoners of War”, online United States Holocaust Memorial Museum <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007178>.
67 In the 1983 trial judgment of Heinz Barth, a SS man who took part in the events at this French village on 10 June 1944 as a platoon leader, the court considered the 642 deaths flowing from the massacre as a fact, the whole in accordance with a judgment rendered by a French tribunal in 1953, see Heinz Barth’s Trial Judgment (1983), BS-11/83211-24/82, 1009a, Berlin City Court (East Berlin).
68 The Moscow Conference: October 1943, 30 October 1943, (United States, United Kingdom, Soviet Union, China), online: Yale Law School Library <http://avalon.law.yale.edu/wwii/moscow.asp> [Moscow Declaration].
69 Ibid.
70 Ibid.
the international treaties and other instruments, I will first review the IMT judgment and the judgments issued by other post-WW2-era courts.

2.1.2.2.1. The International Military Tribunal

As for those whose offences had no particular geographic location, they were tried according to Charter of the International Military Tribunal\(^{71}\), which had been annexed to the London Agreement of August 8\(^{th}\) 1945\(^{72}\). Article 6 of the Charter\(^{73}\) states the crimes on which the IMT will have jurisdiction:

<table>
<thead>
<tr>
<th>The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Crimes against peace: (…).</td>
</tr>
<tr>
<td>(b) War crimes: (…).</td>
</tr>
<tr>
<td>(c) Crimes against humanity: (…).</td>
</tr>
</tbody>
</table>

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.\(^{74}\)

This provision has first to be noted because, according to the IMT, the law of Charter\(^{75}\) “is the expression of International Law existing at the time of its creation”.\(^{76}\) This statement is applicable only to the crimes against peace (article 6(a)) and to the war

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\(^{71}\) Charter of the International Military Tribunal, (annexed to the London Agreement of August 8\(^{th}\) 1945), online: Yale Law School Library <http://avalon.law.yale.edu/imt/imtconst.asp> [Charter].

\(^{72}\) London Agreement of August 8\(^{th}\) 1945, 8 August 1945, (United States, French Republic, United Kingdom, Soviet Union), online: Yale Law School Library < http://avalon.law.yale.edu/imt/imtchart.asp >.

\(^{73}\) Supra note 71.

\(^{74}\) Ibid, art 6 [emphasis added].

\(^{75}\) Supra note 71.

\(^{76}\) Göring, supra note 1 at 444.
crimes (article 6(b)), for which some international instruments seemed to show the presence of a custom prior to 1939. As for article 6 *in fine*, it appears to stem from the moral conception of the law held by the drafting powers which was echoed in the IMT judgment notably by this passage “the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished”.

77 Article 6 lead to the conviction of many accuseds who had not personally committed the offence reproached to them which situation made the International Law Commission (ILC) say:

> [T]he Tribunal convicted several of the defendants of war crimes and crimes against humanity because they gave orders resulting in atrocious and criminal acts which they did not commit themselves. In practice, therefore, the Tribunal seems to have applied general principles of criminal law regarding complicity.

78 Despite this statement, for the purpose of understanding the content of the customary international law on complicity, article 6 is of limited use because the whole IMT’s analysis is predicated on the commission of the crimes by the defendants. True, in the assessment of guilt of some of the defendants, discussions about acts performed in knowledge of the actual perpetrator’s crime can be found; however, the notion of complicity *per se* is not examined in detail anywhere. This phenomenon might be explained by two realities. On the one hand, article 6 *in fine* merely treats complicity in the context of the “formulation or execution of a common plan or conspiracy to commit” the crimes set out in article 6a)b)c). To that effect, the IMT interpreted the last paragraph of article 6 as “designed to establish the responsibility of persons participating

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77 *Supra* note 1 at 444.
79 *Charter, supra* note 71, art 6 *in fine*. 
in a common plan\textsuperscript{80} to commit aggressive war. On the other hand, the first paragraph of article 6 only provides for the punishment of the persons who committed the crimes. In view of the above, it is not appropriate to dwell on the IMT judgment concept of complicity any further.

2.1.2.2.2. The judgments issued by other post-WW2-era courts

The first meaningful articulation of the concept of complicity in ICL was made in the context of punishing the offences committed at particular locations for which the Control Council for Germany, the allied body which managed Germany immediately after its capitulation, adopted on 20 December 1945 the \textit{Control Council Law No. 10}\textsuperscript{81}. Article 2 paragraphs 1 and 2 of this law read:

1. Each of the following acts is recognized as a crime:

(a) Crimes against Peace. (…).

(b) War Crimes. (…).

(a) Crimes against Humanity. (…).

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

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 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-

\textsuperscript{80} Göring, supra note 1 at 449.

\textsuperscript{81} Control Council Law No. 10, 20 December 1945, (United States, France, United Kingdom, Soviet Union), online: Yale Law School Library <http://avalon.law.yale.edu/imt/imt10.asp> [Law No. 10].
belligerents or satellites or held high position in the financial, industrial or economic life of any such country.  

As a preliminary remark, it should be noted that in the Einsatzgruppen case, Law No. 10, just like the Charter before it, was declared by the court to be a mere codification of the customary international law existing before WW2:

Law No. 10, which, like the Charter of the International Military Tribunal, was not an arbitrary exercise of power of the victorious nations but the expression of international law existing at the time of its creation. Control Council Law No. 10 is but the codification and systemization of already existing legal principles, rules, and customs.

With that in mind, the expressions “was accessory to the commission”, “abetted”, and “took a consenting part therein” contained in the abovementioned provision yielded interesting decisions interpreting complicity in ICL. In United States of America v Josef Altstoetter (Justice Case), the court mentioned that “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”. Applying that principle, it found one accused, Curt Rothenberger, who had notably been an appellate court judge during the war and who had constructive knowledge of the killings in the concentration camps guilty of war crimes and crimes against humanity stating that “[h]e aided and abetted in the program of racial persecution, and notwithstanding his many protestations to the contrary he materially contributed toward the prostitution of the Ministry of Justice and

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82 Supra note 81, art 2(1)-(2).
83 Supra note 20.
84 Supra note 81.
85 Supra note 71.
86 Supra note 20 at 456-457 [emphasis added].
87 United States of America v Josef Altstoetter (Justice Case), Case No. 3, Judgment (3-4 December 1947) (Nuremberg Military Tribunal III), online: < www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf> [Justice].
88 Ibid at 1124.
the courts and their subordination to the arbitrary will of Hitler, the Party minions, and the police”.

In the *Trial of Friedrich Flick and Five Others (Flick Trial)*, the six defendants, leading German industrialists, were accused of crimes against humanity and war crimes for, *inter alia*, providing financial aid to the SS. The court said “[o]ne 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”. In the *Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v Hermann Roechling (The Roechling Case)*, businessmen from the Saar region were indicted for war crimes and crimes against peace for, *inter alia*, the use the companies they managed made of deportees in their workforce and their plundering of resources in occupied countries. Among them was Ernst Roechling for which the court said:

It cannot be assumed that the administrator of a company (and Ernst Roechling held this office in the Societe de Credits et d'Investissements (…)) which was formed for the purpose of committing criminal acts and whose activity consisted thereof, should be absolved of criminal responsibility because he played no specific part. He could only escape this responsibility by proving that he was only a *pro forma* administrator, had been deceived as to the true purpose of the company, and had known nothing of its operations.

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89 *Supra* note 87 at 1118.
90 *Trial of Friedrich Flick and Five Others (The Flick Trial)*, Case no. 48, Judgment (22 December 1947) (United States Military Tribunal Nuremberg), online: World Courts <http://www.worldcourts.com/ildec/eng/decisions/1947.12.22_United_States_v_Flick2.pdf> [Flick].
91 *Ibid* at 29.
93 *Ibid* at 1123 [emphasis added].
In *Trial of Carl Krauch and Twenty-Two Others (The I.G. Farben Trial)*\(^{94}\), involving a major industrial company which, *inter alia*, had taken part in Germany’s rearmament during the 1930’s, the court expressed the following principle:

> The Prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it. (…). [T]he evidence must establish action of the character we have indicated, with knowledge of the essential elements of the crime.\(^{95}\)

Assessing the case of a member of the board of directors of that company, one Schmitz, the court declared that he “bore a responsibility for, and knew of, Farben's programme to take part in the spoliation of the French dyestuffs industry and, with this knowledge, expressly and impliedly authorized and approved it”.\(^{96}\) In the *Einsatzgruppen* case\(^ {97}\), the court put forward the idea that knowledge and contribution to the crime are not enough to convict a person for complicity in a crime; the contribution must have an effect on the commission of the crime by the actual perpetrator. This assertion is substantiated by observations made by the court in its assessment of the culpability of some of the accuseds. In the case of accused Mathias Graf, a non-commissioned officer member of an *einsatzkommando*, the court found him not guilty on these grounds:

> [I]t is not to be doubted that he knew of at least some of these executions. However, more than mere knowledge of illegality or crime is required in order to establish guilt under counts one and two of the indictment. (…). Since there is no evidence in the record that Graf was at any time in a position to protest against the illegal actions of others, he cannot be found guilty as an accessory under counts one and two of the indictment.\(^{98}\)

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\(^{94}\) *Trial of Carl Krauch and Twenty-Two Others (The I.G. Farben Trial)*, Case no. 57, Judgment (29 July 1948) (United States Military Tribunal Nuremberg), online: <http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf> [IG Farben].

\(^{95}\) Ibid at 52 [emphasis added].

\(^{96}\) Ibid.

\(^{97}\) Supra note 20.

\(^{98}\) Ibid at 584 [emphasis added].
Whereas in the case of accused Waldemar Klingelhofer, the court, responding to the accused’s contention that he was a mere interpreter for the killing squads, said:

Even if this were true it would 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.

The same idea is found in the case of accused Joachim Drosihn, the senior gassing technician in the *Zyklon B* case, for which the Judge Advocate remarked that “whether there was any evidence that he [Drosihn] was in a position either to influence the transfer of gas to Auschwitz or to prevent it” was the main question, which, if answered in the negative, would entail that “no knowledge of the use to which the gas was being put could make him guilty”. In *United States of America v Ernst Von Weizsäcker et al.* *(The Ministries Trial)*, a number of government and business officials active during the Nazi era were indicted notably for war crimes and crimes against humanity. With regards to the case of two government officials, the court explained:

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.

As to the liability of Schwerin von Krosigk, another accused in this case, for crimes against humanity through his acts as Reich Minister of Finance and member of the Cabinet during the war, the court emphasized that “[i]t is clear, however, that

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99 *Supra* note 20 at 568 [emphasis added].
100 *Supra* note 19.
102 *Ibid*.
103 *United States of America v Ernst Von Weizsäcker et al.* *(The Ministries Trial)*, Judgment (11 April 1949) (United States Military Tribunal Nuremberg), online: <http://werle.rewi.hu-berlin.de/ministries.pdf> [Ministries].
104 *Ibid* at 477 [emphasis added].
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”. 105

The following cases were heard by British military courts in the British occupied zone of
Germany under the Royal Warrant of 18 June 1945106. This legislation was designed to
punish only persons who committed war crimes and did not contain a specific provision
on complicity, but provided that United Kingdom law on court martials should apply save
otherwise provided by the Royal Warrant107. 108 Consequently, the wording of the
complicity provision, if any, applied in these cases is rather unclear. Despite these
shortcomings, these cases are deemed relevant and are cited by modern international
courts to identify the customary elements of the aiding and abetting liability; 109 therefore,
it is appropriate to set out their dicta on that matter. In the Zyklon B case110, the owner of
a gas firm, his second-in-command, and his senior technician were accused of being
accessory to the commission of war crimes for having supplied the Zyklon B gas to the
SS operating in the concentration camps. The Judge Advocate, in summing up the case,
said that three facts should be proved in order to convict any of the accuseds: 1) “first,
that Allied nationals had been gassed by means of Zyklon B”, 111 2) “this gas had been
supplied by Tesch and Stabenow [the owner and his second-in-command]”, 112 and 3) “the

105 Supra note 103 at 679.
106 Royal Warrant of 18 June 1945 (UK), 1945, 0160/2498, A. O. 81/1945, Regulations for the Trial of War
Criminals, online: <http://avalon.law.yale.edu/imt/imtroyal.asp> [Royal Warrant].
107 Ibid.
108 Ibid, ss 3-4.
109 See Furundzija TJ, supra note 25 at para 196.
110 Supra note 19.
111 Ibid at 9.
112 Ibid.
accused knew that the gas was to be used for the purpose of killing human beings”. In the *Trial of Werner Rohde and Eight Others*, the Judge Advocate declared:

[T]o be concerned in a killing [which was the equivalent of aiding and abetting in this case] it was not necessary that any person should actually have been present. (...) If two or more men set out on a murder and one stood half a mile away from where the actual murder was committed, perhaps to keep guard, although he was not actually present when the murder was done, 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.

In the *Trial of Franz Schonfeld and Nine Others*, the Judge Advocate, expounding the law relating to accessories and aiders and abettors, mentioned:

There must also be a participation in the act; for even if a man is present whilst a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony. It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting.

In the *Trial of Max Wielen and 17 Others (Stalag Luft III Case)*, the Judge Advocate enunciated:

If people are all present, aiding and abetting one another to carry out a crime they knew was going to be committed, they are taking their respective parts in carrying it out, whether it be to shoot or whether it is to keep off other people or act as an escort whilst these people were shot, they are all in law equally guilty of committing that offence, though their individual responsibility with regard to punishment may vary.

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113 Supra note 19 at 9.
114 *Trial of Werner Rohde and Eight Others*, Case No. 31, Judgment (29 May-1 June 1946) (British Military Court, Wuppertal, Germany), online: <http://www.worldcourts.com/ildc/eng/decisions/1946.06.01_United_Kingdom_v_Rohde.pdf> [Rhode].
115 Ibid at 56.
117 Ibid at 70 [emphasis added].
118 *Trial of Max Wielen and 17 Others (Stalag Luft III Case)*, Case No. 62, Judgment (1 July-3 September 1947) (British Military Court, Hamburg, Germany), online: <http://www.worldcourts.com/ildc/eng/decisions/1947.09.03_United_Kingdom_v_Wielen.pdf> [Stalag Luft III] [emphasis added].
119 Ibid at 43-44 [emphasis added].
Other cases are also cited and deemed relevant to complicity in ICL by the contemporary tribunals even though the law applied was of uncertain origins or domestic law. In the *Trial of Gustav Becker, Wilhelm Weber and 18 Others*, three custom agents and seventeen others who helped them were accused, the former as joint perpetrators, the latter as accomplices, of illegal arrest and ill-treatment (offences under the French Penal Code) which resulted in the deportation and death of some of the victims. In the midst of a discussion of complicity through denunciation, it was said:

The offence is committed only if, by giving information, the informer becomes a party to, or accomplice in, a war crime recognized as such in international law. This condition is fulfilled if circumstances constituting complicity are present, e.g., if the informer knew that his action would lead to the commission of a war crime and either intended to bring about this consequence or was recklessly indifferent with regard to it.

In the *Synagogue Case*, decided by the German Supreme Court, a long-time Nazi militant was declared guilty of crimes against humanity, which consisted in the devastation of a synagogue, for his intermittent presence on the crime scene and knowledge of the crime being committed.

### 2.1.3. International treaties

Customary international law regarding criminal complicity is also found in international treaties adopted since 1945. First to mention is the *Convention on the Prevention and
Punishment of the Crime of Genocide adopted on 9 December 1948 which provides for the punishment of, *inter alia*, “complicity in genocide”. Secondly, the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practice Similar to Slavery* signed on 7 September 1956 which urges the state parties to criminalize notably conveying of slaves from one country to another regardless of the means of transport used or enslaving another person or being an accessory thereto (article 3 paragraph 1 and article 6 paragraph 1 respectively). Thirdly, the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid* which declares apartheid and apartheid-related practices to be crimes against humanity and whose article 3 states:

> International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:

a. Commit, *participate in*, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;

b. *Directly abet, encourage or co-operate in* the commission of the crime of apartheid.

Fourthly, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, signed on 10 December 1984, does not elevate torture as an
international crime; however, it directs the parties to the convention to criminalize “all acts of torture” and “attempt to commit torture and [...] act by any person which constitutes complicity or participation in torture”. Also worth mentioning because of its provisions on complicity is the United Nations Convention against Transnational Organized Crime, which was opened for signature on 15 November 2000 and entered into force on 29 September 2003. This convention requires that the state parties adopt measures to quash participation in an organized criminal group (article 5), money laundering activities (articles 6 and 7), and corruption of state officials (articles 8 and 9).

Part of its article 5 mentions:

128 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, (entered into force on 26 June 1987), online: Office of the High Commissioner for Human Rights <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> [Torture Convention].

129 For greater certainty, what I mean by that is that the convention does not create a standalone crime of torture such as the war crimes, genocide, or the crimes against humanity defined in the statutes of the various international criminal tribunals, but directs the states to criminalize conducts amounting to torture under their national law. That being clarified, I fully acknowledge that torture is prohibited in international law under different legal mechanisms, including the following. First, it is included in broader offences found in the statutes of international criminal tribunals (notably arts 2(b) and 5(f) of the ICTY Statute, infra note 227, arts 3(f) and 4(a) of the ICTR Statute, infra note 228, and arts 7(1)(f) and 8(c)i) of the Rome Statute, supra note 29). Second, torture is outlawed through an international custom as there are 156 state parties to the convention which fact demonstrates a general practice accepted as the law, see Arbour & Parent, supra note 43 at 121-124; Christoph Burchard, “Torture in the Jurisprudence of the Ad Hoc Tribunals: A Critical Assessment” (2008) 6 Journal of International Criminal Justice 159 at 162. Third, torture is criminalized with the application of the concept of jus cogens, see Burchard, ibid, and Prosecutor v Zejinil Delalic, IT-96-21-T, Trial Judgment (16 November 1998) at para 454 (International Criminal Tribunal for the former Yugoslavia), online: ICTY website <http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf>. Fourth, some multilateral treaties, including the Torture Convention, supra note 128, by their scope, object, and the juridical situations they create entail obligations for third party states and can be qualified as international statute applicable erga omnes. The authors Arbour and Parent refer to these treaties as “treaty-statute” and explain they are “multilateral treaties concluded in the general interest of the international community and create impersonal and general juridical situations which establish abstract principles to such an extent that they can be assimilated to a genuine international legislation”, see Arbour & Parent, supra note 43 at 120. See Furundzija TJ, supra note 25 at paras 147-157.

130 Supra note 128, art 4 para 1.

131 Ibid.

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

None of the foregoing treaties sets out a definition of its complicity provision.

2.1.4. Other international instruments

On 21 November 1947, the UNGA adopted resolution 177 (II) which directed the ILC to formulate the legal principles recognized by the Charter and the IMT judgment in Göring and to prepare a draft code of offences against the peace and security of mankind. Pursuant to this mandate, the ILC identified seven principles among which is found:

Principle VII
Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

133 Supra note 132, art 5 [emphasis added].
134 Supra note 71.
135 Supra note 1.
136 Formulation of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, GA Res 177 (II), UNGAOR, 123rd Plenary Meeting, (1947) 111.
137 Nuremberg Principles, supra note 78, principle 7.
These principles were never formally adopted or rejected by the UNGA nor were they developed any further, but “[t]hey are today widely considered to represent customary international law”. The ILC then furnished the 1954 Draft Code of Offences against the Peace and Security of Mankind, which worded the notion of complicity in the following way “complicity in the commission of any of the offences defined in the preceding paragraphs of this article”. Interestingly, the commentaries on that article provide:

In including "complicity in the commission of any of the offences defined in the preceding paragraphs" among the acts which are offences against the peace and security of mankind, it is not intended to stipulate that all those contributing, in the normal exercise of their duties, to the perpetration of offences against the peace and security of mankind could, on that ground alone, be considered as accomplices in such crimes. There can be no question of punishing as accomplices in such an offence all the members of the armed forces of a State or the workers in war industries.

This code was never adopted or rejected by the UNGA, which, for decades, postponed its formal consideration. During that time period, the work on the code continued and, in 1987, the title of the code was changed to Draft Code of Crimes against the Peace and Security of Mankind, which instrument, in 1996, was formally adopted by the ILC.

Article 2 paragraph 3 subparagraph d of this code states:

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140 Ibid, art 2(12)iv).

141 Ibid at 137 [emphasis added].


Article 2. Individual responsibility

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, in the commission of such a crime, including providing the means for its commission.\(^{144}\)

In the commentaries for this provision, the ILC explained:

The 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). In addition, the accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way. (…) The principle of individual criminal responsibility for complicity in the commission of a crime set forth in subparagraph (d) is consistent with the Charter of the Nurnberg Tribunal (art. 6), the Convention on the Prevention and Punishment of the Crime of Genocide (art. III, subpara. (e)), the statute of the International Tribunal for the Former Yugoslavia (art. 7, para. 1) and the statute of the International Tribunal for Rwanda (art. 6, para. 1). This principle is also consistent with the Nurnberg Principles (Principle VII) and the 1954 draft Code (art. 2, para. 13 (iii)).

The Commission concluded that complicity could include aiding, abetting or assisting \textit{ex post facto}, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of the crime.\(^{145}\)

The elements found in the commentary seem to muddy the water with respect to the legal elements yielded by a plain reading of article 2(3)d). As to the \textit{mens rea}, on a plain reading of the provision, it would be that aider/abettor acts knowing that he aids or abets directly and substantially in the commission of the crime while the commentary speaks of “knowing that the assistance will facilitate the commission of a crime”. As to the \textit{actus reus}, the plain reading informs that it should be that the aider/abettor assists directly and substantially in the commission of the crime whereas the commentary suggests that it must be an “assistance which facilitates the commission of a crime in some significant

\(^{144}\) Supra note 143, art 2(3)d) [emphasis added].

\(^{145}\) Ibid at 21.
way”. The doubts as to the objective element are deepened by the expression “by providing the means which enable the perpetrator to commit the crime”\textsuperscript{146} purported to be an example of what is a direct and substantial assistance, but in fact seems to indicate a causal connection potentially absent in the “direct and substantial assistance” standard. What is more, the last sentence of the commentary’s first paragraph inaccurately asserts that the \textit{Code of Crimes}\textsuperscript{147} provision is consistent with that of the other international instruments dealing with complicity in international crimes. In fact, all the provisions referred to by the commentary contain less details and are less stringent. To that effect, article 2(3)d) of this code is unique to the extent that it is the sole provision requiring a knowingly provided direct and substantial assistance. In any event, the \textit{Code of Crimes}\textsuperscript{148} was never approved by the UNGA, although it is mentioned from time to time by the international jurisprudence for interpretation purposes.

\textbf{2.1.5. The custom as assessed by the contemporary international tribunals}

The content of the customary international law as to complicity was examined notably by three cases at the ICTY and one at the SCSL which are respectively \textit{Prosecutor v Dusko Tadic}\textsuperscript{149}, \textit{Furundzija TJ}\textsuperscript{150}, \textit{Prosecutor v Nikola Sainovic}\textsuperscript{151}, and \textit{Taylor}\textsuperscript{152}. In \textit{Tadic}\textsuperscript{146} supra note 143 at 21.

\textsuperscript{146} Supra note 143.
\textsuperscript{147} Ibid.
\textsuperscript{148} Ibid.
\textsuperscript{150} Supra note 25.
\textsuperscript{152} Taylor, supra note 35.
the Trial Chamber formulated the content of the custom in two statements which are difficult to reconcile. Firstly, the court advanced:

First, 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. Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act.  

Secondly, the Trial Chamber summed up the content of the jurisprudence and of the international documents which it had cited in the following way:

In sum, 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.

In Furundzija TJ, the Trial Chamber said that the custom was “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime” coupled with “knowledge that his actions will assist the perpetrator in the commission of the crime”. As to the mens rea, the court added:

[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.

In Taylor, the court opined that the customary international law definition of the actus reus of the aiding and abetting liability was that “an accused’s acts and conduct of assistance, encouragement and/or moral support had a substantial effect on the
commission of each crime charged for which he is to be held responsible.”161 As to the mens rea, the court underscored 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”.162 In Sainovic163, the ICTY Appeals Chamber articulated the customary international law on aiding and abetting liability in these words “the actus reus of aiding and abetting “consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime”.164 The required mens rea was identified as “the knowledge that these acts assist the commission of the offense”.165

2.1.6. Analysis, opinion, and conclusion on the custom

There are seven critical points flowing from the examination above.

Firstly, the origins of the provisions on complicity in ICL are not clear. This confusion is illustrated notably by the complicity provision of the Charter166 and of the Law No. 10167 both of which have been deemed to be a mere codification of the pre-existing custom.168 Had a custom supported their existence, the two provisions, although they might have been worded differently, would have at least carried the same concepts and essentially the same internal framework. However, far from that, the two provisions bear no similarity, a reality which demonstrates that no international custom on complicity existed in 1945. As

161 Supra note 35 at para 401.
162 Ibid at para 483.
163 Supra note 151.
164 Ibid at para 1649.
165 Ibid.
166 Supra note 71.
167 Supra note 81.
168 Göring, supra note 1 at 444; Einsatzgruppen, supra note 20 at 457.
hinted above, the only provisions of these statutes for which a pre-existing custom could be reasonably asserted were those with respect to war crimes and crimes against peace. The remainder of the two abovementioned laws, including the provisions on complicity, were the product of the moral conception of justice put forward by the Allies in order to punish those they deemed deserved it. This shadiness was reflected in the provisions on complicity that followed. Indeed, the international treaties do not evince a strong, principled, and consistent wording in their provisions on complicity. These documents speak of “accessorial liability”, “direct aid”, “participation or cooperation in”, “complicity”, but none of them provides a definition of the concept or sets out its legal requirements. The international instruments were also impacted by these uncertain beginnings. In effect, “complicity in the commission of a crime against peace, a war crime, or a crime against humanity”, the presumed custom in 1950, morphed in 1996 to “[k]nowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime” without changes in ICL that could justify such a shift.

Secondly, the international treaties and instruments do not furnish a great deal of help in ascertaining the elements of the custom on complicity in ICL. As to the international treaties, on four treaties, two use the term “complicity” and one, “accessorial liability” without any explanation. The Apartheid Convention gives little more guidance as it uses expressions like “participate in, directly abet, encourage or co-operate in”. The word “directly” certainly helps with regards to the objective element of complicity, but

169 Nuremberg Principles, supra note 78, principle 7.
170 Code of Crimes, supra note 143, art 2(3)d).
171 Supra note 126.
172 Ibid, art 3.
total obscurity remains as to the subjective element. Finally, the *Organized Crime Convention*\(^\text{173}\), although not applicable in the field of ICL, contains the most detailed provisions on complicity. I included it in the international treaties review for inspiration purposes. On the one hand, its section on the complicity of an individual with a criminal organization (article 5a(ii)a.b.)) is quite detailed and affords specific elements on which to make a determination. However, this provision presents the same difficulty as that of article 25(3)d) of the *Rome Statute*\(^\text{174}\) in the sense that it requires an intentional conduct which potentially overlaps with the other elements of the *mens rea* of this mode of liability. On the other hand, its general provision on complicity (article 5b)) is significant in its simplicity since, to cross the threshold, there needs to be aiding or abetting actions effectuated with the intent to aid or abet. Passing now to the international instruments, their evolution displays an inconsistency which diminishes their persuasive force. In 1950, principle 7 of the *Nuremberg Principles*\(^\text{175}\) designed by the ILC simply speaks of “complicity” with international crimes without further details. Four years later, another document, the *Draft Code of Offences*\(^\text{176}\), which provisions were supposed to be based on the same sources as *Nuremberg Principles*\(^\text{177}\), was put forward by the same organization using the exact same words, but with the notable exception that routine duties could not satisfy the *actus reus* of complicity. In 1996, that is 42 years later, the ILC, continuing its work on the instrument brought forward in 1954, came up with *Code of Crimes*\(^\text{178}\) which now deemed complicity to be composed of a knowingly provided direct and substantial

\(^{173}\) *Supra* note 132.

\(^{174}\) *Supra* note 29.

\(^{175}\) *Supra* note 78.

\(^{176}\) *Supra* note 139.

\(^{177}\) *Supra* note 78.

\(^{178}\) *Supra* note 143.
assistance towards the commission of the crime. These changes to the objective and subjective elements of complicity are difficult to link to any step of the evolution of ICL during these 42 years. Indeed, the statutes of the ICTY (1993) and ICTR (1994) could not justify such changes given the fact that their complicity provision is simply “aiding and abetting” in preparation, formulation, perpetration of a crime. As stated above, the complicity provision of the Code of Crimes\footnote{Supra note 143.} is unique in its formulation and enunciates an \textit{actus reus} (substantial and direct aid) which was unprecedented at the time of its adoption. Further, the Code of Crimes\footnote{Ibid.} has been assessed by various international courts and its provision on complicity have not been adjudged to be representative of the custom, let alone the prevailing statement of the law. Mindful of the foregoing, it is possible to say that the custom on complicity has a foundation in treaties and international instruments, but not that these documents are authoritative as to the content thereof.

Thirdly, the judgements of post-WW2-era courts do not always make crystal clear whether their analysis is based on complicity or on joint criminal enterprise liability (JCE).\footnote{For a detailed distinction between these two concepts in modern international criminal law, see Joseph Rikhof, \textit{The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law}, Human Rights Series Volume 3 (St.Louis, Missouri: Republic of Letters, 2012) at 191-201 [Rikhof, \textit{The Criminal Refugee}]. In brief, joint criminal enterprise liability stems from \textit{Tadic, supra} note 16, where the court explained that the ICTY Statute, although not expressly stated at its article 7, includes the joint criminal enterprise liability the features of which (\textit{actus reus} and \textit{mens rea}) are found in customary international law. According to the court, this form of liability encompasses three categories of collective criminality. Firstly, where the defendants, acting pursuant to a common design, possess the same criminal intention. Secondly, where the defendants act pursuant to a concerted plan which is in fact a variant of the first category. Thirdly, where the defendants have a common design to pursue one course of conduct during which commission one of the perpetrators commits an act that, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. To be found liable of a crime under the joint criminal enterprise liability, the following criteria must be met: i) there must be a plurality of persons, ii) the existence of a common plan, design or purpose}
courts, except in the Zyklon B\textsuperscript{182} case for which the analysis seems to revolve around complicity. Taking into account the provisions of the Royal Warrant\textsuperscript{183}, it could easily be argued that the jurisprudence of these cases, except the Zyklon B\textsuperscript{184} case, only pertains to and is relevant for the joint criminal enterprise mode of liability.\textsuperscript{185} This element

which amounts to or involves the commission of a crime provided for in the Statute, iii) participation of the accused in the common design (\textit{actus reus}), and with any one of the following elements: i) the intent to perpetrate a certain crime (first category), or ii) personal knowledge of the concerted plan and intent to further this common concerted plan (second category), or iii) the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group (third category). In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk. By contrast, in complicity, there is no common plan and intent to pursue this common plan, but simply an assistance to the principal who commits the crime with knowledge that this assistance assist the commission of the crime.

\textsuperscript{182} Supra note 19.
\textsuperscript{183} Supra note 106.
\textsuperscript{184} Supra note 19.
\textsuperscript{185} As stated above, section 3 of the Royal Warrant, supra note 106, directs that British military law apply to the trial of the suspected war criminals which makes uncertain the wording of a potential provision on complicity, if any. Compounded to that, in all these cases, the court arguably alludes to the criminal responsibility of the accuseds for a group crime which is in fact the modern-day joint criminal enterprise liability. In Rhode, supra note 114, the accuseds were charged of war crimes in connection with the lethal injection killing of British prisoners of war in a camp. The knowledge of the accuseds of a common plan to commit the crime is unclear from the judgment. However, in the quoted passage, the court talked about a common plan among a plurality of persons, as evinced by the words “if two or more men set out on a murder”, coupled with any contribution to this plan both of which facts point towards the joint criminal enterprise liability rather than complicity. In Schonfeld, supra note 116 at 70, the accuseds were charged with war crimes regarding the killing of three allied airmen in Holland. The accuseds who were found guilty had been ordered to go out to a house and arrest the airmen. The court said “it is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting”. This passage seems to suggest that the court was thinking of something other than the aiding and abetting liability in that 1) the court puts forward the proposition that it is not necessary to prove that the party aided in the commission of the crime, 2) the court talks about companions, as opposed to perpetrators and aiders, 3) the court’s formulation does not put a threshold regarding the impact of the assistance on the commission of the crime, 4) the emphasis put by the court on the \textit{mens rea} which is that the acts must be made “to give additional confidence [in the commission of the crime] to his companions ”, as opposed to simply be done while knowing that they assist the commission of the crime. In Stalag Luft III, supra note 118, the accuseds were charged with war crimes because of the killing of British escapees from a prisoner of war camp in Czechoslovakia. The executions nearly all took place as a result of a collaboration of accuseds aware of what was going to happen. Thus, in the quoted passage, the court explained that if the accused took any part in a crime he knew was going to be committed, he is guilty of committing that offence. If one equates the knowledge of an impending crime to the awareness of an existing plan to commit that crime, then this statement is more about the joint criminal enterprise than aiding and abetting. To the contrary, in the Zyklon B case, supra note 19, the accuseds were charged with war crimes in that they furnished the poison gas used to kill allied nationals in the
inevitably hampers their persuasive force as precedents on complicity. In cases decided under *Law No. 10*\(^{186}\), this uncertainty about the modes of liability is at least partly caused by the fact that most of the accuseds in these cases were high-profile persons in their respective organization. Given their rank, expertise, and general knowledge of the institution in which they were involved, it was sometimes unclear whether the court took into account their knowledge of the crimes committed or the fact that they shared the criminal intent of the perpetrators.

Fourthly, a hierarchy has to be established among the various judgments and other documents used to discover the customary elements of complicity in ICL. As for the judgements, many of the above cited decisions do not even purport to interpret international law, but simply apply domestic law. This reasoning applies to the four cases tried by the British military courts and to the *Becker*\(^{187}\) and *Synagogue*\(^{188}\) cases. The idea here is not to deny their importance, but to suggest that there might be precedents that are more on point than others. The *dicta* contained in the precedents applying domestic law are nonetheless noteworthy because of the context in which the pronunciation is made: the trial of alleged war criminals for acts made in war. In international law as in other areas of the law, like cases deserve like treatment and the pronouncements made by courts applying national law cannot be ignored in these circumstances. Also, the domestic law used in these cases might not be as far of the international law as one might think.

\(^{186}\) Supra note 81.  
\(^{187}\) Supra note 120.  
\(^{188}\) Supra note 122.
This prompted the court in *Furundzija TJ*\(^{189}\) to say with regards to the British cases, “[h]owever, there is sufficient similarity between the law applied in the British cases and under Control Council Law No. 10 for these cases [the British cases] to merit consideration. The British cases deal with forms of complicity analogous to that alleged in the present case”.\(^{190}\) On the whole, the judgments issued by courts applying municipal law are worthy of consideration, but cannot be said to be as important as those issued under *Law No. 10*\(^{191}\). The elements found in the interpretation of complicity by the first cannot outweigh those found by the second. As for the treaties and international instruments, although important, they do not bear the same significance in the debate as that of the jurisprudence of the post-WW2-era courts. In effect, the treaties and international instruments evince the *opinio juris* of the states and the ideas of the most qualified publicists of the world respectively, but cannot have the same impact as decisions issued by international courts on complicity in ICL notably because of the principle that like cases must receive like treatment. Therefore, the court precedents ought to prevail in informing the content of the custom on complicity in ICL.

Fifthly, the jurisprudence of the post-WW2-era courts lacks consistency and uniformity to such an extent that it is difficult to pinpoint exactly all the elements of a potential custom. For example, the *Justice* case\(^{192}\), the *Flick* case\(^{193}\), and the *Ministries* case\(^{194}\) pertaining to accused Schwerin von Krosigk, and the four cases decided by British

\(^{189}\) *Supra* note 25.
\(^{190}\) *Ibid* at para 196.
\(^{191}\) *Supra* note 81.
\(^{192}\) *Supra* note 87.
\(^{193}\) *Supra* note 90.
\(^{194}\) *Supra* note 103.
military courts, except for accused Drosihn in the *Zyklon B* case\(^{195}\), all propose that a knowing support or contribution to the commission of the crime by the perpetrator is enough to attract criminal liability under the concept of complicity.\(^{196}\) To the contrary, the *Roechling* case\(^{197}\), the *IG Farben* case\(^{198}\), the *Einsatzgruppen* case\(^{199}\), and the *Zyklon B* case\(^{200}\) regarding the accused Drosihn suggest that the aider/abettor’s acts must have some effect on the commission of the crime by the principal. As for the *IG Farben* case\(^{201}\), it refers to a *mens rea* that includes that the aider/abettor must be aware of the essential elements of the crime committed by the principle, a criterion which does not appear in any other judgment. All the other cases, except one of the British cases\(^{202}\), propose that the mental element of complicity is knowledge that the aid given assist in the commission of the crime by the perpetrator. With respect to the *Ministries* case\(^{203}\), it is the only case that requires “substantial” assistance to fulfill the *actus reus* of the aiding and abetting liability. On this aspect, some cases demand a simple assistance while others dictate that the assistance have some effect on the commission of the crime, but none of them calls for a “substantial” assistance. However, one could argue that the “substantial assistance” standard is echoing the “material contribution” standard which was used in the *Justice* case\(^{204}\) to describe the contribution to the commission of the crime by accused

\(^{195}\) *Supra* note 19.

\(^{196}\) The strength of the support offered to this proposition by the *Ministries* case, *supra* note 103, is reduced by the fact that the court, dealing with the particular case of accused Curt Rothenberger, said that he “materially” contributed to the commission of the crime.

\(^{197}\) *Supra* note 92.

\(^{198}\) *Supra* note 94.

\(^{199}\) *Supra* note 20.

\(^{200}\) *Supra* note 19.

\(^{201}\) *Supra* note 94.

\(^{202}\) *Schonfeld*, *supra* note 116.

\(^{203}\) *Supra* note 103.

\(^{204}\) *Supra* note 87.
Curt Rothenberger. As to the *Schonfeld* case\textsuperscript{205}, the court articulated the mental element of complicity as knowledge of the assistance to the commission of the crime which is calculated to give additional confidence to the perpetrators. Although this statement seems to be made in general terms, logic dictates that it was probably designed to apply only in that particular case. Finally, with regards to the *Becker*\textsuperscript{206} and *Synagogue*\textsuperscript{207} cases, I do not consider their precedential value significant. In the former case, the law applied is clearly domestic while, in the latter, not only is that element obscure, but the English or French versions of the judgment could not be retraced. Plus, their definitions seem too much at odds compared to the rest of the jurisprudence to receive extensive attention. The above amply demonstrates that to pin down the elements of the custom on complicity is a perilous enterprise and that any *ex cathedra* declaration of its content should be welcomed with a certain amount of doubt.

Sixthly, owing to these divisions and as implied above, the precedents issued by the post-WW2-era courts only provide shaky foundations when it comes to build a comprehensive understanding of the content of the customary international law on complicity in modern ICL. Curiously, this reality is only partly reflected in the four contemporary judgments interpreting the content of the custom. Before exploring this idea further, it is important to select which one of the definitions put forward in *Furundzija TJ*\textsuperscript{208} will be used. On that point, it is logical to argue that the first statement\textsuperscript{209} was a mere introductory remark

\textsuperscript{205} *Supra* note 116.
\textsuperscript{206} *Supra* note 120.
\textsuperscript{207} *Supra* note 122.
\textsuperscript{208} *Supra* note 25.
\textsuperscript{209} *Furundzija TJ, supra* note 25 at para 674 where the court states “[f]irst, 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.
and did not purport to be the statement of the custom. The second\textsuperscript{210} is more detailed and is made after the review of authorities; therefore, I will use it for the sake of the present work. That noted, pertaining to the \textit{actus reus} of the custom on complicity as interpreted by the four contemporary judgments, three of them\textsuperscript{211} phrase it as an assistance which has a substantial effect on the crime while the first in time to give an opinion on the matter, \textit{Tadic TJ}\textsuperscript{212}, held differently. In that judgment, the court maintained that a “participation [which] directly and substantially affect[s] the commission of that offence through supporting the actual commission before, during, or after the incident”\textsuperscript{213} was the correct standard. This standard is materially different from the one expounded in the three other decisions, for it adds the requirements that the assistance be directly affecting the commission of the crime and that the assistance supports the actual commission of the crime. These two differences restrict and limit considerably the scope of the objective element in comparison to the formulation adopted in the other three judgments. Concerning the \textit{mens rea}, all four judgments\textsuperscript{214} express it as knowledge that the assistance given assists in the commission of the offence. The only element that stands out is found in \textit{Furundzija TJ}\textsuperscript{215} where the court added to the knowledge standard that the assister must be “aware that one of a number of crimes will probably be committed, and

\begin{footnotes}
\item[210] \textit{Ibid} at para 692 where the court underlined that “[i]n sum, 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”.
\item[211] \textit{Furundzija TJ}, \textit{supra} note 25; \textit{Taylor}, \textit{supra} note 35; \textit{Sainovic}, \textit{supra} note 151.
\item[212] \textit{Supra} note 149.
\item[213] \textit{Ibid} at para 692.
\item[214] \textit{Tadic TJ}, \textit{supra} note 149; \textit{Furundzija TJ}, \textit{supra} note 25; \textit{Taylor}, \textit{supra} note 35; \textit{Sainovic}, \textit{supra} note 151.
\item[215] \textit{Supra} note 25.
\end{footnotes}
one of those crimes is in fact committed”.\textsuperscript{216} All things considered, it is possible to say that the mainstream interpretation of the custom on complicity by contemporary tribunals consists of an assistance which has a substantial effect on the commission of the crime provided knowing that it assists in the commission of the said crime. This apparent consensus omits to take into account the fact that the jurisprudence issued by the post-WW2-era courts and the provisions of international treaties and instruments, i.e. the basis on which the formulations of the custom about complicity are made, do not clearly and entirely support this assertion. Especially with respect to the actus reus, only one judgment\textsuperscript{217} can be said to support, albeit not completely, the “substantial effect” requirement. The rest of the cases are split between the position that requests the acts of the aider to have some effect on the commission of the crime and that which demands acts participating in the commission of the offence, the majority of the cases siding with the latter.

Seventhly, these general considerations about the content of the custom lead to the conclusion that everything beyond requiring an assistance that is provided knowing that it assists in the commission of the crime cannot be said to be staunchly supported by precedents and documents on which that custom is founded. Indeed, these two elements constantly come back in the various judgments of the post-WW2-era courts and are the only ones which can be qualified as undoubtedly customary. The other elements found in the various statements of the custom on complicity by the modern-day tribunals, notably the substantial effect on the commission of the crime requirement in the objective

\textsuperscript{216} Supra note 25 at para 246.
\textsuperscript{217} Ministries, supra note 103.
element, are debatable and questionable. Furthermore, judgements reviewing the authorities and giving the customary elements of complicity used the precedents to buttress their view, but with a certain lack of rigor. To obviate that defect, ideally, as they are the most pertinent, only judgments issued under Law No. 10\textsuperscript{218}, as opposed to other judgments, the treaties, and international instruments, should be used when it comes to conclusively determine the content of the custom. In doing so, explanations should be given as to the choice made among the diverse jurisprudential currents available.

To conclude this section, in spite of what is mentioned in certain judgments of the contemporary international tribunals, the content of the custom has not yet been conclusively identified. The jurisprudence issued by the post-WW2-era courts under the Law No. 10\textsuperscript{219} does not provide clear and principled guidance as to the applicable law. True, the knowing assistance standard receives a noticeable support in that jurisprudence, but it is not the only one articulation of the law furnished by these precedents. In view of the foregoing, when the ICTY and the ICTR were put in place at the beginning of the 1990’s, it was reasonable to say that the customary law on complicity had yet to be determined. To that effect, as shown above, the analyses found in the various contemporary decisions that tried to pinpoint the customary elements of the accomplice liability did not achieve full success in this endeavor. In effect, none of them carefully considered with an open mind the jurisprudential trends disclosed in the post-WW2-era precedents, picked one, and thoroughly justified the choice with a principled argumentation. This lack of certainty about the customary elements of complicity is a

\textsuperscript{218} Supra note 81.
\textsuperscript{219} Ibid.
major cause of the discrepancies, uncertainties, and unresolved issues between and within international tribunals today. Perhaps even more serious, it provides little basis on which solutions can be designed to settle these issues. In this context, the next section will detail the evolution of the concept of complicity at the contemporary international criminal tribunals (ICTY, ICTR, SCSL, STL, and ICC) and explore the issues arising out of their jurisprudence.

2.2. COMPLICITY AT THE CONTEMPORARY INTERNATIONAL CRIMINAL TRIBUNALS

2.2.1 Introduction

In this section, I will discuss the law on complicity applied by the ICTY, the ICTR, the SCSL, the STL, and the ICC and analyze the main issues present in their jurisprudence. I will not examine the jurisprudence issued by the Extraordinary Chambers in the Courts of Cambodia, for no significant pronouncement on complicity was made by that tribunal.

2.2.2. The ICTY and ICTR

2.2.2.1. Background information

Both these tribunals were put in place by a resolution of the United Nations Security Council (UNSC) aimed at achieving three goals: 1) “bring to justice” those responsible for mass violations of human rights, 2) contribute to the process of reconciliation, 3) help in restoring and maintaining peace. More specifically, the ICTY was created on 25

May 1993 in the midst of the wars attending to the disintegration of Yugoslavia during the 1990’s.\footnote{Resolution 827 (1993), supra note 220; More specifically, the decision to put in place the ICTY was taken in the course of the following events. On 25 June 1991, Croatia declared its independence from Yugoslavia which proclamation was rejected by the significant ethnic Serb minority in Croatia. This minority, helped by the Yugoslavian army and Serbia, asserted its authority on its territory declaring it an independent state from Croatia and proceeded to an ethnic cleansing on all non-Serb living in this part of Croatia. Fighting ensued between the belligerents in the field with various violations of the provisions of international law. In Bosnia and Herzegovina, following a referendum held in March 1992, which was boycotted by the Bosnian Serbs forming around 33% of the Bosnian population, more than 60 percent of the votes was in favour of independence. Supported by Yugoslavian Army and Serbia, the Bosnian Serbs refused this state of affairs and rebelled in April 1992 declaring that the territory under their control was an independent Serb state in Bosnia and Herzegovina. For their part, Bosnian Croats, who formed 17 percent of Bosnia and Herzegovina’s population at the time of the events, also refused this new political situation and, with the backing of Croatia, declared their own republic. A three-sided civil war broke out and detention centres were put in place by the three entities. At the beginning of August 1992, journalists from The Guardian and ITN reported on the existence of camps near the city of Prejedor in Northwest Bosnia and Herzegovina which led the Time magazine to publish on 17 August 1992 an issue on the situation in the region (see International Criminal Tribunal for the former Yugoslavia, Documentary, “Crimes before the ICTY: Prijedor”, online: ICTY <http://www.icty.org/sid/11341>; J.F.O Mcallister, “Atrocity and Outrage”, Time 140: 7 (August 17, 1992), online: Time Magazine <http://content.time.com/time/magazine/article/0,9171,976238,00.html>). The images and journalistic accounts shocked the world and spurred the international community to take action. In this factual backdrop, the UNSC adopted a series of resolutions throughout 1992 notably resolution 730 of 6 October 1992 (United Nations Security Council, Resolution 780 (1992), S/RES/780 (1992), UNSCOR, 3119th meeting, online: UNSC <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/780%281992%29>). which requested the UN Secretary General to establish a Commission of Experts to investigate the allegations of violations of international humanitarian law purportedly committed during these conflicts. On 10 February 1993, the Commission of Experts came back to the UN with an interim report (United Nations Commission of Experts on Yugoslavia, Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), S/25274, 10 February 1993, online: UN <http://www.un.org/sga/search/view_doc.asp?symbol=S/25274>). saying that grave breaches and other violations of international humanitarian law had been committed, including wilfull killing and ethnic cleansing, and that the establishment of an \textit{ad hoc} international tribunal would be consistent with its work. Drafts were submitted and, on 25 May 1993, the ICTY Statute, infra note 227, was adopted by the UNSC. See International Criminal Tribunal for the former Yugoslavia, The Conflicts, online: ICTY <http://www.icty.org/sid/322>; Finlan, supra note 14; Norman M. Naimark & Holly Case, Yugoslavia and Its Historians: Understanding the Balkan Wars of the 1990s, (Stanford, California: Stanford University Press, 2003).} The first judgment following a full-length trial was handed down on 7 May 1997; nine cases remain to be completed before the final closure of the tribunal. As of 28 October 2014, the ICTY has dealt with 161 accuseds, the proceedings are concluded against 141 of them while 20 are still being tried (16 before the Appeals Chamber and 4 by the Trial Chamber). On the 141 accuseds for which the file is closed, 18 have been
acquitted, 74 were sentenced, 13 were referred to a national jurisdiction, and 36 had their indictment withdrawn or died before the proceedings concluded.\textsuperscript{222} The ICTR was put in place on 8 November 1994 by the UNSC at the demand of the government of Rwanda.\textsuperscript{223}

From April to July 1994, a genocide had taken place in Rwanda resulting in the death of 800,000 to 1,000,000 people, mostly Tutsis and moderate Hutus, without the international community taking steps to prevent or halt the killings and other mass violations of human rights.\textsuperscript{224} Only one appeal remains to be dealt with by the ICTR which is projected to be

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\item Among the historical events that lead to this genocide, I noted the following. At the beginning of the 1994 genocide, the Rwandan population comprised 85% of Hutus, 14% of Tutsis, and 1% of Twas. Exiled Rwandan Tutsis in neighbouring Uganda had created the Rwandan Patriotic Front (RPF) in 1987 to fight the one-party Hutu-dominated government that was ruling Rwanda since 1975. From 1990 onwards, the RPF progressed into northern Rwanda until the Arusha Accords were reached by the RPF and the Rwandan government on 4 August 1993. In October 1993, the United Nations Assistance Mission for Rwanda was sent to Rwanda by the UNSC to support the peace process. On 6 April 1994, the Accords fell apart and the civil war between the RPF and the government army resumed when the plane in which the president of Rwanda was crashed at the Kigali airport. In the minutes following the crash, massacres began. During the three-month civil war that ensued, both sides violated the provisions of the international humanitarian law, but the most prominent and well-remembered features among these horrors is the killing of 800,000 to 1,000,000, mostly Tutsis and moderate Hutus (a rate of killing four times greater than at the height of the Nazi Holocaust), which would later be labelled as a genocide. The killings only halted on 4 July 1994 when the RPF took control of the entire country. This genocide is all the more startling since it was perpetrated while a UN peace mission was on active duty in the country. To that effect, it is worth noting that, after the
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completed not before August 2015, according to the tribunal’s completion strategy dated 5 November 2014.\textsuperscript{225} As of January 2015, the ICTR has dealt with 93 accuseds, 14 have been acquitted, 61 were sentenced, 10 were referred to a national jurisdiction, 3 are still at large, and 5 had their indictment withdrawn or died before the proceedings concluded.\textsuperscript{226} The ICTY and the ICTR’s law are examined in the same section as their provision on complicity is identical and their jurisprudence is used interchangeably by both tribunals.

2.2.2.2. Preliminary observations on the law

The notion of complicity is embodied in both statutes as the “aiding and abetting” mode of liability. Written in almost the same terms at article 7 paragraph 1 of the \textit{Statute of the International Criminal Tribunal for the former Yugoslavia}\textsuperscript{227} and article 6 paragraph 1 of the \textit{Statute of the International Criminal Tribunal for Rwanda}\textsuperscript{228}, the provision reads:

\begin{quote}
A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 [4 for the ICTR] of the present Statute, shall be individually responsible for the crime.\textsuperscript{229}
\end{quote}

\begin{footnotes}
\footnote{226}{International Criminal Tribunal for Rwanda, \textit{Key Figures of ICTR Cases}, online: ICTR <http://www.unicrt.org/en/tribunal>.}
\footnote{229}{\textit{Ibid}, art 6 para 1; \textit{supra} note 220, art 7 para 1; the only difference between the two provisions is the reference to the articles defining the crimes under the tribunal’s jurisdiction.}
\end{footnotes}

The whole point is to identify the legal meaning of the expression “aided and abetted” for which no definition has been provided in either statutes. Generally speaking, the

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230 In comparison, some national jurisdictions have defined more precisely the accomplice liability. Among those, I noted the following. In Germany, section 27(1) of the German Penal Code specifies “Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider”, see German Criminal Code, Translation of the German Criminal Code provided by Prof. Dr. Michael Bohlander, 2013, online: bundesministerium der Justiz und für Verbraucherschutz (Federal Ministry of Justice and Consumer Protection) <http://www.gesetze-im-internet.de/englisch_stgb/>. In France, article 121-7 of the French Penal Code states “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” (Is an accomplice to the crime or misdemeanor the person who purposefully, by aid or assistance, facilitated its preparation or its commission (translated by author)), see Code Pénal, JO, 1 January 2015, online: Legifrance <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&amp;dateTexte=20150114>. In England, in National Coal Board v Gamble (1959), [1959] 1 Q.B. 11, the court said at page 20 “A person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with the intent to aid, he abets it as well and is therefore guilty of aiding and abetting. […] Another way of putting the point is to say that aiding and abetting is a crime that requires proof of mens rea, that is to say, of intent to aid as well as of knowledge of the circumstances, and that proof of the intent involves proof of a positive act of assistance voluntarily done” (see also R v Bryce (2004), [2004] 2 Cr App R 35 where the court held at paragraph 81 “all that is necessary in the secondary party is the foresight of the real possibility that an offence will be committed by the person to whom the accessory’s acts of assistance are directed”). In Canada, section 21(1)b) of the Criminal Code declares “Every one is a party to an offence who does or omits to do anything for the purpose of aiding any person to commit it”, see Criminal Code, RSC 1985, c C-46. In Israel, article 31 of the Penal Code says “If a person does anything – before an offence is committed or during its commission – to make its commission possible, to support it or to protect it, or to prevent the perpetrator from being taken or the offence or its loot from being discovered, or if he contributes in any other way to the creation of conditions for the commission of the offence, then he is an accessory”, see Penal Law 5737 – 1977, Translated by the Organization for economic cooperation and development (OECD), online: OECD <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/43289694.pdf>. In the United States of America, the United States Model Penal Code states at section 2.06(3)a(ii) “A person is an accomplice of another person in the commission of an offense if: with the purpose of promoting or facilitating the commission of the offense, he aids or agrees or attempts to aid such other person in planning or committing it”, see Model Penal Code (1962), online: University of Toronto <http://www.law-lib.utoronto.ca/bclc/crimweb/web1/mpc/mpc.html#fn1>. In Japan, article 62(1) of the Japan Penal Code asserts “A person who aids a principal is an accessory”, see Penal Code, Act no. 45 of 1907, Translated by the Japanese Cabinet Secretariat, online: Japanese Cabinet Secretariat <http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf>. In China, article 27 of the Chinese Penal Code expresses “An accomplice refers to any person who plays a secondary or auxiliary role in a joint crime”, see Criminal Law of the People’s Republic of China 1997, Translated by the Organization for economic cooperation and development (OECD), online: OECD <http://www.oecd.org/site/adboecdanticorruptioninitiative/46814270.pdf>. In Burundi, article 38(3) of Burundi Penal Code enunciates “Sont considérés comme complices d’une infraction, ceux qui, sans participation directe à celle-ci et sans que leur concours soit indispensable, ont, avec connaissance, aidé par tout moyen ou assisté l’auteur ou les auteurs de l’action dans les faits qui l’ont préparée ou facilitée ou dans ceux-ci qui l’ont consommée” (Is considered an accomplice in an offence, anyone who, without his direct participation to the offence and without his contribution being essential, has knowingly, through any means, aided or assisted the perpetrator or perpetrators of the offence in the acts that prepared, facilitated or helped its commission (translated by author)), see Code Pénal du Burundi, online: International Committee of the Red Cross <https://www.icrc.org/ihl.nat/a24d1cf334e99934125673e0e0508142/cb9d300d8db9fc37c125707300338af2%FILE/Code%20P%C3%A9nal%20du%20Burundi%20.pdf>. In Ghana, section 20(1) of the Criminal Code proclaims “Every person who, directly or indirectly, instigates, commands, counsels, procures,
Oxford English Dictionary\textsuperscript{231} defines the verb “to aid” as “help or support (someone or something) in the achievement of something” and identifies the following synonyms “assist”, “support”, and “back up”.\textsuperscript{232} The verb “to abet” is given the following definition by the same dictionary “encourage or assist (someone) to do something wrong, in particular to commit a crime”, words such as “endorse”, “boost”, “favour”, “champion”, “sanction”, “succour”, “promote”, and “further” are held to be synonyms.\textsuperscript{233} The Trial Chamber of the ICTR was probably inspired by these definitions in \textit{Prosecutor v Jean-Paul Akayesu}\textsuperscript{234} when it said:

484. Article 6 (1) declares criminally responsible a person who "(...) or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 (...)". \textbf{Aiding and abetting}, which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto. The issue here is to whether the individual criminal responsibility provided for in Article 6(1) is incurred only where there was aiding and abetting at the same time. The Chamber is of the opinion that either aiding or abetting alone is sufficient to render the perpetrator criminally liable.\textsuperscript{235}

\subsection*{2.2.2.3. Objective element}

The first appellate decision to interpret the aiding and abetting mode of liability was the 1999 ICTY \textit{Tadic}\textsuperscript{236} where its \textit{actus reus} was defined as “[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration

\begin{footnotesize}
\begin{enumerate}
\item \textit{Oxford English Dictionary}\textsuperscript{231}
\item \textit{Ibid}, sub verbo “aid”.
\item \textit{Ibid}, sub verbo “abet”.
\item \textit{Ibid} at para 484 [bold in original] [emphasis added].
\item \textit{Supra} note 16.
\end{enumerate}
\end{footnotesize}
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”.\textsuperscript{237} It is worth noting that this definition was formulated in the process of a comparison between the joint criminal enterprise\textsuperscript{238} and aiding and abetting modes of liability. The tribunal’s discussion about the former is 25-page long and well supported by deep analysis and many precedents and other international documents whereas the one about the latter is a subparagraph of a paragraph without any document or precedent to substantiate it. One year later, the ICTY Appeals Chamber in \textit{Prosecutor v Zlatko Aleksovski}\textsuperscript{239} interpreted that peculiarity as showing that “that judgement \cite{Tadic} does not purport to be a complete statement of the liability of the person charged with aiding and abetting”\textsuperscript{240}.

The \textit{actus reus} elements outlined in \textit{Tadic}\textsuperscript{241} have been refined and explained over the years by many decisions of both tribunals among which the following need to be cited. In \textit{Prosecutor v Tihomir Blaskic}\textsuperscript{242}, the ICTY Appeals Chamber said that “proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime […] is not required”\textsuperscript{243} and that “the actus reus of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and that the

\begin{footnotesize}
\textsuperscript{237} Supra note 16 at para 229.
\textsuperscript{238} See supra note 181 for the definition and discussion about the concept of joint criminal enterprise.
\textsuperscript{240} Ibid at para 163.
\textsuperscript{241} Supra note 16.
\textsuperscript{243} Supra note 242 at para 48.
\end{footnotesize}
location at which the \textit{actus reus} takes place may be removed from the location of the principal crime".\textsuperscript{244} In \textit{Prosecutor v Vidoje Blagojevic}\textsuperscript{245}, the ICTY Appeals Chamber declared:

\begin{quote}
The \textit{actus reus} need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated. The Appeals Chamber has also determined that the \textit{actus reus} of aiding and abetting may be satisfied by a commander permitting the use of resources under his or her control, including personnel, to facilitate the perpetration of a crime.\textsuperscript{246}
\end{quote}

The court also added that that the accused can fulfill the \textit{actus reus} requirement by simply completing his routine duties and rejected “the proposition that independent initiative, power, or discretion must be shown in order for the \textit{actus reus} of aiding and abetting to be established.”\textsuperscript{247} In \textit{Mikaeli Muhimana v Prosecutor}\textsuperscript{248}, the ICTR Appeals Chamber observed that “it is not necessary to prove that he [the accused] had authority over the principal perpetrator”.\textsuperscript{249} In \textit{Callixte Kalimanzira v Prosecutor}\textsuperscript{250}, citing another judgment, the ICTR Appeals Chamber emphasized that “[a]n accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime”\textsuperscript{251} and that “it is not necessary for a principal perpetrator to be aware of the

\begin{itemize}
\item \textsuperscript{244} Supra note 242 at para 48.
\item \textsuperscript{246} \textit{Ibid} at para 127 [footnotes omitted] [emphasis added].
\item \textsuperscript{247} \textit{Ibid} at para 189, 195.
\item \textsuperscript{248} \textit{Mikaeli Muhimana v Prosecutor}, ICTR-95-1B-A, Appeal Judgment (21 May 2007) (International Criminal Tribunal for Rwanda), online: ICTR <http://www.unictr.org/Portals/0/Case/English/Muhimana/judgement/070521_apl_judgement.pdf>.
\item \textsuperscript{249} \textit{Ibid} at para 189.
\item \textsuperscript{251} \textit{Ibid} at para 74.
\end{itemize}
 aider and abettor’s contribution”.252 In *Dominique Ntawukulilyayo v Prosecutor*253 the ICTR Appeals Chamber established that an omission, not only an act, can satisfy the *actus reus* of the aiding and abetting mode of responsibility.

These refinements to the *actus reus* of aiding and abetting laid down by *Tadic*254 in 1999 mostly outlined what type of acts can satisfy the standard, but never altered or contradicted the essence of the rule. Despite that apparent continuity in the statement of the rule, an important element of the *actus reus* definition has been plagued by uncertainty since the beginning of the 2000’s: the specific direction requirement. This element comes from the *Tadic*255 decision in which the ICTY Appeals Chamber underlined that the accomplice’s acts have to be “*specifically directed* to assist, encourage or lend moral support to the perpetration of a certain crime (…)”.256 Since then, three options have surfaced in the jurisprudence. The first one argues that we should apply the definition developed by *Tadic*257, i.e. the accomplice’s acts have to be *specifically directed* towards the perpetration of the principal’s crime to fulfill the aiding and abetting *actus reus*. The second one contends that acts simply *directed* (as opposed to specifically directed) towards the commission of the offence are enough to fulfil the aiding and abetting *actus reus*. The third one holds that the accomplice’s acts *do not have to be specifically directed or directed* towards the commission of the principal’s crime to

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252 *Supra* note 250 at para 87.
254 *Supra* note 16.
256 *Ibid* at 229 [emphasis added].
satisfy the material element of aiding and abetting. The last decision on specific direction by an appellate court, *Prosecutor v Vujadin Popovic*\(^{258}\), has been rendered on 30 January 2015 and some think that it might have settled the issue, although one judge arguably dissented from the majority’s reasoning. This matter of specific direction is in fact the main issue found in the jurisprudence of the ICTY and the ICTR as far as the accomplice liability is concerned. In order to better understand all the nuances of that debate, it is appropriate to first dig down deeper into the jurisprudence about the *mens rea* of the aiding and abetting liability.

### 2.2.2.4. The subjective element

The first decision to mention is the 1999 ICTY Appeals Chamber decision in *Tadic*\(^{259}\) in which the court said “[i]n 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”.\(^ {260}\) In *Aleksovski*\(^ {261}\), the ICTY Appeals Chamber rejected the abovementioned *dictum* laid down in *Tadic*\(^ {262}\) and rather adopted an aiding and abetting *mens rea* containing the following elements: 1) the aider must have participated in the illegal act in full knowledge of what he was doing which can be shown through a) an awareness of the act of participation coupled with, b) a conscious decision to participate, and 2) an awareness by the aider and abettor of the essential elements of the crime committed by the principal (including his relevant *mens rea*).\(^ {263}\) These two

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\(^{259}\) *Supra* note 16.

\(^{260}\) *Ibid* at para 229.

\(^{261}\) *Supra* note 239.

\(^{262}\) *Supra* note 16.

\(^{263}\) *Supra* note 239 at para 164.
standards differ in three ways. Firstly, for the Tadic definition\textsuperscript{264}, the accused has to know that he is assisting the commission of a crime whereas, for the Aleksovski definition\textsuperscript{265}, the accused has to be aware of his participation in the crime and make the conscious decision to participate. Secondly, for the Tadic definition\textsuperscript{266}, the aider has to know that his acts assist the commission of a specific crime by the principal whereas, for the Aleksovski definition\textsuperscript{267}, the aider must be aware of the crime committed by the principal. Thirdly, the Aleksovski definition\textsuperscript{268} contains an element absent of the other definition: a conscious decision to participate. In the 2004 ICTY Appeals Chamber judgment in Blaskic\textsuperscript{269}, the court declared that the mens rea of aiding and abetting was “knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator’s crime”\textsuperscript{270} and added that the Trial Chamber had erred in asserting that recklessness was sufficient.\textsuperscript{271} At paragraph 50 of the decision, the court countenanced the following statement:

\begin{quote}
[I]t is not necessary that the aider and abettor...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.\textsuperscript{272}
\end{quote}

In light of the foregoing \textit{dicta}, it seems clear that the court in that case endorsed the standard put forward in Tadic\textsuperscript{273} rather than Aleksovski\textsuperscript{274}. It should also be noted that it added a new element which consisted of the awareness of the aider/abettor that a number

\begin{footnotes}
\item \textsuperscript{264} \textit{Supra} note 16 at para 229.
\item \textsuperscript{265} \textit{Supra} note 239 at para 164.
\item \textsuperscript{266} \textit{Supra} note 16 at para 229.
\item \textsuperscript{267} \textit{Supra} note 239 at para 164.
\item \textsuperscript{268} \textit{Ibid}.
\item \textsuperscript{269} \textit{Supra} note 242.
\item \textsuperscript{270} \textit{Ibid} at para 49.
\item \textsuperscript{271} \textit{Ibid}.
\item \textsuperscript{272} \textit{Ibid} at para 50 [emphasis added].
\item \textsuperscript{273} \textit{Supra} note 16.
\item \textsuperscript{274} \textit{Supra} note 239.
\end{footnotes}
of crimes might be committed with the aid and one of them is actually committed. Indeed, according to Tadic\textsuperscript{275} and Aleksovski\textsuperscript{276}, although this requirement appears to be stronger in the latter decision, the aider had to know the elements of the crime actually committed by the perpetrator which was a narrower standard. This new element seems to usher in, despite the court’s view on that matter, a recklessness element. Another interesting aspect of the Blaskic\textsuperscript{277} mens rea is the part of the above quotation where the court said “he has intended to facilitate the commission of that crime”. This seems to imply that intent to facilitate the commission of the crime is part of the mental element of the aiding and abetting mode of liability. Such a construction would be in direct conflict with the clear statement of the court to the effect that knowledge, and not purpose, is the right subjective element for the aiding and abetting mode of liability. Therefore, I think that priority should be given to the *dictum* of the court which underlined the applicability of the knowledge standard. The said part of sentence ought simply to be taken as the logical conclusion arising out of the combined knowledge of the assistance and the awareness that a number of crimes might be committed with it. Be that as it may, overall, it can be said that the knowledge is the dominant position in the jurisprudence of the court. For instance, in *Prosecutor v Mitar Vasiljevic*\textsuperscript{278}, *Prosecutor v Milorad Krnojelac*\textsuperscript{279}, *Prosecutor v Blagoje Simic*\textsuperscript{280}, *Prosecutor v Andre Ntagerura*\textsuperscript{281}, and *Ntawukulilyayo*\textsuperscript{282}.

\textsuperscript{275} Supra note 16.
\textsuperscript{276} Supra note 239.
\textsuperscript{277} Supra note 242.
\textsuperscript{280} Prosecutor v Blagoje Simic, IT-95-9-A, Appeal Judgment (28 November 2006) at para 86 (International Criminal Tribunal for the former Yugoslavia), online: ICTY <
the ICTY and ICTR Appeals Chambers repeated word for word the *dictum* set out in *Tadic*\(^{283}\). Same thing occurred in *Blagojevic*\(^{284}\) with the exception that the court elaborated that “[i]n cases of specific intent crimes such as persecutions or genocide, the aider and abettor must know of the principal perpetrator’s specific intent”.\(^{285}\) The more recent judgements issued by the Appeals Chambers of the ICTY and the ICTR confirm the foregoing comments about the *mens rea* of aiding and abetting.\(^{286}\) Lastly, in the 2014 ICTY Appeals Chamber judgment *Sainovic*\(^{287}\), the court epitomized particularly well the current statement of the law:

It is firmly established in the jurisprudence of the Tribunal that to satisfy the *mens rea* requirement for aiding and abetting, it must be shown that the aider and abettor knew that his acts or omissions assisted the commission of the specific crime by the principal, and that the aider and abettor was aware of the essential elements of the crime which was ultimately committed, including the intent of the principal perpetrator. In addition, the Appeals Chamber recalls that it is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed – if he is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.

The Appeals Chamber has previously defined “specific crime” as referring to, for example, “murder, extermination, rape, torture, wanton destruction of civilian property, etc.” There is no legal requirement that the aider and abettor know every detail of the crime that was eventually committed. Nonetheless, the degree of knowledge pertaining to the details of the crime required to satisfy the *mens rea* of aiding and abetting will depend on the circumstances of the case, including the scale of the crimes and the type of assistance provided.\(^{288}\)

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\(^{282}\) *Supra* note 253 at para 222.

\(^{283}\) *Supra* note 16.

\(^{284}\) *Supra* note 245.

\(^{285}\) *Ibid* at para 127.


\(^{287}\) *Supra* note 151.

\(^{288}\) *Ibid* at paras 1772-1773 [reference omitted].
2.2.2.5. Analysis and discussion of the main issue: the specific direction requirement

2.2.2.5.1. The basic tension

The basic tension of the specific direction debate is simple. As stated above, the first case to define the material element of the aiding and abetting mode of liability was the 1999 Appeals Chamber Tadic in which the court described it in this way, “[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 (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime”. The definition set out in Tadic was challenged right from the beginning in 2001 with the judgment in Prosecutor v Zejnil Delalic where the Appeals Chamber endorsed the Trial Chamber’s definition of the material element of aiding and abetting which was “all acts of assistance that lend encouragement or support to the perpetration of an offence”, simply adding that “the acts of assistance, encouragement or support must have a substantial effect on the perpetration of the crime”. Contrary to the dictum in Tadic, no reference was made to the specific direction of the accomplices’ acts towards the commission of the crime by the principal. Having laid down the main parameters of the debate, it is now appropriate to see how the jurisprudence evolved from 2001 to 2015 on the specific direction requirement.

289 Supra note 16.
290 Ibid at para 229 [emphasis added].
291 Supra note 16.
293 Ibid at para 352.
294 Supra note 292 at para 352.
295 Supra note 16.
As preliminary remark, it is important to recognize that many appellate cases on aiding and abetting do not provide a clear answer about the question of specific direction. For instance, in the 2000 decision *Prosecutor v Anto Furundzija*\(^\text{296}\), the Appeals Chamber does not enumerate the elements of aiding and abetting, but seems to endorse the Trial Chamber’s decision which adopted the version free of the specific direction requirement.\(^\text{297}\) Another example of that is the 2004 judgment *Blaskic*\(^\text{298}\) where the court apparently endorses both sides of the debate by saying there is no reason to depart from the definition in *Vasiljevic*\(^\text{299}\) (which contains the specific direction requirement),\(^\text{300}\) while adding that the Trial Chamber was correct in defining the *actus reus* of aiding and abetting as “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime”.\(^\text{301}\) A last demonstration of this trend is the 2007 ICTY Appeals Chamber decision in *Blagojevic*\(^\text{302}\) in which the ICTY Appeals Chamber declared:

> [W]hile the *Tadic* definition has not been explicitly departed from, specific direction has not always been included as an element of the *actus reus* of aiding and abetting. This may be explained by the fact that such a finding will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime.\(^\text{303}\)

Reinforcing the confusion is the fact that the court in that decision applied that legal standard to the conduct of one of the accuseds\(^\text{304}\) while declaring that the *Tadic*\(^\text{305}\) dictum


\(^{297}\) Ibid at para 126.

\(^{298}\) Supra note 242.

\(^{299}\) Supra note 278.

\(^{300}\) Supra note 242 at para 45

\(^{301}\) Ibid at para 46.

\(^{302}\) Supra note 245.

\(^{303}\) Ibid at para 189 [footnotes omitted].

\(^{304}\) Ibid at para 199.
(which includes the specific direction) was the correct statement of the law in the case of a co-accused. 306

2.2.2.5.2. The three approaches

2.2.2.5.2.1. The restrictive approach: specific direction required

The first jurisprudential trend has been to follow closely the dictum given in Tadic307. This current is supported by a certain number of decisions which only a few will be detailed here. First in 2001, the Appeals Chamber in Prosecutor v Zoran Kupresic308 said that the actus reus of aiding and abetting a crime is “acts specifically directed to assisting, encouraging or lending moral support to the perpetration of the offence (...)” and that “his support must have a substantial effect on the perpetration (...).” 309 Also, many appeal judgments afterwards simply repeated the dictum in Tadic310 notably the 2003 decision Krnojelac311, the 2004 Vasiljevic312, the 2005 Prosecutor v Miroslav Kvocka313, and thus do not need to be discussed at great length here. In February 2013, the majority in Perisic314 maintained that the specific direction was still a part of the material element

305 Supra note 16.
306 Supra note 245 at para 127.
307 Supra note 16.
309 Ibid at para 254.
310 Supra note 16.
311 Supra note 279 at para 33.
312 Supra note 278 at para 102.
314 Supra note 34; Before that decision, the jurisprudential trend to the effect that specific direction was not part of the actus reus of aiding and abetting was gathering speed which prompted the court to formulate arguments to debunk that trend and to support the presence of specific direction.
of aiding and abetting.\footnote{Supra note 34 at para 36.} The majority supported this position by pointing out that 1) to date, no Appeals Chamber judgments gave cogent reasons to depart from the dictum in Tadic\footnote{Supra note 16.},\footnote{Supra note 34 at para 28.} \footnote{Ibid.} 2) many decisions referred to the specific direction requirement as part of the \textit{actus reus} of aiding and abetting,\footnote{Ibid. at para 29.} 3) when some judgements did not refer to the specific direction requirement, they employed most of the time equivalent formulations,\footnote{Ibid. at para 30.} 4) the judgements that did not use the specific direction element or an equivalent formulation did not aim at giving a comprehensive definition of the material element of aiding and abetting,\footnote{Supra note 286.} 5) the opinion issued in Mrksic\footnote{Supra note 34 at para 34.} (no specific direction requirement) was simply an attempt to summarise an earlier judgment and did not aim at overturning a well-settled jurisprudential principle such as the specific direction.\footnote{Ibid at para 38.} The majority supplemented this analysis by enunciating that when there is proximity between the acts of the aider and abettor and the principal’s crime, “specific direction may be demonstrated implicitly through discussion of other elements of aiding and abetting liability, such as substantial contribution”.\footnote{Supra note 34 at para 39.} When that proximity is absent, explicit consideration of specific direction is required.\footnote{Supra note 34 at para 39.} This proximity is to be analyzed on a case-by-case basis; relevant elements to make a determination include temporal and geographical factors.\footnote{Ibid at para 40.} The penultimate push for that thesis was made on 23 January
2014 when the minority in *Sainovic*\(^{326}\), constituted by Mr. Justice Tuzmukhamedov, while being unclear as to its stance on the debate, made comments which may indicate a preference for the specific direction requirement. Generally, the minority pointed out that *Sainovic*\(^{327}\) was not an appropriate forum to address specific direction since it had no pertinence in the case\(^{328}\) and it would have been appropriate to avoid tackling the issue in these circumstances in order to preserve judicial harmony, legal certainty, stability, and predictability.\(^{329}\) Then, the minority asserted that the “Appeals Chamber should follow its previous decisions unless there are cogent reasons to depart from them in the interests of justice”\(^{330}\) and that the majority did not provide explanations “as to whether it was guided by that standard in reaching its conclusions”.\(^{331}\) Lastly, on 30 January 2015, the minority in *Popovic*\(^{332}\), while it conceded that specific direction was not part of the analysis, emphasized that:

> My view is more nuanced however, regarding the legal characterisation of “aiding and abetting”. The review of state and international practices undertaken in the recent Tribunal case law is not conclusive as to any exclusive epithet when defining “aiding and abetting”. When the alleged acts of abetting are too remote from the main offense or are so equivocal in their meaning to cast a shade as to their purpose, a specific enquiry to unveil their true meaning may be required. Whether that exercise is referred to as establishing “the knowledge” or “wilful support” of the crime, is for me a secondary issue, so long as the legitimacy of the enquiry is not called into question. (...) I join the Majority only because I hold the view that the Trial Chamber’s findings sufficiently and adequately characterise Pandurević’s purposeful involvement in the forcible removal as “aiding and abetting”\(^{333}\).

This passage indicates that, for the minority, the purpose of the aid might need to be analyzed in certain fact scenarios (when the aider’s acts are remote from the main offence

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\(^{326}\) *Supra* note 151.

\(^{327}\) *Ibid*.

\(^{328}\) *Ibid* at para 40 of Judge Tuzmukhamedov’s dissent.

\(^{329}\) *Ibid* at para 45.

\(^{330}\) *Ibid* at para 47.

\(^{331}\) *Ibid*.

\(^{332}\) *Supra* note 258.

\(^{333}\) *Ibid* at paras 23-25 of Judge Mandiaye Niang’s dissent [emphasis added] [footnotes omitted].
or do not disclose a clear intent to aid) which is the equivalent of examining whether the aid was specifically directed towards the commission of the crime. This position is unmistakably similar to that adopted by the majority in *Perisic*.334

2.2.2.5.2.2. The liberal approach: specific direction not required

Running afoul of this jurisprudential trend is the one that does not include the specific direction requirement in the material element of aiding and abetting. As indicated above, this opinion is rooted in the 2001 decision *Delalic*, but the impetus for the latter decision was provided by the 2000 decision in *Aleksovski*336 where the court questioned the accuracy of the definition put forward in *Tadic*.337 338 It further qualified as a “reasonably accurate statement of the law” the following passage from the trial decision:

   The accused must have participated in the commission of the offence and “all acts of assistance by words or acts that lend encouragement or support” constitute sufficient participation to entail responsibility according to Article 7(1) whenever the participation had [a] “substantial effect” on the commission of the crime. It is unnecessary to prove that a cause-effect relationship existed between participation and the commission of the crime. The act of participation need merely have significantly facilitated the perpetration of the crime.339

The rest of the appeal judgment remains unclear as to the exact definition considered by the tribunal in order to reach its decision, but this passage suggests that the court did not consider specific direction as part of the aiding and abetting liability. That incertitude opened the way for the *Delalic* decision rendered one year later the elements of which

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334 *Supra* note 34.
335 *Supra* note 292.
336 *Supra* note 239.
337 *Supra* note 16.
338 *Supra* note 239 at para 163.
339 *Ibid* at para 164 [emphasis added].
340 *Supra* note 292.
are outlined above.  

Afterwards, as has been shown above, the ICTY Appeals Chamber rendered many decisions which were unclear as to whether the specific direction requirement should be included in the material element of aiding and abetting. In that trend is the 2007 Blagojevic decision which hinted that this requirement might sometimes be comprised in the substantial contribution element of the said concept. This proposition was interpreted in the 2009 decision Mrksic where the tribunal declared that “‘specific direction’ is not an essential ingredient of the actus reus of aiding and abetting”. This jurisprudential position was consolidated by the November 2012 judgement Prosecutor v Ante Gotovina where the tribunal pointed out that “for an individual to be held liable for aiding and abetting, he must have substantially contributed to the crime (...)

Another reinforcement for this position is found in the December 2012 decision in Prosecutor v Milan Lukic in which the majority, speaking of Mrksic, held that regarding the material element of aiding and abetting “there is no cogent reason to depart from this jurisprudence”. The majority’s position in Lukic was deemed to be correct by two dissenting judges in the February 2013 judgment.

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341 For greater certainty, I here refer to the following. In Delalic, supra note 292, the ICTY Appeals Chamber endorsed the Trial Chamber’s definition of the material element of aiding and abetting which was “all acts of assistance that lend encouragement or support to the perpetration of an offence”, simply adding that “the acts of assistance, encouragement or support must have a substantial effect on the perpetration of the crime”. Contrary to the dictum in Tadic, supra note 16, no reference was made to the specific direction of the accomplices’ acts towards the commission of the crime by the principal.

342 Supra note 245.

343 Ibid at para 189.

344 Supra note 286.

345 Ibid at para 159.


347 Ibid at para 127.


349 Supra note 286.

350 Supra note 348 at para 424.

351 Supra note 438.
Indeed, Judge Lui of the minority explained his dissent with the following arguments: 1) the specific direction element has not been applied consistently, 2) the jurisprudence of the tribunal shows that aiding and abetting liability can be found without referring to the specific direction requirement, 3) given the fact that the specific direction condition has not been applied with rigor in the past, to insist on it would increase the threshold to find an accused liable under that mode of responsibility, 4) this shift might permit the accuseds who knowingly facilitated the most grievous crimes to elude responsibility for their misdeeds. At the beginning of 2014, the majority in Sainovic, supported the version of the actus reus of aiding and abetting free of specific direction. In that decision, the majority invoked decisions from the ICTY and the ICTR and the customary international law to buttress its claim. As for the jurisprudence of the two tribunals, the majority said that 1) the definition of the actus reus set out in Tadic “does not purport to be a comprehensive statement of the aiding and abetting liability”, and therefore should not be used as a valid precedent with respect to specific direction, 2) many decisions do not include the specific direction requirement in the actus reus of aiding and abetting, 3) prior to Perisic, “no independent specific direction requirement was applied by the Appeals Chamber to the facts of any case before it”. As for the customary international law, the majority maintained that an analysis of the

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352 Supra note 34.
353 Ibid at para 2 of Judge Lui’s opinion.
354 Ibid.
355 Ibid at para 3.
356 Ibid.
357 Supra note 151.
358 Supra note 16.
359 Supra note 151 at para 1623.
360 Ibid.
361 Ibid at para 1624.
362 Supra note 34.
363 Supra note 151 at para 1625.
post-WW2-era decisions yielded a material element of aiding and abetting free of specific direction. The majority added:

In none of these relevant cases “specific direction” was required as a distinct element. Rather, they focused on: (i) the degree of each defendant’s contribution to a crime, demonstrated through the role he played in, and the impact he exerted on, the commission of the crime; and (ii) whether the defendant knew that his acts contributed to the commission of the crime.\footnote{Supra note 151 at para 1627.}

The majority further noted that the analysis of the national law of many countries around the world did not exhibit a wide consensus with respect to the presence of the specific direction element in the aiding and abetting liability. Then, the majority concluded that specific direction could not be justified by analogy with the content of the Code of Crimes\footnote{Supra note 143.} or with the Rome Statute\footnote{Supra note 29.}. Lastly, in January 2015, the majority in Popovic\footnote{Supra note 258.} stressed that the \textit{actus reus} of aiding and abetting consisted of “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime”\footnote{Ibid at para 1732; Despite the controversy, the court did not elaborate more extensively and simply stated its conception of the law citing notably Sainovic, supra note 151, Blaskic, supra note 242, and Taylor, supra note 35, in support of that assertion.} and added that “specific direction is not an element of aiding and abetting under customary international law”.\footnote{Supra note 258 at para 1758; The court did give any more explanations than citing Sainovic, supra note 151, to support its reasoning on that point.}

\textbf{2.2.2.5.2.3. The median approach: the direction requirement}

Halfway between the two above described approaches lies the one under which the material element of aiding and abetting is satisfied when the accomplice’s acts are \textit{directed} towards the perpetration of the principal’s crime. This position comes from the
decision Simic where the court asserted that “the actus reus of aiding and abetting consists of acts directed to assist, encourage or lend moral support to the perpetration of a certain specific crime, and which have a substantial effect upon the perpetration of the crime”. This jurisprudential trend was strengthened two years later by the Prosecutor v Naser Oric decision where the actus reus of aiding and abetting was defined in the exact same way. Since this view is similar to specific direction and has not been addressed in the literature or in the subsequent jurisprudence, it will not be treated any further.

2.2.2.5.3. Provisional outcome of the debate on specific direction

The controversy about specific direction is not limited only to the jurisprudence of the ICTY. The SCSL refused to include the said element in its definition of the actus reus of aiding and abetting in its most high-profile case. The issue is currently and will continue to be debated at the ICC as a minority’s opinion of a recent decision has already contended that specific direction should not be ignored in certain circumstances. In short, it is a global jurisprudential issue in ICL and the arguments provided on both sides deserve consideration. When drafting my position on complicity, I had to cogitate about all the possibilities and implications involved in the selection of whichever option.

For these reasons, I will provide a detailed analysis about the propriety of specific

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370 Supra note 280.
371 Ibid at para 85.
373 Ibid at para 43.
374 Taylor, supra note 35.
direction in the accomplice liability in the fourth chapter of this work; therefore, I will not explain in details in the current chapter all the intricacies of the debate except to say the following which is in fact an epitome of my position. Specific direction should be left out of the objective element of the accomplice liability because it is too narrow, unworkable, and confusing.

At any rate, despite the majority’s holding on the question in *Sainovic*\(^ {376}\) and *Popovic*\(^ {377}\), the jurisprudence of the ICTY on that issue remains uncertain. This has been acknowledged by many experts in the field after the pronouncement of *Sainovic*\(^ {378}\) and I think that it continues today.\(^ {379}\) Yet, the ICTY Appeals Chamber in *Sainovic*\(^ {380}\) used unusually strong language to put forward its conclusion about the controversy:

> [T]he Appeals Chamber […] comes to the compelling conclusion that “specific direction” is not an element of aiding and abetting liability under customary international law. […]. Consequently, the Appeals Chamber […] unequivocally rejects the approach adopted in the Perisic Appeal Judgment as it is in direct and material conflict with the prevailing jurisprudence on the actus reus of the aiding and abetting liability and with the customary international law in this regard.\(^ {381}\)

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\(^{376}\) *Supra* note 151.

\(^{377}\) *Supra* note 258.


\(^{379}\) I say that because the judges (Judge Moloto at the Trial Chamber, Judges Meron, Agius, and Vaz at the Appeals Chamber) who expressed the conviction that specific direction was part of the aiding and abetting liability in *Perisic*, *supra* note 34, have not decided other cases on this point since then and might therefore contradict the view laid down in *Sainovic*, *supra* note 151, and *Popovic*, *supra* note 258, in their next pronouncement. Also, the issue of specific direction contains complicated issues and, as will be shown in chapter four, many convincing arguments could be brought in favour of inserting it in the provisions dealing with complicity in ICL. For these reasons, despite that the two last appeal judgements were opposed to the presence of specific direction in the aiding and abetting liability, it is far from impossible that other benches in subsequent cases maintain that specific direction is indeed part of the *actus reus* of aiding and abetting.

\(^{380}\) *Supra* note 151.

\(^{381}\) *Ibid* at paras 1649-1650 [my emphasis] [footnotes omitted].
This passage cannot be understood or interpreted as a simple statement of the law by a bench harbouring views at variance with a previous bench. The formulation of the phrases has, logically, to mean something more. Coupling the aforesaid semantic peculiarity to the substantially long review of the authorities and precedents contained in majority’s opinion helps to solve this quandary. In my view, the lengthy jurisprudential review and the strong language discussed above are echoing to the observations made by the majority in *Perisic*\(^{382}\) where it was asserted that the ICTY Appeals Chamber had never intended in its previous judgments to depart from *Tadic*\(^{383}\). In effect, the majority in *Perisic*\(^{384}\) had declined to follow the 2009 ICTY appeal judgment *Mrksic*\(^{385}\), which had stated clearly that specific direction was not part of the *actus reus* of aiding and abetting, on several grounds. Firstly, the statement was made “in passing”\(^ {386}\). Secondly, it was made in the midst of a discussion about the *mens rea*, not the *actus reus*, of aiding and abetting\(^ {387}\). Thirdly, *Mrksic*\(^ {388}\) did not persuade the court that it contained the intention to depart from the settled precedent established by *Tadic*\(^ {389}\)\(^ {390}\). Fourthly, the court recalled “its settled practice to only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and

\(^{382}\) Supra note 34.
\(^{383}\) Supra note 16.
\(^{384}\) Supra note 34.
\(^{385}\) Supra note 286.
\(^{386}\) Supra note 34 at para 32.
\(^{387}\) Ibid.
\(^{388}\) Supra note 286.
\(^{389}\) Supra note 16.
\(^{390}\) Supra note 34 at para 32.
the facts",\textsuperscript{391} and declared that the statement made in \textit{Mrksic}\textsuperscript{392} did not satisfy this careful consideration standard.\textsuperscript{393} Lastly, the court argued:

Had the Appeals Chamber 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. Instead, the relevant reference to specific direction […] 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 […].\textsuperscript{394}

All these alleged defects on which the majority in \textit{Perisic}\textsuperscript{395} latched on in order to dismiss the authoritative force of precedents arguing against specific direction seem to have been significantly addressed by the majority in \textit{Sainovic}\textsuperscript{396} with the strong language and lengthy development mentioned above. Arguably, the majority’s idea in \textit{Sainovic}\textsuperscript{397} was to put an end to the controversy by carefully reviewing the ICTY and ICTR jurisprudence on the content of aiding and abetting, by abundantly providing historical jurisprudence issued by the post-WW2-era tribunals, and by analyzing the articulation of the concept of complicity in national jurisdictions around the world. This laudable effort has borne fruits to a certain extent because the majority in \textit{Popovic}\textsuperscript{398} adhered to the aiding and abetting version free of specific direction without a debate by simply citing \textit{Sainovic}\textsuperscript{399} in a footnote. However, still one judge, just like in \textit{Sainovic}\textsuperscript{400}, remained

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\begin{itemize}
\item \textsuperscript{391} \textit{Supra} note 34 at para 34.
\item \textsuperscript{392} \textit{Supra} note 286.
\item \textsuperscript{393} \textit{Supra} note 34 at para 34.
\item \textsuperscript{394} \textit{Ibid} [emphasis added] [footnotes omitted].
\item \textsuperscript{395} \textit{Supra} note 34.
\item \textsuperscript{396} \textit{Supra} note 151.
\item \textsuperscript{397} \textit{Ibid}.
\item \textsuperscript{398} \textit{Supra} note 258.
\item \textsuperscript{399} \textit{Supra} note 151.
\item \textsuperscript{400} \textit{Ibid}.
\end{itemize}
unconvinced by this approach and stated that, when the aid is remote or neutral, it would be appropriate to conduct an inquiry as to its purpose.\footnote{401}{Supra note 258 at paras 23-25 of Judge Mandiaye Niang’s opinion.}

Also interesting in this debate is the fact that arguments put forward by the proponents of each side seem to be mainly grounded in a different interpretation of the same jurisprudence. Both sides seem to say that specific direction does or does not have its place in the actus reus of the aiding and abetting liability in virtue of the precedents, the stability, continuity and predictability of the law, and judicial harmony. Arguments about the practical utility, the impacts, the purposes, and the philosophical underpinnings of specific direction have not been dealt with meaningfully. At the end of the day, as David Jens Ohlin pointed it out, “[i]t would seem that future cases dealing with specific direction will hinge entirely on which Appeals Chamber judges are selected to sit on the case”.\footnote{402}{Supra note 378; In that regard, it will be interesting to read how will the judges that were on the bench in Perisic, supra note 34, notably Theodor Meron, Carmel Agius, and Andrésia Vaz will deal with the judgments in Sainovic, supra note 151, and Popovic, supra note 258, in their next pronouncement on the specific direction issue.} This is state of affairs is of course unacceptable for the accuseds who have to respond to grave accusations before the tribunal. Principles of justice and fairness to the accused call for a more definite statement of the law. These preoccupations, amongst others, were probably what prompted the minority in Sainovic\footnote{403}{Supra note 151.} to aver:

\begin{quote}
[I]t would be prudent to exercise some restraint in addressing such rifts in the jurisprudence of a respectable and authoritative judicial institution so as to preserve as much as possible, judicial harmony in the case law that impacts the development of international criminal law and international humanitarian law, as well as legal certainty, stability and predictability, in particular, for the benefit of the parties to proceedings before the Tribunal.\footnote{404}{Ibid at para 45 of Judge Tuzmukhamedov’s opinion [emphasis added].}
\end{quote}

\begin{tabular}{l}
\textbf{unconvinced by this approach and stated that, when the aid is remote or neutral, it would be appropriate to conduct an inquiry as to its purpose.} \\
\textbf{Also interesting in this debate is the fact that arguments put forward by the proponents of each side seem to be mainly grounded in a different interpretation of the same jurisprudence. Both sides seem to say that specific direction does or does not have its place in the actus reus of the aiding and abetting liability in virtue of the precedents, the stability, continuity and predictability of the law, and judicial harmony. Arguments about the practical utility, the impacts, the purposes, and the philosophical underpinnings of specific direction have not been dealt with meaningfully. At the end of the day, as David Jens Ohlin pointed it out, “[i]t would seem that future cases dealing with specific direction will hinge entirely on which Appeals Chamber judges are selected to sit on the case”. This is state of affairs is of course unacceptable for the accuseds who have to respond to grave accusations before the tribunal. Principles of justice and fairness to the accused call for a more definite statement of the law. These preoccupations, amongst others, were probably what prompted the minority in Sainovic to aver:}

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\textbf{\footnote{401}{Supra note 258 at paras 23-25 of Judge Mandiaye Niang’s opinion.}} \\
\textbf{\footnote{402}{Supra note 378; In that regard, it will be interesting to read how will the judges that were on the bench in Perisic, supra note 34, notably Theodor Meron, Carmel Agius, and Andrésia Vaz will deal with the judgments in Sainovic, supra note 151, and Popovic, supra note 258, in their next pronouncement on the specific direction issue.}} \\
\textbf{\footnote{403}{Supra note 151.}} \\
\textbf{\footnote{404}{Ibid at para 45 of Judge Tuzmukhamedov’s opinion [emphasis added].}}
\end{tabular}
An interesting solution has been put forward by Jens David Ohlin which consists of an *en banc* review of the specific direction matter. In the words of the author:

> Everything would be solved if there was simply a provision to allow *en banc* review of an Appeals Chamber judgment on matters of specific questions of law. The full Appeals Chamber could then hold a hearing on that question, seek additional briefing, and issue an *en banc* judgment. Every judge on the Appeals Chamber should get one vote to decide the fate of specific direction.  

Apart from the fact that no such procedure is provided for by the *ICTY Statute*, which is a major impediment, I fail to see why this procedure would not be advisable in the circumstances. This would be a “cheap, democratic, and easy-to-implement” mechanism that would allow the Appeals Chamber to set the record straight once and for all on the contentious matter that is specific direction. The only limit that should apply on this legal device is that the request for the *en banc* review should only be available in certain specified narrow circumstances so that it does not become a second appeals chamber and to avoid that the opinions given by the court *en banc* be reviewed and varied just as easy as any appellate judgement of the court.

On 3 February 2014, after the pronouncement of the Appeals Chamber decision in *Sainovic* on 27 January 2014, the Office of the Prosecutor filed a motion for reconsideration of the Appeals Chamber’s decision in the *Perisic* case arguing that it was decided on flawed legal grounds and that “that the erroneous reversal of Mr.

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405 Ohlin, *supra* note 378.
406 *Supra* note 227.
408 *Supra* note 151.
409 *Supra* note 34.
Perišić’s lawful convictions and 27 year sentence must be corrected to redress the grave injustice caused to the tens of thousands of men, women and children killed or injured in Sarajevo and Srebrenica and to their families.” 411 On 20 March 2014, this motion was dismissed by the Appeals Chamber stating that 1) the importance of certainty with regards to final judgments, 2) the victim’s interest is an insufficient basis on which the motion could be granted, and 3) the prosecution failed to establish cogent reasons for departing from settled jurisprudence of the ICTY. 412 In other words, the right of the accused in the finality of the proceedings trumped the victims’ interest in seeing the case reopened. It is logical to surmise that the court did not want to resolve the controversy over specific direction to the detriment of an accused who enjoyed his first months of liberty after almost ten years of legal battle at the ICTY. This outcome is probably the correct one to adopt in the circumstances of this case although it would have been interesting to see how another ICTY Appeals Chamber bench would have handled the issue on its merit. Be that as it may, given the tenor of the court’s opinion in Sainovic 413 and Popovic 414, one cannot help but wonder whether a major miscarriage of justice did not happen thereby engendering a revolting injustice for the victims in the Perisic 415 case. Regardless of the answer to that question, it seems evident that the court’s credibility has been tarnished as a result of this controversy.

411 Supra note 410.
413 Supra note 151.
414 Supra note 258.
415 Supra note 34.
2.2.3. The Special Court for Sierra Leone

2.2.3.1. Background information

In 2002, as the civil war drew to a close and the rebels were disarmed, the government of Sierra Leone came to an agreement with the United Nations to create a special court (the SCSL) to try the individuals most responsible for the atrocities committed from 1996 onwards. The Statute of the Special Court for Sierra Leone provides the SCSL

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416 The history of the Sierra Leonean civil war is, in broad lines, as follows. On 27 April 1961, Sierra Leone gained independence from the United Kingdom and retained a political regime based on parliamentary democracy and membership in the Commonwealth of Nations. At the time of independence, the dominant political party was the Sierra Leone People’s Party (SLPP) the leader of which unexpectedly died in 1964 and was replaced to the post of Prime Minister by his half-brother. The transition did not go smoothly as the new Prime Minister tried to establish an authoritarian one-party state and refused to collaborate with the tribe chiefs across the country. Riots broke out and, in 1967, elections were called which were won by the main opposition party, the All People’s Congress (APC). Three military coup d'état ensued the last of which returned the elected Prime Minister to power. In 1978, the APC leader, Siaka Stevens, transformed the country’s political regime into a one-party state in which the only political party allowed was the APC. In 1990, a reform was adopted under which a multi-party system was to be in force before the next election. Unsatisfied by that promise and with other political aims, the 1988-created Revolutionary United Front (RUF) attacked two villages in March 1991 which in fact started the civil war in Sierra Leone. In April 1992, a military coup occurred ousting the country’s president, Joseph Saidu Momoh, and putting the National Provisional Ruling Council (NPRC) in charge of the country. This entity was ineffectual at fighting the RUF rebellion to such an extent that, by 1994, the RUF held much of the diamond-rich eastern part of the country and was at the edge of Freetown, the country’s capital. In 1996, another military coup occurred, but the SLPP returned to power following elections held the same year. The newly-elected president, Ahmad Tejan Kabbah, opened negotiations with the RUF with a view to ending the civil war which process lead to the November 1996 Abidjan Peace Accord. This peace agreement was not implemented and soon fell apart and, in May 1997, another coup d'état came to pass which put Armed Forces Revolutionary Council (AFRC) in power. The new junta invited the RUF to form the government which it did and Freetown was flooded by RUF fighters within days. After 10 months in office, the junta was evicted from power by multinational-Nigerian-led military force and President Kabbah was reinstated in power in March 1998. Following the Lome Peace Accord, the UN peacekeepers arrived in Sierra Leone in December 1999 to restore order and disarm the rebels. The disarmament operations did not go well and the Sierra Leonian government and UN troops resumed fighting against the RUF in the spring of 2000. Finally, a British Army contingent helped by the UN and Guinea defeated the RUF in 2001 and the war was declared over on 18 January 2002 by President Kabbah. Between 1991 and 2001, the civil war had claimed the lives of 50,000 people and occasioned the displacement of hundreds of thousands from their homes. See Abdullah Ibrahim, ed, *Between democracy and terror: the Sierra Leone civil war*, (Dakar, Senegal: Council for the Development of Social Science Research in Africa, 2004); Gberei Lansana, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone*, (Bloomington, Indiana: Indiana University Press, 2005); Andrew Dorman, *Blair’s successful war: British military intervention in Sierra Leone*, (Farnham, England: Ashgate, 2009); Wikipedia, *Sierra Leone Civil War*, online: Wikipedia <http://en.wikipedia.org/wiki/Sierra_Leone_Civil_War>.

417 *Special Court Agreement, 2002 (Ratification) Act, 2002*, (2002) Supplement to the Sierra Leone Gazette Vol. CXXXIII No. 22; The court was established in circumstances among which I noted the following. On 12 June 2000, Sierra Leone President Ahmad Tejan Kabbah wrote a letter to the UNSC demanding help from the international community with respect to the prosecution of those responsible for the crimes
competence on “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”.

The crimes within the jurisdiction of the court are crimes against humanity, violation of article 3 common to the Geneva Conventions, other serious violations of international humanitarian law, and certain crimes under the Sierra Leonean law such as abuse of children and arson. The SCSL closed at the end 2013 and the Residual SCSL has taken over its obligations notably regarding witness protection, supervision of prison sentences, and management of the SCSL archives.

perpetrated during the civil war that affected his country from 1991 to 2001. His letter justified his demand by saying “[w]ith regard to the magnitude and extent of the crimes committed, Sierra Leone does not have the resources or expertise to conduct trials for such crimes. [...] Also, there are gaps in Sierra Leonean criminal law as it does not encompass such heinous crimes as those against humanity and some of the gross human rights abuses committed by the RUF. It is my view, therefore, that, unless a court of such as that now requested is established here to administer international justice and humanitarian law, it will not be possible to do justice to the people of Sierra Leone or to the United Nations peacekeepers who fell victim to the hostage-taking” (see Letter from Sierra Leone President Ahmad Tejan Kabbah to the United Nations Security Council (12 June 2000) in Annex to the letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council (UNSC document number S/2000/786), online: UNSC <http://www.rscsl.org/Documents/Establishment/S-2000-786.pdf>). On 31 July 2000, the UN Secretary-General informed the UNSC in a report that the situation in Sierra Leone remained dangerous and volatile and that “[t]he civilian population continues to suffer as a result of the ongoing fighting in many parts of the country. I am deeply concerned about reports of continuing abductions, rape and sexual abuse, destruction and looting of civilian property, and forced recruitment of children. [...]. In this connection, I fully support efforts to hold accountable and prosecute those who are responsible for serious crimes in Sierra Leone” (see United Nations Secretary-General, Fifth report of the Secretary-General on the United Nations Mission in Sierra Leone, S/2000/751, UNSCOR, (2000), online: UNSC <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/554/71/PDF/N0055471.pdf?OpenElement>). Finally, on 14 August 2000, taking into account the foregoing, and notably “deeply concerned” by the serious crimes committed in Sierra Leone and the prevailing situation of impunity, the UNSC requested the UN Secretary-General to commence negotiation with the Sierra Leonean government to put in place a special court to deal with those responsible for these crimes (see United Nations Security Council, Resolution 1315, S/Res/1315 (2000), UNSCOR, 4186th meeting, (2000), online: UNSC <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1315%282000%29>). This negotiation process lead to the creation of the SCSL in 2002.


Ibid, art 1 para 1.

Ibid, arts 2-5.


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During its existence, four trials were conducted before the SCSL in which ten persons stood accused of various crimes. Nine were convicted and sentenced to terms of imprisonment ranging from 15 to 52 years while one died during the course of his trial. 422

2.2.3.2. The law

The provision about complicity is worded the same way as those found in the ICTY and the ICTR statutes:

6(1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime. 423

2.2.3.2.1. Objective element

As for the actus reus, in the May 2008 SCSL appeal judgment Prosecutor v Moinina Fofana 424, the court did not give a clear and comprehensive definition of the objective element of the aiding and abetting liability. Nonetheless, the court specified that “encouragement and moral support may constitute the actus reus and the acts of aiding and abetting can be made at a time and place removed from the actual crime”. 425 Most of the SCSL Appeals Chamber’s analysis revolved around the substantial effect on the commission of the crime requirement and made clear that this element was an integral part of the aiding and abetting liability. 426 Similarly, in the 2009 SCSL Appeals Chamber

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422 The Special Court for Sierra Leone, The Special Court Trials, online: SCSL <http://www.rscsl.org/index.html>.
423 SCSL Statute, supra note 418 art 6 para 1.
425 Ibid at para 72.
426 Ibid at para 84.
decision *Prosecutor v Issa Hassan Sesay*\(^{427}\), the court did not lay out a general definition of the aiding and abetting *actus reus*, but said that in the context of a conduct consisting of tacit approval and encouragement, the aider/abettor need not to have superior authority or effective control on the actual perpetrator.\(^{428}\) The court also reiterated the importance of the substantial contribution requirement in the analysis.\(^{429}\) In the 2013 SCSL Appeals Chamber judgment *Taylor*\(^{430}\), the court articulated the *actus reus* of aiding and abetting as “assistance, encouragement or moral support that has a substantial effect on the crimes”.\(^{431}\) It specifically rejected the defense’s argument to the effect that “the aider and abettor provided assistance to the physical actor, and that the assistance was used in the commission of a specific crime by the physical actor”\(^{432}\) was a necessary part of the *actus reus* of the aiding and abetting liability, stressing that this interpretation was contrary to the court statute and to the prescriptions of customary international law. The court also opined that the personal guilt principle was taken care of by the substantial effect requirement, which ensures the presence of a criminal link between the aider/abettor’s conduct and the commission of the crime.\(^{433}\) With respect to the specific direction requirement, the court emphasized that it was not a part of the objective element of aiding and abetting.\(^{434}\) To substantiate this opinion, the court argued that 1) the majority in *Perisic*\(^{435}\) simply applied internally binding precedents and not customary international

\(^{427}\) *Prosecutor v Issa Hassan Sesay*, SCSL-04-15-A, Appeal Judgment (26 October 2009) (Special Court for Sierra Leone), online: SCSL Website <http://www.rscsl.org/RUF_Appeals_Chamber_Decisions.html> [Hassan].

\(^{428}\) *Ibid* at para 541.

\(^{429}\) *Ibid* at para 542.

\(^{430}\) *Supra* note 35.

\(^{431}\) *Ibid* at para 368.

\(^{432}\) *Ibid* at para 363.

\(^{433}\) *Ibid* at paras 390, 392.

\(^{434}\) *Ibid* at para 474.

\(^{435}\) *Supra* note 34.
law,436 2) Tadic437, due to its internal structure, is a thin authority for specific direction,438 3) the possibility that the said element might be implicit or self-evident in certain circumstances, as explained in Perisic439, might violate the presumption of innocence and the requirement that proof of all the elements of the crime must be proven against the accused beyond reasonable doubts,440 4) the court statute and customary international law did not support an actus reus definition comprising specific direction,441 5) the substantial effect on the commission of the crime element was sufficient to ensure that a culpable link existed between the accused’s conduct and the commission of the crime,442 6) specific direction is contrary the oft-recognized jurisprudential teaching that acts of aiding and abetting can be made at a time and place removed from the actual crime,443 7) there is no good reason to depart from the well-settled jurisprudence on aiding and abetting, which does not include specific direction, at this time.444

2.2.3.2. Subjective element

As for the mens rea, in the February 2008 SCSL appeal judgment Prosecutor v Alex Tamba Brima445, the court deemed the following passage a correct definition of the subjective element of aiding and abetting:

The 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

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436 Supra note 35 at para 476.
437 Supra note 16.
438 Supra note 35 at para 478.
439 Supra note 34.
440 Supra note 35 at paras 477-479.
441 Ibid at paras 473-475.
442 Ibid at para 475.
443 Ibid at para 480.
444 Ibid.
the substantial likelihood that his acts would assist the commission of a crime by
the perpetrator. However, it is not necessary that the aider and abettor had
knowledge of the precise crime that was intended and which was actually
committed, as long as he was aware that one of a number of crimes would probably
be committed, including the one actually committed.\textsuperscript{446}

To support this opinion, the Appeals Chamber invoked and endorsed two ICTY decisions
which, according to it, concluded that “liability for aiding and abetting requires proof that
the accused knew that one of a number of crimes would probably be committed, that one
of those crimes was in fact committed, \textit{and} the accused was aware that his conduct
assisted in the commission of that crime”.\textsuperscript{447} In \textit{Fofana}\textsuperscript{448}, the court approved the
definition set out in \textit{Brima}\textsuperscript{449} adding that “[t]he person aiding and abetting a specific
intent crime need not possess the principal’s intent to commit the crime, but must at least
have knowledge of the principal’s intent”.\textsuperscript{450} \textit{Brima}’s formulation of the \textit{mens rea} of
aiding and abetting was also approved and applied in \textit{Hassan}.\textsuperscript{451} In \textit{Taylor}\textsuperscript{452}, the SCSL
Appeals Chamber reiterated that either knowledge that his acts would assist the
commission of the crime or being aware of the substantial likelihood that his acts would
assist the commission of the crime was a sufficient \textit{mens rea} standard.\textsuperscript{453} It also gave its
accord to the \textit{mens rea} articulated by the Trial Chamber which comprised “[t]he Accused
is aware of the essential elements of the crime committed by the principal offender,
including the state of mind of the principal offender”.\textsuperscript{454} The court dismissed the
defence’s argument to the effect that the prosecution must prove that the accused knew

\textsuperscript{446} Supra note 445 at paras 242-243.
\textsuperscript{447} Ibid.
\textsuperscript{448} Supra note 424.
\textsuperscript{449} Supra note 445.
\textsuperscript{450} Supra note 424 at paras 366-367 [footnotes omitted].
\textsuperscript{451} Supra note 427 at para 546.
\textsuperscript{452} Supra note 35.
\textsuperscript{453} Ibid at paras 437-438.
\textsuperscript{454} Ibid at paras 403, 440.
that his acts would have a substantial effect on the commission of the crimes on the grounds that to do would be inconsistent with the court’s jurisprudence and that “it is the task of judges, not an accused, to determine the correct legal characterisation of an accused's conduct”.455

2.2.3.3. Analysis and discussion of the main issue: recklessness-based mental element

The main issue in the jurisprudence of the SCSL is definitively the recklessness-based mens rea standard set forth by the Appeals Chamber in its four cases. A few points need to be made with regards to that standard.

Firstly, this openly recklessness-based mens rea’s source appears to be obscure. It cannot be said to have any obvious underpinnings in the post-WW2-era judgements nor in the jurisprudence issued by the ITCR and ICTY. In fact, all these decisions endorse knowledge as the test for the aiding and abetting liability. In its first decision on the matter456, the only precedent the court gave to support its assertion was the abovementioned judgements of the ICTY Appeals Chamber none of which set out a recklessness-based mens rea. In the three decisions that followed, the SCSL Appeals Chamber simply referred to its own precedents to declare that knowledge or recklessness constituted the applicable mental element within the aiding and abetting analytical framework. Similarly, no doctrinal or philosophical arguments were provided to explain

455 Supra note 35 at para 439.
456 Brima, supra note 445.
this standard. Professor and blogger Kevin John Heller summed up the situation quite well:

_Every post-WW II case cited by the Taylor AC against the specific-direction requirement adopts knowledge, not recklessness, as the mens rea of aiding and abetting._ Indeed, the Taylor AC does not cite anything other than its own jurisprudence in defence of recklessness — all of the ICTY and ICTR cases it mentions in two footnotes (nn. 1282 & 1283) adopt knowledge. So why, despite the jurisprudence of the post-WW II tribunals, the ICTY, and the ICTR, does the Taylor AC adopt a mens rea of recklessness?\(^\text{457}\)

Secondly, and related to the first point, the court’s justification for this standard seems insufficient. It seems that the court simply thought it to be appropriate to use that standard. More meaningful explanations should have been provided, especially since this standard can be said to be a departure from the customary international law and the more recent jurisprudence. This lack of justification is also quite strange owing to the fact that the court’s statute asks the tribunal to take guidance from the jurisprudence handed down by the ICTY and ICTR.\(^\text{458}\) Even more puzzling is that this hole in the reasoning of the court turns on an element that is often crucial in the court’s decisions. For example, in _Taylor\(^\text{459}\), one of the main accusations levelled against Mr. Taylor was of having aided and abetted the rebellious forces in Sierra Leone; therefore, the content of this mode of liability was central to the court’s reasoning to determine the guilt or innocence of the accused. In this context, it was reasonable to expect more details about the legal mechanism used to ascribe liability in the case. If we compound to that latter observation the fact that Mr. Taylor’s file was one of the most prominent in the recent history of ICL, the void in the court’s reasons appears to be even more startling. Indeed, to my

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\(^{458}\) _SCSL Statute_, _supra_ note 418, art 20 para 3.

\(^{459}\) _Supra_ note 35.
knowledge, only four heads of state/government were ever tried before international criminal tribunals: Karl Donitz, president of German Reich for a few days following Adolf Hitler’s death, Jean Kambanda, prime minister of Rwanda during the 1994 genocide, Slobodan Milosevic, president of Serbia during the wars attending to the disintegration of Yougoslavia in 1990’s, and Radovan Karadzic, the president of the Republika Srpska, the Bosnian Serb entity within Bosnia-Herzegovina, during the civil war in that same state.\footnote{460} All these landmark cases garner attention from political leaders all around the world because they purport to set the rules applicable to a central issue in the foreign policy of any state. In these circumstances, it would have been more than welcome and particularly apposite to dissipate the legitimate doubts created by the court’s analysis.

Thirdly, although true, these concerns lose some of their force when the situation is subjected to a more thorough scrutiny. Indeed, the standard adopted by the SCSL can be logically explained in different ways. First, through this new standard, the court might have wanted to summarize the mechanism of application of the mental element of the aiding and abetting liability used by the ICTY and the ICTR, which is knowledge that the conduct of the aider/abettor assist in the commission of a crime, when the help is supplied before the commission of the crime. In this type of cases, the assistance is provided by the aider/abettor when the commission of the crime has not yet started, but in

\footnote{460 The charges against Uhuru Muigai Kenyatta, the current president of Kenya, before the ICC have been withdrawn on 5 December 2014. An ICC warrant of arrest is in force against Omar Hassan Ahmad Al Bashir, the current president of Sudan, since 2009, but the suspect is ignoring the procedure taken against him. Finally, Laurent Gbagbo, former president of Côte d’Ivoire, is likely the next in the short list given that his trial before the ICC is set to begin on 7 July 2015 in connection with charges of crimes against humanity allegedly committed between 16 December 2010 and 12 April 2011 at various locations in Côte D’Ivoire. See International Criminal Court, All Cases, online: ICC <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx>.}
circumstances which signify that it will probably be committed at some ulterior time. In other words, in these cases, the knowledge which is referred to by the ICTY and ICTR’s jurisprudence is the knowledge that something will happen in the future. But what a person knows of the future is often not 100% certain to happen and is influenced by many exterior factors outside the person’s control so much so that it can only be said to be a probability. Therefore, in these cases, knowledge is applied as recklessness in the sense that the aider contributes to a situation which he knows is likely, in the normal course of events, to evolve into the commission of a crime. An example of the above would be an aider which provides weapons to the perpetrators knowing their intent of killing inhabitants of a nearby village and that, at some later time, in the normal course of events, they will act on their intent and use the equipment provided to commit the deed. In this scenario, the aider is aware of the probability that his aid will assist in the commission of the crime. If the crime is committed by the principal, the aider will, all other things being equal, likely be judged as knowing that his assistance assisted the commission of a crime and would probably be convicted for such a deed. But in fact he was simply aware of the high risk and was reckless about it materializing. Second, although less likely than the first hypothesis, the SCSL might have wanted its analysis to cater for the theory of the perpetrator viewed as a free-willed agent. In this theory, the aider supplies the assistance to the perpetrator who is understood as a free-willed agent, which attribute only allows a recklessness-based mental element. The reasoning is the following. When the assistance is being put in the hands of the perpetrator that person chooses what do to

with it through his own choices made according to his own free will. In this scheme, the aider is reckless as to what the perpetrator will do with the things provided given the circumstances, but cannot be said *per se* to know that the aid will assist the commission of the crime because you cannot know what a free-willed agent will do at 100% certainty. As in the cases of involving aid provided for an ulterior crime, the result of the help given will hinge on many factors outside the control of the aider, mainly the perpetrator’s free will. To sum up, the aider is negligent and reckless about the result of the aid, but do not know anything *per se* about what that the perpetrator, understood as a free-willed agent, will do with it. Third, and perhaps most convincing, this recklessness-based standard could be explained by the confusion engendered by the articulation of the *mens rea* standard developed by the ICTY and the ICTR. As enunciated above, the ICTY and the ICTR made clear that their standard is knowledge that the acts of aider assist in the commission of the crime. This formula is almost always supplemented by the requirement that the crime which is the subject of the knowledge of the aider does not have to be definitively identified when the aid is given; rather, it will be sufficient that the aider is aware that a number of potential crimes might be committed one of which is actually committed. This statement contains a strong risk-taking aspect since it demands that the aider furnish his aid while being aware that one out of a number of dangers (crimes) might happen. Such a standard is arguably close to the recklessness notion which is a severe disregard for the dangers arising out of one’s conduct. Given that risk-taking element, the confusion is inevitable. To sum it up, on the one hand, the ICTY and ICTR made clear that the rule is knowledge and not recklessness because it would be too low a standard. On the other hand, the supplement to that knowledge rule is recklessness-
based and almost seems to override the first part of the rule. One way to reconcile this apparent contradiction is to say that pure recklessness is different from the recklessness evinced in the supplement to the basic rule. In the supplement, the aider has to know that a number of things (crimes) might happen while in pure recklessness the aider does not know about and does not pay due care to the particular harmful things that might ensue from his conduct. Put it another way, knowing that a number of things might happen is different than showing an absence of care for the results of one’s conduct. Within the framework of both notions the aider takes a risk with the aid he provides, but in the supplement to the rule he knows about the ambit of the risk taken as opposed to recklessness in which the scope of the risk is unknown and recklessly disregarded. Interpreted this way, the supplement would be there to limit the scope of the aider’s knowledge in the sense that it would delineate what the aider could be taken to have known when he supplied the aid. To sum up, the supplement would require that the aider knows that a number of crimes might be committed one of which is committed, as opposed to giving the aid while being reckless as to the ultimate criminal usage thereof. Accordingly, applying this interpretation would make that if the aider supplies gas for tanks, while being aware that some villagers in the town which will be subjected to the tanks onslaught might be killed in a criminal way, and the tanks leader, the perpetrator, uses the tanks not to fight and to eliminate the adversary in the said town and commit the foreseen crime, but to reach another village to rape women, the aider would not be held liable for aiding and abetting rape because it was not within the number of crimes that he knew might be committed. Be that as it may, this reasoning is not perfect as some will rightly point out that this reduction of the ambit of the risk taken is already present in the
recklessness idea. Indeed, when the risk is taken (the aid is given), the aider takes some risks, but not all the risks possible in the world; he takes the foreseeable risks of such an aid. This would negate the difference between simple recklessness and the recklessness described in the supplement of the rule.

To add to the complexity, it is not possible to maintain that the knowledge-based test developed by the ICTY and the ICTR is equivalent to a recklessness standard in all cases. Indeed, for example, when the assistance is given contemporaneously to the commission of the crime and the aider has actual knowledge thereof, no recklessness is involved and pure and simple knowledge applies.

The foregoing point indicates that the recklessness-based mens rea adopted by the SCSL might not be as revolutionary as one might think at first blush. The uncertainty surrounding the mens rea elaborated by the ICTY and ICTR permits such an interpretation.

Fourthly, as pointed out by Professor Heller463, adopting a mens rea standard arguably unsupported by the precedents (at least in a formal and open way) and, in the same time, refusing to include specific direction in the actus reus because there is no basis for this element in the same precedents poses a logical problem and inevitably undermines the coherence of the decision. The SCSL is in all probabilities correct in contending that specific direction lacks support in the jurisprudence, notably in the post-WW2-era decisions, but the application of this precedent-oriented analysis to the mens rea arguably

leads to the conclusion that reckless should not be part of the mental element of aiding and abetting liability. In other words, the court should have explained clearly, as it was possible to do so, why it formally included a recklessness notion in the *mens rea*.

2.2.4. The Special Tribunal for Lebanon

2.2.4.1. Background information

The STL was created by a UNSC resolution on 30 May 2007 following a terrorist attack that killed 23 people\(^{464}\), including former Lebanese Prime Minister Rafik Hariri, and injured many others on 14 February 2005.\(^{465}\) The *Statute of the Special Tribunal for* 


\(^{465}\) Among the events that lead to the establishment of the STL, I noted the following. After the 14 February 2005 attack, the UN Secretary-General sent a fact-finding mission to inquire about the circumstances of the incident pursuant to an order to that effect from the UNSC (President of the United Nations Security Council, *Statement by the President of the Security Council*, S/PRST/2005/4, UNSCOR, 5122\(^{\text{nd}}\) meeting, (2005), online: UNSC <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PRST/2005/4>). On 24 March 2005, the group delivered its report, which recommended that “it became clear to the Mission that the Lebanese investigation process suffered from serious flaws. Whether caused by lack of capabilities or commitment, this process is unlikely to reach a satisfactory conclusion. In addition, the credibility of the Lebanese authorities handling the investigation has been questioned by a great number of Lebanese, in the opposition as well as in government. It is therefore the Mission’s view that an international independent investigation would be necessary to uncover the truth” (Peter FitzGerald, *Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri*, at para 62, 24 March 2005, online: STL <http://www.stl-tsl.org/en/documents/un-documents/un-fact-finding-mission/Report-of-the-Fact-finding-Mission-to-Lebanon>). In view of that recommendation, on 7 April 2005, the UNSC put in place an independent investigation commission to assist the Lebanese authorities in the investigation of the attack (United Nations Security Council, *Resolution 1595 (2005)*, S/RES/1595 (2005), UNSCOR, 5160\(^{\text{th}}\) meeting, (2005), online: UNSC <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1595%282005%29>). On 13 December 2005, following a series of other killings and bombings in Lebanon, notably the one that killed prominent member of parliament and journalist Gebran Tueini, the Prime Minister of Lebanon sent a letter to the UNSC requesting the establishment of “a tribunal of international character to convene in or outside Lebanon, to try all those who are found responsible for the terrorist crime perpetrated against Prime Minister Hariri” (Letter from Fuad Siniora, Prime Minister of Lebanon, to the United Nations Secretary-General (13 December 2005), annexed to the letter from Ibrahim Assaf, UN Chargé d’affaires for Lebanon, to the UN Secretary-General dated 13 December 2005, S/2005/783, online: UN <http://unispal.un.org/UNISPAL.NSF/0/DDC381B371F31242852570D800533D9E>). On 29 March 2006, the UNSC ordered the UN Secretary-General to commence negotiation to reach an agreement with the Lebanese government for the establishment of “a tribunal of an international character based on the highest international standards of criminal justice” (United Nations Security Council, *Resolution 1664 (2006)*, S/RES/1664 (2006), UNSCOR, 5401\(^{\text{st}}\) meeting, (2006), online: UNSC <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1664%282006%29>). An agreement was
Lebanon\textsuperscript{466} gives jurisdiction over those responsible for the 14 February 2005 bombing and for other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date agreed to by the parties and approved by the UNSC, if they are connected to and of a gravity and nature similar to the 14 February 2005 attack.\textsuperscript{467} The crimes within the court’s jurisdiction are set forth at article 2:

The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute:

(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and

(b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on “Increasing the penalties for sedition, civil war and interfaith struggle”.

Since its inception, six cases have been opened at the STL,\textsuperscript{469} the most advanced of which is Ayyash et al.\textsuperscript{470}, which pertains to the attack on the former Lebanese Prime Minister Rafik Hariri on 14 February 2005.\textsuperscript{471} The trial started on 16 January 2014 and is still on-going.\textsuperscript{472} The other cases have still not reached the trial stage.\textsuperscript{473}


\textsuperscript{467} Ibid, art 1.

\textsuperscript{468} Ibid, art 2.

\textsuperscript{469} The Special Tribunal for Lebanon, The cases, online: STL <http://www.stl-tsl.org/en/the-cases>.

\textsuperscript{470} Ayyash et al., STL-11-01.

\textsuperscript{471} It is worth noting that the four accuseds in this case are still at large and that the proceedings against them are being carried out in abstentia (Special Tribunal for Lebanon, News Release, STL1101, “Ayyash et al case opens at the Special Tribunal for Lebanon” (16 January 2014), online: STL <http://www.stl-tsl.org/en/media/press-releases/16-01-2014-ayyash-et-al-case-opens-at-the-special-tribunal-for-lebanon>). Trials in abstentia are permitted by article 22 of the STL Statute, supra note 466.

\textsuperscript{472} The online calendar for the case found on the STL website indicates that the last date reserved for the hearing of this case is 28 May 2015 (Special Tribunal for Lebanon, About the Ayyash et al. trial: Court Schedule, online: STL <http://www.stl-tsl.org/en/the-cases/about-the-trial#practical-information>).
2.2.4.2. The law

The provision on complicity in the *STL Statute*[^474] is not the easiest to understand as it is the result of an interaction between two articles:

**Article 2**

Applicable criminal law

The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute:

(a) The provisions of the Lebanese Criminal Code relating to (…) criminal participation and conspiracy; and

(…).

**Article 3**

Individual criminal responsibility

1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:

(a) Committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or

(b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.

(…)[^475]

The difficulty is the following. Article 2 says that “criminal participation”, which includes complicity, is governed by the provisions of the Lebanese law,[^476] “subject to the provisions” of the *STL Statute*[^477]. As a result of that latter clause, the provisions of article 3 paragraph 1 subparagraphs a) and b) have precedence over the content of article 2.

[^473]: The Special Tribunal for Lebanon, *supra* note 469.
[^474]: *Supra* note 466.
[^477]: *Supra* note 466.
Therefore, complicity in ICL would apply. Nevertheless, despite the fact that this consequence may seem relatively clear, the fact that the statute lays down a rule in article 2 ("criminal participation" is governed by the Lebanese law) and annuls it through the *chapeau* of the very same article and article 3 ("subject to the provisions of this statute" which refers notably to the provisions on complicity of article 3) is rather uncanny.\footnote{478} Usually, statutes are not designed so that one part clearly negates the content of another part in every circumstance. These reflections, among others, are probably what prompted the Pre-Trial Judge in *Ayyash et al.*\footnote{479} to submit to the STL Appeals Chamber 15 questions about the tenor of the applicable law notably in terms of modes of liability, including complicity.\footnote{480} In the interlocutory judgment that ensued,\footnote{481} the court explained that the Lebanese law is to be applied with regards to the provision on complicity.\footnote{482}
Nevertheless, in doing so, the STL Appeals Chamber identified the elements of complicity in ICL.\footnote{Ayyash, supra note 478 at paras 225-228.}

2.2.4.2.1. Objective element

The STL Appeals Chamber defined the \textit{actus reus} of complicity as:

\begin{quote}
The accomplice's practical assistance, encouragement, or moral support to the principal perpetrator. In addition, such assistance or support must have a \textit{substantial effect} on the perpetration of the crime. This assistance may be provided in the form of positive action or omission, and it may be provided before, during or after perpetration of the crime. Furthermore, the assistance may be physical (or tangible) or moral and psychological.\footnote{\textit{Ibid} at para 226 [emphasis in original] [footnotes omitted].}
\end{quote}

This statement is pretty much a summary of the jurisprudence handed down by the other \textit{ad hoc} international tribunals. To that effect, the court buttresses its statement of the \textit{actus reus} with three judgments of the ICTY.\footnote{\textit{Ibid}.}

\footnotetext[483]{Ayyash, supra note 478 at paras 225-228.}
\footnotetext[484]{\textit{Ibid} at para 226 [emphasis in original] [footnotes omitted].}
\footnotetext[485]{\textit{Ibid}.}
2.2.4.2. Subjective element

The STL Appeals Chamber defined the mens rea of complicity in the following manner:

The 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”. Thus, this subjective element consists of two requirements: (i) awareness that the principal perpetrator will use the assistance for the purpose of engaging in criminal conduct, and (ii) intent to help or encourage the principal perpetrator to commit a crime. It is not required that the accessory be fully cognizant of the specificities of the crime that will be committed by the perpetrator. Indeed, aiding and abetting does not presuppose that the accomplice shares a common plan or purpose with the principal perpetrator or his criminal intent (...). Instead, the aider and abettor is required to be aware either of the criminal intent of the perpetrator or at least of the substantial likelihood that the perpetrator will commit a crime. In other words, it may suffice for the accomplice to entertain what in certain legal systems is defined as “advertent recklessness” (dolus eventualis) with regard to the specific conduct of the principal perpetrator, if there is also an intent to encourage or enable the principal's criminal conduct. This accords with fundamental principles of criminal law: if someone provides a gun to a well-known thug with the knowledge that it will be used (or is reasonably likely to be used) to commit a crime, he is liable for aiding and abetting whatever that crime is, regardless of whether he was fully aware of the specific crime the thug intended to perpetrate.486

As I understand it, the rule contains the following elements 1) awareness that the principal perpetrator will or is substantially likely to use the assistance for the purpose of engaging in criminal conduct, and 2) intent to help or encourage or enable the principal perpetrator to commit a crime.

2.2.4.3. Analysis and discussion of the main issue: the incertitude surrounding the content of the subjective element

The way I summarized the court’s statement on the subjective element of complicity in ICL does not address the many issues and ambiguities found in the same which can be described as follows.

486 Ayyash, supra note 478 at para 227 [emphasis in original] [footnotes omitted].
First, the STL Appeals Chamber says that the *mens rea* standard is knowledge by the accomplice that his actions will assist the perpetrator in the commission of the crime and breaks that general statement down into two elements, which are 1) awareness that the principal perpetrator will use the assistance for the purpose of engaging in criminal conduct, and 2) intent to help or encourage the principal perpetrator to commit a crime. *Prima facie*, these elements do not appear to be contained in the general statement. Indeed, as to the first element, the general statement requires that the accomplice knows that his actions assist the perpetrator while the first element demands that the accomplice be aware (or know) that the perpetrator will use the assistance provided to him for the purpose of engaging in criminal conduct. In the former proposition, the knowledge is about the consequences of the accomplice’s actions, in the latter proposition, the knowledge is about the perpetrator’s actions. As to the second element, I have difficulty to see how it could fit within the general knowledge-based statement. Indeed, intent to help is different than knowledge of assistance. In view of the jurisprudence of other *ad hoc* tribunals, the second element is a new one and therefore needs to be supported by some precedents, but the Appeals Chamber provides none. It is reasonable to believe that, in designing that new element, the Appeals Chamber was probably inspired by the provision on complicity found in the *Rome Statute*\(^\text{487}\). Be that as it may, the wording of this element is not clear because the court first word it as the accomplice’s intent to encourage or help and then as his intent to encourage or enable. Helping and enabling are not the same concept. Helping is less demanding that enabling, which indicates an element of causation.

\(^{487}\) *Supra* note 29, art 25(3)c.)
Second, the intent to help or encourage the principal perpetrator to commit a crime criterion alluded to in the last paragraph seems to be difficult to apply. In effect, on the one hand, the court says that the accomplice must have intended to help the perpetrator to commit a crime while, on the other hand, it stresses that he is not obliged to be “fully cognizant of the specificities” of the said crime. Thus, if we blend the two propositions, the accomplice must have intended to help something that he was not fully aware of which raises the question of how can one help something outside of the scope of his knowledge.

Third, as enunciated above, the *mens rea* formulation of the STL Appeals Chamber is twofold 1) awareness that the principal perpetrator will or is substantially likely to use the assistance for the purpose of engaging in criminal conduct, and 2) intent to help or encourage or enable the principal perpetrator to commit a crime. By any means, this standard is a new one, materially different from the ones arising out of the other *ad hoc* tribunals or the ICC’s jurisprudence. Hence, it should have been supported by some precedents or justified with convincing rational arguments explaining the reasons why this new standard is now appropriate.

Fourth, the statement of the rule is confusing because of the summing-ups the court made. The court laid down the general knowledge-based statement and then broke it down into two elements (awareness that the principal perpetrator will use the assistance for the purpose of engaging in criminal conduct and intent to help or encourage the principal perpetrator to commit a crime), which appear to be the legal standard to assess complicity.
in crimes. But later in the paragraph, the court twice summarized the test with a different wording. First, by saying “the aider and abettor is required to be aware either of the criminal intent of the perpetrator or at least of the substantial likelihood that the perpetrator will commit a crime”, 488 “if there is also an intent to encourage or enable the principal's criminal conduct”. 489 Being aware of the criminal intent might not be too dissimilar to knowing that the perpetrator will use the assistance for the purpose of engaging in criminal conduct, but the former is probably more expansive as knowledge of the criminal intent seems to be less specific than that the perpetrator will use the assistance provided for the commission of a criminal act. Also, the substantial likelihood standard is not used in the two original elements. Second, “if someone provides a gun to a well-known thug with the knowledge that it will be used (or is reasonably likely to be used) to commit a crime, he is liable for aiding and abetting whatever that crime is, regardless of whether he was fully aware of the specific crime the thug intended to perpetrate”. 490 This phrase seems to be more an application than a summary of the rule. Therefore, it should apply the elements discussed above or a combination of them which it does not. In fact, the standard the court uses in this example is knowledge that it is reasonably likely that the assistance provided will be used to commit any crime. More specifically, the court use “reasonably likely” instead of “substantial likely” which is a lower standard and do not mention the second original element, the intent to help or encourage the principal perpetrator to commit a crime. The court’s declaration that such an accomplice would be guilty of whatever crime the perpetrator would have committed with the gun shows that the intent criterion is troublesome because it is difficult to intend

488 Ayyash, supra note 478 at para 227.
489 Ibid.
490 Ibid.
to further what one does not know and is contrary to the implied court’s assertion that there must be at least some knowledge of the crime to be committed by perpetrator (I take that implied assertion from the intent to help criterion mentioned by the court). To summarize, the court should have avoided the rephrasing and reformulations of the two original elements.

2.2.5. The International Criminal Court

2.2.5.1. Background information

The ICC was created by the *Rome Statute*\(^1\) which was signed by 120 state parties on 17 July 1998 and entered into force on 1 July 2002.\(^2\) The aims of this treaty, as evinced by its preamble, are to end the impunity of the perpetrators of the most serious crimes of concern to the international community and to contribute to the prevention of such crimes.\(^3\) Four crimes are within the jurisdiction of the court, 1) genocide, 2) war crimes,

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\(^1\) *Supra* note 29.

\(^2\) International Criminal Court, *About the Court*, online: ICC <http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx>.

\(^3\) *Rome Statute*, *supra* note 29, preamble paras 1-2, 4-5, 9, 11: “Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time”, “Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”, “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”, “Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”, “Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole”, “Resolved to guarantee lasting respect for and the enforcement of international justice”; The empirical impetus which prompted the adoption of the *Rome Statute, ibid,* in July 1998 is well summarized by Roy S. Lee when he declared that “[a]rmed conflicts and serious violations of human rights and humanitarian law continue to victimize millions of people throughout the world. As a result, more than 86 million civilians have died, been disabled or been stripped of their rights, property and dignity since the end of World War II. The world community has done very little for them or their families. Most victims have been forgotten and few perpetrators have been brought to justice. A culture of impunity seems to have prevailed. Today’s conflicts are often rooted in the failure to repair yesterday's injury. The fight against impunity is not only a matter of justice but is also inextricably bound up with the search for lasting peace in post-conflict situations. Unless the injuries suffered by the victims
3) crimes against humanity, 4) aggression. For the ICC to have jurisdiction on these crimes, many conditions must be met. First, the crime has to be committed after the entry into force of the *Rome Statute*, *i.e.* 1 July 2002. If a state joins the treaty after that date, only crimes committed after the entry into force of the *Rome Statute* for that state are under the court’s jurisdiction, unless the state decides to give jurisdiction to the court for the particular anterior crime through a written declaration to that effect. Second, the case has to be admissible to the ICC. For that purpose, article 17 of the *Rome Statute* states that a case is not admissible to the ICC where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court. and their families are redressed, wounds will fester and conflicts will erupt again in the future. Accountability is therefore an indispensable component of peace-building. International treaties and customs have produced a plethora of rules, laws and norms prohibiting atrocities such as genocide, war crimes and crimes against humanity, or forbidding the use of poison gas and biological and chemical weapons. But the record of application and enforcement of these laws is not impressive. While States are competent and often legally obligated under international law to investigate, prosecute and punish such violations, States have often been either unable or unwilling to apply the law. Few perpetrators have in fact been brought to justice” (Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute*, (Cambridge, Massachussetts: Kluwer Law International, 1999) at page 1).

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494 *Supra* note 29, arts 5-8 *bis*.
495 *Supra* note 29.
496 *Ibid*, art 11(1).
497 *Supra* note 29.
500 *Supra* note 29.
501 *Ibid*, art 17(1)a-d; As explained in note 517 *infra*, the principle of complementarity is found at article 17(1)a-c and the reader is referred to that note for more information on that principle.
Third, the crime must be referred to the ICC’s Prosecutor by a state party to the *Rome Statute*\(^{502}\), \(^{503}\) by the UNSC, \(^{504}\) or the ICC Prosecutor himself has opened an investigation on the crime *proprio motu*. \(^{505}\) If the crime is referred by a state party or the ICC Prosecutor opened the inquest *proprio motu*, the court will have jurisdiction over the crime if one of these two conditions apply either 1) the crime occurred on the territory of a state party or a state that has accepted the court’s jurisdiction in a written declaration or 2) the accused is a national of a state that is state party or a state that has accepted the court’s jurisdiction in a written declaration. \(^{506}\) Also, the ICC Prosecutor’s inquiry must be authorized by the ICC Pre-Trial Chamber. \(^{507}\) With regards to the referral made by the UNSC, no strictures apply, except that the council must be acting under Chapter VII of the *Charter of the United Nations*\(^{508}\) \(^{509}\). In addition, a few restrictions apply with regards to the court’s jurisdiction on the crime of aggression, \(^{510}\) notably a state party can, at anytime, declare that it does not accept the court’s jurisdiction over that crime with a written declaration. \(^{511}\) Finally, and this is valid for all crimes within the ICC’s jurisdiction,

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\(^{502}\) Supra note 29.  
\(^{503}\) Ibid, arts 13(a), 14.  
\(^{504}\) Ibid, art 13(b).  
\(^{505}\) Ibid, art 13(c).  
\(^{506}\) Ibid, art 12.  
\(^{507}\) Ibid, art 15(3)-(4).  
\(^{508}\) *Charter of the United Nations*, 26 June 1945, Can TS 1945 No. 7.  
\(^{509}\) Supra note 29, art 13(b); Chapter VII of the *Charter of the United Nations*, supra note 508, (articles 39 to 51) deals with the “action with respect to threats to the peace, breaches of the peace, and acts of aggression”. According to article 39, the Security Council determines the existence of a threat to the peace, a breach of the peace, or an act of aggression and makes recommendations or decides what measures pursuant to articles 41 and 42 to take to maintain or restore international peace and security. Articles 41 and 42 specify the actions, military, diplomatic, or economic, that can be used to enforce the council’s decision.  
\(^{510}\) Supra note 29, arts 15 bis, 15 ter.  
\(^{511}\) Ibid, art 15 bis (4); It is to be noted that, as per article 15 bis, such a declaration would be valid against a referral made by a state party to the ICC Prosecutor and if the latter wanted to open an investigation against the declaring state. Nevertheless, following art 15 ter, it would not be valid if the situation was referred to the ICC Prosecutor by the UNSC in which case the only strictures would be that 1) the acts of aggression have been committed one year after the ratification of the amendments on the crime of aggression by thirty state parties and that 2) the state parties have approved the jurisdiction of the ICC on the crime of aggression which can only be done after 1 January 2017.
the UNSC must not have prevented the commencement of the investigation or the prosecution in accordance with article 16.\footnote{512} As of January 2015, 21 cases are opened at the ICC arising out of nine situations. With that as a backdrop, in view of its permanence and its universal aspirations, great expectations were put at the outset on the ICC’s shoulders as some observers thought “[f]or the first time, states had established a system of justice that could stop and prevent violence, rather than intervening only \textit{a posteriori}”.\footnote{513} However, some commentators and specialists in the field now point out that many issues still plague the institution.\footnote{514} Among those, the following can be noted:

1) to this date (January 2015), only two cases have been adjudicated by the Trial Chamber,\footnote{515} 2) the ICC still has no jurisdiction on the situation in Syria even though the civil war in the country has been going on since March 2011,\footnote{516} 3) the tension between

\footnote{512}Article 16 of the \textit{Rome Statute}, \textit{supra} note 29, gives the right to the UNSC to adopt a resolution to thwart the commencement of investigations or prosecutions under the \textit{Rome Statute}, \textit{supra} note 29, for a period of 12 months, which can be renewed.


the universal aspirations, as evinced by its preamble and its jurisdiction over international core crimes which are by nature the concern of the humanity as a whole, and the sovereignty principle adopted notably through the complementarity principle\(^{517}\)\(^{518}\) 4) the jurisdiction over the crime of aggression is delayed to 1 January 2017 at the earliest,\(^{519}\) 5) the ICC does not regulate corporate criminal responsibility,\(^{520}\) 6) the allegations of bias

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\(^{517}\) The complementarity principle can be defined by saying that the national jurisdictions have priority in terms of dealing with the accuseds over the ICC. This principle is embodied in the *Rome Statute* at article 17(1)a-c by which, in conformity with the idea expressed at paragraph 10 of the preamble, if the case is being investigated or prosecuted by a state which has jurisdiction over it or the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned or the person has already been tried for conduct which is the subject of the complaint, that case is inadmissible to the ICC. Therefore, the case is only admissible to the ICC if the concerned state does not take actions to deal with the situation; otherwise, the ICC cannot intervene and it is the state’s sovereignty that prevails. It is in that sense that the ICC complements the national jurisdictions. See Mohamed M. El Zeidy, *The principle of complementarity in international criminal law: origin, development, and practice*, (Boston, Massachussetts: Martinus Nijhoff Publishers, 2008); Jo Stigen, *The relationship between the International Criminal Court and national jurisdictions: the principle of complementarity*, (Boston, Massachussetts: Martinus Nijhoff Publishers, 2008).

\(^{518}\) The tension can be understood in the two following ways. First, on the one hand, the offences under the ICC’s jurisdiction are offences against the humanity as a whole. On the other hand, the prosecution of the same can be done by only a small part of the offended community, the national jurisdiction which undertakes to prosecute those responsible for its commission and that state can contest the admissibility of the case before the ICC under article 17 of the *Rome Statute*, supra note 29, which in a way represents the whole offended community. Second, with their veto power, the five permanent members of the UNSC, through articles 13(b) and 16, have a tremendous influence with regards to the commencement of investigations and prosecutions of offences which are supposed to be international in nature and the concern of the humanity as a whole. This paradox prompted William A. Schabas to say “[t]here is no room for deference to the Security Council in a holistic, coherent and principled package of international justice” (Schabas, “The Banality of International Justice”, *supra* note 514 at 550).


\(^{520}\) *Rome Statute, supra* note 29, art 25(1) which states that the court’s jurisdiction is over natural persons and thereby excludes jurisdiction over legal persons such as corporations. However, it has to be kept in mind that this limitation does not preclude the ICC’s jurisdiction over persons who are committing crimes over which the court is competent through corporations. This proposition seems logical as these persons are acting through an entity just like the army commander is acting through the army and the politician is acting through the state. For all these situations, the framework is the same, crimes are committed by people through an exterior entity, which can be of different types depending on the circumstances of the case. The mode of liability applying to persons acting through an entity, whether it be a corporation, an army or a state, is found at article 25(3)a) of the *Rome Statute, supra* note 29, (the said article states “commits such a crime, […] through another person, regardless of whether that other person is criminally responsible”). In the 2012 decision *Prosecutor v Francis Kirimi Muthaura, ICC-01/09-02/11*, Decision on Confirmation of Charges (23 January 2012) at 297 (International Criminal Court), online: ICC <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf> [Muthaura], the court laid down the elements for the
application of that mode of liability: 1) the accused must have control over the organization, 2) the organization must consist of an organized and hierarchical apparatus of power, 3) the execution of the crimes must be secured by an almost automatic compliance with the orders issued by the accused, 4) the accused must satisfy the mens rea of the crimes committed, 5) the accused must be aware of the factual circumstances enabling him to exercise control over the commission of the crime through another person. In the recent decision *Prosecutor v Charles Blé Goudé*, ICC-02/11-02/11, Decision on the Confirmation of Charges (11 December 2014) at para 137 (International Criminal Court), online: ICC <http://www.icc-cpi.int/iccdocs/doc/doc1879935.pdf> [Blé Goudé], the court appears to have rationalized the elements found in the aforesaid 2012 decision by indicating that to commit crimes through another person 1) the accused has to have relied on the other person, which can be an organization, to carry out the material elements of the crime, 2) the perpetrator exercised control subjugating the individual will of the those actually committing the crimes, 3) the accused held the mens rea corresponding to the crime charged. So far, the ICC has not dealt with any person accused of having committed crimes through a corporate entity. Furthermore, it is to be noted that two propositions were made by France prior to the final adoption of the *Rome Statute*, supra note 29, which envisaged the criminal liability of corporate entities within the ICC framework. See Volker Nerlich, “Core Crimes and Transnational Business Corporations” (2010) 8 Journal of International Criminal Justice 895.

For example, John Dugard encapsulates this criticism when he argues that “[t]he decisions of both old and new Prosecutors to concentrate on African situations and to ignore the commission of international crimes in Iraq (by British forces), Colombia (by both the FARC and government forces), the Comoros (by Israel’s attack on a ship registered in the Union of the Comoros – the *Mavi Marmara*) and Palestine, which have been brought to the attention of the Prosecutor’s Office, raise doubts about the independence of the Prosecutors and whether they have indeed displayed an anti-African bias, as claimed by the African Union, in order to appease European states and the United States, which although not a party to the ICC Statute wields tremendous influence behind the scenes in decision-making in the Court. The refusal of both Prosecutors to investigate the situation in Palestine is particularly disturbing” (John Dugard, “Palestine and the International Criminal Court: Institutional Failure or Bias?” (2013) 11 Journal of International Criminal Justice 563 at 564). For his part, William A. Schabas underlined that “[o]ne of the great and defining moments of international justice in recent times was the arrest of Augusto Pinochet in London in October 1998. Occurring only a few months after the adoption of the Rome Statute, it sent a message that even the friends of the most powerful could be brought to book if a genuinely independent and impartial justice system was in operation. Pinochet was not some obscure African tyrant. He was an intimate friend of Margaret Thatcher, having seized power in a coup d’etat and then held it for many years with the complicity of Washington. Fifteen years later, international criminal justice is focussed on global pariahs like Charles Taylor, Saif Gaddafi and Hissene Habre. The friends of the rich and powerful are nowhere to be seen. There are no more Pinochets in the dock. The ICC finds technical and unconvincing pretexts to avoid tackling hard cases like British atrocities in Iraq, Operation Cast Lead and the ongoing construction of settlements in the West Bank” (Schabas, “The Banality of International Justice”, supra note 514 at 550). The main complaint of bias comes from the African states in part because of the proceedings undertaken against the heads of state of Sudan and Kenya in 2008 and 2011 respectively. The African Union even protested during a summit in 2013 during which some of the leaders of its member countries expressed vehement opinions denouncing the “racism” in the case selection by the court (see “African Union demands ICC exempt leaders from prosecution”, *The Globe and Mail* (12 October 2013), online: Globe and Mail <http://www.theglobeandmail.com/news/world/african-union-demands-icc-to-protect-leaders-from-prosecution/article14850866/>; “African Union urges ICC to defer Uhuru Kenyatta case”, *BBC News* (12 October 2013), online: BBC News Africa <http://www.bbc.com/news/world-africa-24506006>). Unfortunately, the declarations made at the end of the special 2013 African Union summit are not accessible online. See Max du Plessis, Tiyanjana Maluwa & Annie O’Reilly, “Africa and the International Criminal Court” (Lecture, delivered at the Chatham House, July 2013), online: Chatham House
2.2.5.2. The law

2.2.5.2.1. Overview

The concept of complicity is found at article 25 of the Rome Statute\(^{524}\) which reads:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

(...)

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:

(...)

(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;

(...)^{525}

\(^{522}\) Rome Statute, supra note 29.

\(^{523}\) The United States of America has signed the Rome Statute, ibid, on 31 December 2000, but the treaty was never ratified. On 6 May 2002, the government of the USA informed the UN Secretary-General that “in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty” (Letter from John R. Bolton, USA Under Secretary of State for Arms Control and International Security, to UN Secretary-General Kofi Annan (6 May 2002), online: USA Government <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>). The Russian Federation has signed the treaty on 13 September 2000, but never ratified it. China, India, Turkey, Indonesia, and Pakistan did not sign the treaty. Israel signed it on 31 December 2000, but never ratified it and, on 28 August 2002, sent a letter with the same words as that of 6 May 2002 from the United States to the UN Secretary-General expressing its absence of intent of becoming a party to the treaty. Egypt signed the treaty on 26 December 2000, but never ratified it. Iran signed it on 31 December 2000, but never ratified it. See United Nations Treaty Collection, Rome Statute of the International Criminal Court, online: UN <https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-10&chapter=18&lang=en#3>.

\(^{524}\) Supra note 29.

\(^{525}\) Ibid, art 25(1), (3)c)(d)(i)(ii).
Two forms of complicity are found in this article. The first one, set forth by article 25(3)c, refers to the person who aids or abets a perpetrator other than a group with a common purpose. The second form of complicity, contributing to a crime committed by a group acting with a common purpose, appears at article 25(3)d(i)-ii). What’s more, given that the *Rome Statute* is a treaty, the *Vienna Convention on the Law of Treaties* can be referred to for interpretation purposes. To that effect, its article 31 paragraph 1 informs:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

I will review below the jurisprudence for both these provisions.

### 2.2.5.2.2. Article 25(3)c: aiding or abetting a perpetrator other than a group acting with a common purpose

#### 2.2.5.2.2.1. General remark

As of January 2015, only two decisions have been rendered by the ICC interpreting article 25(3)c and these were not after full length trials, but decision on confirmation of charges. As a result, they do not provide a vast and elaborated analysis of the elements of article 25(3)c. In view of that impediment, it is sage to not only review the content of these two decisions, but also to examine the *obiter dicta* mentioned in other judgments.

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526 *Supra* note 29.
528 *Ibid*, art 31(1).
2.2.5.2.2. Objective element

As for the objective element, the provision informs that the actus reus is constituted by aiding, abetting, or otherwise assisting the perpetrator. One question which is already debated and that will need further clarification from the court is the level of contribution needed to fulfill that actus reus. For now, the jurisprudential guidance available is the following. In Lubanga\textsuperscript{530}, the Trial Chamber, while discussing the joint criminal enterprise, thus in obiter, said “[i]f accessories must have had “a substantial effect on the commission of the crime” to be held liable (…)”\textsuperscript{531} and cited jurisprudence of the ad hoc tribunals in support of that statement. In Prosecutor v Callixte Mbarushimana\textsuperscript{532}, the court, in obiter again, said, referring to aiding and abetting mode liability found at article 25(3)c), “the application of analogous modes of liability at the ad hoc tribunals suggests that a substantial contribution to the crime may be contemplated”.\textsuperscript{533} However, the court tempered this opinion by saying:

\begin{quote}
[T]he principles set out by the ad hoc tribunals with respect to the analogous modes of liability cannot be applied to the modes of liability set out in article 25(3) without modification, as there are a number of differences between those modes of liability and those set out in the Statute. (…) There is also scholarly disagreement as to whether the actus reus required should likewise differ from the ad hoc tribunals' "substantial contribution" requirement.\textsuperscript{534}
\end{quote}

In Bemba Gombo\textsuperscript{535}, the court said “[i]n relation to the different forms of responsibility employed in article 25(3)(c) of the Statute, the Chamber considers that the elements of this mode of liability are met insofar as the accessory’s contribution has an effect on the

\textsuperscript{530} Supra note 515.
\textsuperscript{531} Ibid at para 997.
\textsuperscript{532} Prosecutor v Callixte Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges (16 December 2011) (International Criminal Court), online: ICC Website < http://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc01040110/court%20records/chambers/pre%20trial%20chamber%20i/Pages/465.aspx> [Mbarushimana].
\textsuperscript{533} Ibid at para 279.
\textsuperscript{534} Ibid at para 281 [emphasis added].
\textsuperscript{535} Supra note 529.
commission of the offence”.\textsuperscript{536} In Blé Goudé\textsuperscript{537}, the court held that to satisfy the \textit{actus reus} of article 25(3)c) the accused must “provide assistance to the commission of the crime”.\textsuperscript{538} It is also interesting to note that the court considered that the accused’s activities “had the effect of strengthening the capability of the pro-Gbagbo forces to commit the crimes”\textsuperscript{539} which might suggest that the assistance must have an effect on the commission of the crime.

\textbf{2.2.5.2.2.3. Mental element}

As to the \textit{mens rea}, the plain reading of article 25(3)c) suggests that the aider’s assistance needs to be provided for the purpose of facilitating the commission of the crime. In Bemba Gombo\textsuperscript{540}, the court observed that the contribution must have been made “with the purpose of facilitating”\textsuperscript{541} the commission of the crime. Similarly, in Blé Goudé\textsuperscript{542}, the court asserted that the incriminated assistance must have been given while the accused intended to “facilitate the commission of the crime”.\textsuperscript{543}

These formulations do not add anything to the \textit{mens rea} described by article 25(3)c). We will probably have to wait for the first trial judgment to have more specifics as to the application of this criterion.

\begin{footnotes}
\item[536] \textit{Supra} note 529 at para 35.
\item[537] \textit{Supra} note 520.
\item[538] \textit{Ibid} at para 167.
\item[539] \textit{Ibid} at para 169.
\item[540] \textit{Supra} note 529.
\item[541] \textit{Ibid} at para 35.
\item[542] \textit{Supra} note 520.
\item[543] \textit{Ibid} at para 167.
\end{footnotes}
2.2.5.2.3. Article 25(3)(d)(i)-ii): contributing to a crime committed by a group acting with a common purpose

2.2.5.2.3.1. General remark

Contrary to article 25(3)c), the contribution to a crime committed by a group liability of article 25(3)(d)(i)-ii) has been examined in the jurisprudence of the ICC although no appellate judgment has been rendered as of January 2015. Aside from the level of contribution required in the application of this article which suffers the same imprecision lacuna as that of article 25(3)c), the peculiarity of this mode of liability is obviously the mental element which has a constant element, general intentionality, and two alternative elements, special intentionality and knowledge. Also, it should be noted that in Katanga\textsuperscript{544}, the court made this general remark about article 25(3)d):

\begin{quote}
It appears that this article proposes a residual mode of complicity which has been introduced in the statute to ensure that the court would have jurisdiction to judge the accomplices whose behaviour does not constitute an aid or an assistance to the commission of the crime within the meaning of article 25(3)c).\textsuperscript{545}
\end{quote}

2.2.5.2.3.2. Objective element

Literally interpreted, the \textit{actus reus} of article 25(3)d) seems to be any contribution to the commission of the crime committed by a group acting with a common purpose. In Mbarushimana\textsuperscript{546}, the Pre-Trial Chamber suggested that the \textit{actus reus} of this article was comprised of: 1) a crime within the jurisdiction of the Court is attempted or committed, 2) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose, 3) the individual contributed to the crime in

\begin{footnotes}
\item[544] Supra note 375.
\item[545] Ibid at para 1618 [translated by the author] [emphasis added].
\item[546] Supra note 532.
\end{footnotes}
any way other than those set out in article 25(3)(a) to (c) of the Statute.\footnote{Supra note 532 at paras 270-276.} As to the second element, the court emphasized that “[a] common purpose must include an element of criminality, but does not need to be specifically directed at the commission of a crime”.\footnote{Ibid at para 271.} Also, the court asserted that article 25(3)(d) applies to contributors whether or not they are member of the group acting with a common purpose.\footnote{Ibid at para 275.} As to the third element, the court observed that a significant contribution is needed and proposed that the following factors could be used in order to assess it: 1) the nature of the participation after acquiring knowledge of the criminality of the group’s goal, 2) any effort to prevent criminal activity or impede the efficient functioning of the group’s crimes, 3) whether the person creates or merely executes the criminal plan, 4) the position of the suspect in the group or relative to the group, 5) the role of the suspect with regards to the seriousness and scope of the crimes committed.\footnote{Ibid at paras 283-284.} Furthermore, the court, citing cases from the post-WW2-era and \textit{ad hoc} tribunals, added that “25(3)(d) liability can include contributing to a crime's commission after it has occurred, so long as this contribution had been agreed upon by the relevant group acting with a common purpose and the suspect prior to the perpetration of the crime”.\footnote{Ibid at paras 286-287.} In \textit{Prosecutor v William Samoeiruto},\footnote{Prosecutor v William Samoeiruto, ICC-01/09-01/11, Decision on Confirmation of Charges (23 January 2012), online: ICC Website <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/chambers/pretrial%20chamber%20ii/Pages/373.aspx> [Samoeiruto].} the Pre-Trial Chamber reiterated that the contribution of the individual must be in any other way than those set out in article 25(a) to (c).\footnote{Ibid at para 397; See also Muthaura, supra note 520 at para 421 which contains the same criteria.} The court specifically disagreed with the defence’s
submission to the effect that the contribution under article 25(3)d) must be substantial saying that the “in any other way” in article 25(3)d) negated this submission. The court went on to say that even assuming that the contribution under article 25(3)c) had to be substantial, that did not mean that the contribution under 25(3)d) had to be of the same nature; otherwise, it would render meaningless the hierarchical structure established by article 25. The court then concluded that “the contribution under subparagraph (d) is satisfied by a less than "substantial" contribution, as far as such contribution results in the commission of the crimes charged”. In Katanga the ICC Trial Chamber repeated the actus reus elements set out in Mbarushimana and added the following. As for the group’s common goal, the court underlined that it must be to commit a crime or comprise the execution thereof, but does not have to be specifically directed towards the commission of a crime within the jurisdiction of the court. In addition, the group’s common goal does not have to be solely criminal nor is it demanded that the group’s final objective be criminal. The court also reiterated that the contributor can incur liability under article 25(3)d) being inside or outside the group. As for the contribution of the accused, it must have had an influence on the commission of the crime which must be either on the occurrence of the crime or on the way it happened. Also, the contribution

554 Samoeiruto, supra note 552 at paras 353-354.
555 Ibid at para 354.
556 Ibid.
557 Ibid.
558 Supra note 375.
559 Supra note 532.
560 Supra note 375 at para 1620.
561 Ibid at para 1627.
562 Ibid.
563 Ibid at para 1631.
564 Ibid at para 1632.
565 Ibid at para 1633.
provided does not have to be directly linked to the actual perpetrator of the crime\footnote{Supra note 375 at para 1635.} and the crime does not have to depend upon the contribution or be conditioned by it.\footnote{Ibid at para 1633.} For the minority, Madam Justice Christine Van den Wyngaert agreed with the majority, subject to the following.\footnote{Ibid at para 283 of Judge Christine Van den Wyngaert’s opinion.} As for the group’s common goal, she said that the criminal component must be an inherent part of it to the extent that it can be said that the crime will happen in the normal course of events.\footnote{Ibid at para 286.} With regards to the contribution, the judge suggested that specific direction requirement might have to be taken into account especially when the group to which the contribution is made has criminal and non-criminal activities or when a neutral contribution is involved, but stopped short of including this element in the analysis for all cases.\footnote{Ibid at para 287.} Lastly, in \textit{Prosecutor v Laurent Gbagbo}\footnote{Prosecutor v Laurent Gbagbo, ICC-02/11-01/11, Decision on Confirmation of Charges, (12 June 2014) (International Criminal Court), online: ICC Website < http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/icc02110111/court%20records/chambers/pretrial%20chamber%20i/Pages/656.aspx> [Gbagbo].} and \textit{Blé Goudé}\footnote{Supra note 520.}, the court enumerated the same \textit{actus reus} elements as in \textit{Mbarushimana}\footnote{Supra note 532.}, except that it did not specify the level of contribution necessary to apply article 25(3)d).\footnote{Gbagbo, supra note 571 at para 252; Blé Goudé, supra note 520 at para 172.}

\subsection*{2.2.5.2.3.3. Mental element}

Literally interpreted, the \textit{mens rea} of article 25(3)d) appears to be that the contribution to the crime is intentionally made (the constant element) and with the aim of furthering the criminal activity or criminal purpose of the group (which involve the commission of a
crime within the jurisdiction of the ICC) or with knowledge of the intention of the group to commit the crime (the alternative elements). In *Mbarushimana*575, the court articulated the *mens rea* elements of article 25(3)d) as follows: 1) the contribution shall be intentional, and 2) shall either (a) be made with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime.576 As to the first element (the contribution shall be intentional), the court mentioned that it was comprised of two elements: i) the accused mean to engage in the relevant conduct that allegedly contributes to the crime and (ii) be at least aware that his or her conduct contributes to the activities of the group of persons for whose crimes he or she is alleged to bear responsibility.577 In *Katanga*578, the court interpreted the *mens rea* required for the application of article 25(3)d)ii) and came up with a mental element composed of two things: 1) the contribution must be intentional (general intentionality), and 2) the accused’s contribution must be made while being aware of the intent of the group to commit the crime (alternative element). As to the first element, the court said that its interpretation must be done having regard to the subparagraphs i) and ii) of article 25(3)d) in order to avoid any encroachments with the elements contained therein.579 To do so, the court declared that the intention must only apply to the conduct of the aider and not to the criminal activity, the common goal or the criminal intent of the group.580 To that end, the aider must have wanted to adopt the conduct, i.e. his behaviour must have been conscious and deliberate.581 What’s more, the aider must have been aware that his

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575 *Supra* note 532.
578 *Supra* note 375.
579 *Ibid* at para 1638.
580 *Ibid*.
581 *Ibid*. 
conduct contributed to the activities of the group with a common purpose.\textsuperscript{582} As to the second element, the knowledge must be shown for each of the crime and cannot be shown through the knowledge of a general criminal intent harboured by the group.\textsuperscript{583} For the minority, Madame Justice Christine Van den Wyngaert agreed with the majority, save for the following. As to the first element, she said that “the person’s intentional contribution must be at least aware that he/she is contributing to the criminal activities of the group”.\textsuperscript{584} In \textit{Gbagbo}\textsuperscript{585}, the court, applying article 25(3)(d)i), opined that its \textit{mens rea} was comprised of: 1) the accused meant to contribute to the commission of the crime, 2) the accused was aware that his conduct contributed to the commission of crime, (two elements of the general intentionality), and 3) the accused carried out his contribution with the aim of furthering the criminal purpose of the group which involved the commission of crimes within the jurisdiction of the court (alternate element of 25(3)d)i)).\textsuperscript{586} Lastly, in \textit{Blé Goudé}\textsuperscript{587}, the ICC Pre-Trial Chamber applied article 25(3)d) literally and, accordingly, maintained that its \textit{mens rea} was:

The person (i) meant to contribute to the commission of the crimes; and (ii) carried out his or her contribution either with the aim of furthering the purpose or the activity of the group (in case of a criminal common purpose or activity involving the commission of crimes within the jurisdiction of the Court), or in the knowledge of the intention of the group to commit the crimes.\textsuperscript{588}

\textsuperscript{582} Supra note 375 at para 1639.
\textsuperscript{583} Ibid at para 1642.
\textsuperscript{584} Ibid at para 286 of Judge Christine Van den Wyngaert’s opinion [emphasis in the original].
\textsuperscript{585} Supra note 571.
\textsuperscript{586} Ibid at paras 252, 257.
\textsuperscript{587} Supra note 520.
\textsuperscript{588} Ibid at para 173.
2.2.5.3. Analysis and discussion of the main issues: the nature of the aid or contribution (25(3)c)d)) and the mental element of contribution to a crime committed by a group liability of article 25(3)d)

The two main issues regarding the accomplice liability present in the jurisprudence of the ICC are the nature of the aid or contribution provided by the aider or contributor, i.e. the objective element of articles 25(3)c)-d), and the mental element of the contribution to a group crime liability found at article 25(3)d).

Concerning the nature of the aid in order to trigger the application of article 25(3)c), in light of the above jurisprudence, it is clear that it needs to be clarified. The obiter dicta seem to suggest that a substantial contribution to the crime might be needed, but the Pre-Trial Chamber did not make any pronouncement in that regard nor did it mention those obiter dicta. Further, such an interpretation would overlook some peculiarities of the Rome Statute. First, the wording of article 25(3)c) differs from the equivalent provision of the ad hoc tribunals’ statute. Indeed, it speaks of aiding, abetting, or otherwise assisting, including providing the means for commission. The ad hoc tribunals have interpreted the words aiding and abetting as requiring a substantial contribution, but what about the words “otherwise assisting” of article 25(3)c). Would it be possible that this expression lowers the threshold of the contribution? But in the same time, what to make of the expression “including providing the means for its commission”? Such a contribution is surely substantial, if not causal in nature. Does that mean that the contribution has to be either substantial or causal? It is unclear. Second, the relation between the actus reus and the mens rea within article 25(3)c) is said by certain to shed

589 Supra note 29.
light on the extent of the contribution needed. The argument made is that, compared to
the complicity provision in the statute of the ad hoc tribunals which has been interpreted,
generally speaking, as a knowingly provided substantial assistance to the commission of
the crime, article 25(3)c provides for a lower actus reus threshold, a simple assistance,
and a higher mens rea, acting for the purpose of facilitating the commission of the crime.
According to this theory, the drafters of the Rome Statute\textsuperscript{590} used this formulation in
order to make sure the lower threshold of contribution would be compensated by a higher
mental element to ensure that the guilt principle is upheld. Third, the application of article
31 paragraph 1 of the Vienna Convention\textsuperscript{591} would probably yield a lower actus reus
devoid of anything more than what is required by the plain reading of the provision.

Considering the above, the statement made in Mbarushimana\textsuperscript{592} about the difficulty to
import the teachings of the ad hoc tribunals in the ICC’s jurisprudence is arguably
appposite with regards to the question of the extent of the contribution needed under article
25(3)c). In fact, a whole new interpretation might be adequate to take into account the
peculiarities of article 25(3)c) and the context of the Rome Statute\textsuperscript{593}, including the
developments made in the interpretation of article 25(3)d). Not to help, the two Pre-Trial
judgments on the threshold of 25(3)c), Bemba Gombo\textsuperscript{594} and Blé Goudé\textsuperscript{595}, did not
substantiate their position to the effect that the aid must have had some effect on the
commission of the crime with any meaningful reasoning. A simple approach would have

\begin{itemize}
  \item \textsuperscript{590} Supra note 29.
  \item \textsuperscript{591} Supra note 527.
  \item \textsuperscript{592} Supra note 532 at para 279.
  \item \textsuperscript{593} Supra note 29.
  \item \textsuperscript{594} Supra note 529.
  \item \textsuperscript{595} Supra note 520.
\end{itemize}
been to argue that, in view of article 21(1)a) of the Rome Statute\textsuperscript{596} which dictates that the statute must be applied in priority over other legal sources, any kind of aid crosses the threshold. Nonetheless, at this preliminary stage and given the content of the Pre-Trial Chamber decisions, it might be reasonable to assume that the assistance must have an effect on the commission of the crime.

With respect to article 25(3)d), the conundrum regarding the level of contribution needed is not less thorny. So far, the jurisprudence has logically said that this contribution must be, in virtue of the expression “in any other way”, different than the one required by articles 25(3)a) to c); that turned out, as per the court\textsuperscript{597}, to be a significant contribution. The jurisprudence also adds that the contribution does not need to be substantial, but must have had an influence on the occurrence of the crime or its manner of commission.\textsuperscript{598} However, these pronouncements were obscured by some others. For example, the court said the contribution required is less than substantial, as far as such contribution results in the commission of the crimes charged.\textsuperscript{599} This phrase contains two contradictory standards: 1) the less-than-substantial contribution, 2) the causal contribution. While the first one appears to be logically and textually founded, the second one cannot be true since it would substantially increase the threshold to an unprecedented point in the history of ICL, is not supported by the legal text it purports to interpret nor is it by the international custom, and is contrary to the whole reasoning effectuated by the court in the same judgment. Another example is the reasoning of one dissent which

\textsuperscript{596} Supra note 29.
\textsuperscript{597} Mbarushimana, supra note 532; Katanga, supra note 375.
\textsuperscript{598} Ibid.
\textsuperscript{599} Samoeiruto, supra note 552 at para 354.
declared that specific direction should not be ignored especially when the contribution is a neutral one or given to an organization which has criminal and non-criminal activities. Given that organizations with mixed purposes and neutral assistance will encompass a great number of cases, such an averment has wide-ranging consequences and would require much more details than what was actually provided. Apart from that, the following issues remain to be solved. First, the jurisprudence refers and gives importance to the expression “in any other way” to such an extent that it rejected the substantial contribution using the said expression, all that while maintaining that the contribution must be significant. This reasoning is weak and incoherent because it does not explain why “in any other way” precludes a substantial contribution, but allows a significant contribution. Logically, if it excludes one of these qualifiers, it should disallow both of them. The court seems to apply a semi-reasoning through which the said expression means something, but not its literal meaning. In these circumstances, if the court is to put weight on “in any other way”, it would be less complicated more coherent to simply apply the plain meaning of the expression instead of giving it half effect and accepting that significant is the equivalent of “any other way”. What’s more, the Vienna Convention militates in favour of applying the plain meaning of the words. Second, as hinted above, the interpretation of article 25(3)d) will inevitably have an effect on article 25(3)c) by reason of the theory suggesting that article 25 modes of liability are organized according to a decreasing control over the crime. This theory necessarily implies that the degree of contribution demanded to apply article 25(3)d) will be lower than that requested under article 25(3)c) and conversely. Third, the fact that the significant

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600 *Katanga*, *supra* note 375 at para 287 of Judge Christine Van den Wyngaert’s opinion.
601 *Samoeiruto*, *supra* note 552.
602 *Supra* note 527.
contribution requirement has been interpreted as a contribution which has an influence on the occurrence or the manner of commission of the crime is confusing. From a semantic standpoint, logic indicates that a significant contribution is more than a mere influence. Indeed, the word “influence” is defined as follows by the Oxford English Dictionary “[t]he capacity to have an effect on the character, development, or behaviour of someone or something, or the effect itself”. “Effect”, “impact”, “control”, “sway” are given as synonyms by the same authority. Contrast this with the same dictionary’s definition of significant “[s]ufficiently great or important to be worthy of attention; noteworthy”. Even more telling are the synonyms: “important”, “serious”, “crucial”, “weighty”. Fourth, the definition of the common purpose of the group committing the crime is not entirely exempt of ambiguities. It was first judged that this purpose must include an element of criminality without necessarily being specifically directed towards the commission of a crime within the jurisdiction of the ICC. Then, a subsequent judgment changed the formulation and insisted that the common purpose of the group must be to commit a crime or comprise the execution thereof. The dissent present in that decision disagreed and maintained that the criminal component must be an inherent part of the common purpose to the extent that it can be said that the crime will happen in the normal course of events. These approaches show a crescendo of stringency from which the subsequent decisions will have to choose from. This choice will have a significant impact given the difference among the various standards. Fifth and finally, it

603 Katanga, supra note 375.
604 Supra note 31, sub verbo “influence”.
605 Ibid.
606 Ibid, sub verbo “significant”.
607 Ibid.
608 Mbarushimana, supra note 532.
609 Katanga, supra note 375.
610 Ibid at para 286 of Judge Christine Van Den Wyngaert’s opinion.
is peculiar that the two last decisions involving article 25(3)d) which date back to June 2014 and December 2014 respectively\textsuperscript{611} did not develop on the threshold to assess the contribution supplied by the aider.

As regards the mental element of the contribution to a group crime liability found at article 25(3)d), it should first be noted that the provision with its constant intentional element that must be coupled with either of the three other alternative elements evinces a certain degree of complexity. Such a complicated scheme can be interpreted two related ways: the Rome Statute\textsuperscript{612} drafters wanted to narrow the scope of application of the article 25(3)d), but did so in a rather awkward way or, and potentially with the said aim in mind, the provision is simply a compromise between the various national delegations present at the Rome Conference as to the most efficient and reasonable concept of complicity with a group crime. In any case, as of January 2015, the mental element of this mode of liability has been interpreted mainly by three judgments\textsuperscript{613} and its lacunas are already easily noticeable. The ICC is not to blame for these difficulties, but, as will be shown below, the court did not help itself in grappling with this problem by reading in the provision elements that are not disclosed by a plain reading of the article. To that end, from the provision, the following elements can be identified: 1) the contribution to the commission of the crime must be intentional, 2) this intentional contribution must be made with the aim of furthering the criminal activity or the criminal purpose of the group, both of which involve the commission of a crime within the ICC jurisdiction, or 3) in the knowledge of

\textsuperscript{611} Gbagbo, supra note 571; Blé Goudé, supra note 520.
\textsuperscript{612} Supra note 29.
\textsuperscript{613} Mbarushimana, supra note 532; Katanga, supra note 375; Gbagbo, supra note 571.
the intention of the group to commit the crime. The difficulties the court is facing when interpreting this *mens rea* can be described as follows.

First, many expressions and words will have to be clarified like “furthering”, “criminal activity”, “knowledge”, “intentional”, and “purpose”. To that end, the ICC jurisprudence already refers and draws on the definition found at article 30 of the *Rome Statute*\(^{614}\) which reads:

1. 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.

2. For the purposes of this article, a person has intent where:

   (a) In relation to conduct, that person means to engage in the conduct;

   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.\(^{615}\)

A careful parsing of this article leaves the reader uncertain as to whether this article applies only to the definition of the crimes or also to the definition of the modes of liability. It seems to me that there is a good case to be made for the first option. Firstly, paragraph one seems to be a mere presumption of *mens rea* that apply when no specific mental element is provided for in the relevant article setting out the definition of a crime. In other words, it simply dictates a default *mens rea* for crimes within the jurisdiction of the court and furnishes definitions to facilitate the interpretation of this default *mens rea*.

\(^{614}\) *Supra* note 29.

Otherwise, these definitions would be at the beginning of the *Rome Statute* and their prescriptions would not be preceded by a limitation phrase such as “for the purposes of this article”. Secondly, applying article 30 to the modes of liability would be peculiar as its paragraph one says “committed” which generally points towards the abovementioned interpretation and not towards a generally applicable article. In that sense, this article would apply only when no mental element is provided in the definition of the relevant crime and if the crime is actually committed by the accused. Should the accused not be the actual perpetrator, the modes of liability supplied by article 25 would apply. Plus, applying paragraph one to the modes of liability would run counter to the “unless otherwise provided” of article 30(1), which expression applies to many modes of liability notably articles 25(3)c) and d). This “unless otherwise provided” would bar the application of article 30(1) to the modes of liability which itself in turn would render inapplicable 30(2) and (3) to the same because of the “for the purposes of this article” at the beginning of those two provisions and thus would be another argument to prevent article 30 to apply to article 25. However, in spite of all these niceties, it would not be unreasonable for the court, using general common sense, to use article 30 in order to interpret the modes of liability as it explains what the ICC drafters understood when they chose words like “knowledge” and “intent”. In that regard, the approach so far adopted by the court (using article 30 to interpret article 25) is reasonable even though it might go beyond the strict reading of the article 30.

Second, the intentional contribution requirement (constant element) is particularly difficult to interpret. The ICC’s first decision interpreted it as calling for two things: 1)
the accused must have wanted to engage in the conduct constituting the contribution to the commission of the crime by the group and 2) while being aware that his or her conduct contributes to the activities of the group.\textsuperscript{617} In the judgment that followed,\textsuperscript{618} the court acknowledged the possibility of encroachments in the mental element of 25(3)d) and resolved this difficulty by reiterating that only the acts constituting the contribution must be intentional and specified that this meant that these acts must be done consciously and deliberately. The minority of this judgment added that the contribution must be done when the contributor is at least aware that he is contributing to the criminal activities of the group.\textsuperscript{619} Then, the third decision, while pretending to do so in accordance with the jurisprudence of the court, set forth a different interpretation of this intentional contribution requirement according to which the accused must have wanted to contribute to the commission of the crime while he was aware that his conduct contributed to the commission of crime.\textsuperscript{620} This review of jurisprudence displays with eloquence the difficulty of the intentional contribution requirement. The main conundrum is to give meaning to this element without encroaching on the other aspects of the \textit{mens rea}. In that regard, the first decision\textsuperscript{621} applied the intention only partially stating that it must go merely to the conduct while the third\textsuperscript{622} applied it more completely, i.e. to the contribution to the commission of the crime. The first decision’s\textsuperscript{623} interpretation does not comport with the literal meaning of the provision while the third one\textsuperscript{624} does, but thereby inevitably leads to encroachments with the rest of the mental element of article

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\textsuperscript{617} Mbarushimana, supra note 532.
\textsuperscript{618} Katanga, supra note 375.
\textsuperscript{619} \textit{Ibid} at para 286 of Judge Christine Van den Wyngaert’s opinion.
\textsuperscript{620} Gbagbo, supra note 571.
\textsuperscript{621} Mbarushimana, supra note 532.
\textsuperscript{622} Gbagbo, supra note 571.
\textsuperscript{623} Mbarushimana, supra note 532.
\textsuperscript{624} Gbagbo, supra note 571.
\end{footnotesize}
25(3)d). In the same way, the approach preconized by the minority in the second judgment\textsuperscript{625}, viz. that the conscious and deliberate conduct be made while being aware that it contributes to the criminal activities of the group, would almost render moot the other components of the mental element of article 25(3)d). Indeed, if the contribution is made while being aware of the criminal activities, it will be very difficult for the contributor to come and say that he did not know about the criminal intent of the group or that he did not want to further the criminal activities or criminal purpose of the group. In these circumstances, the adoption of such an approach in the coming decisions would be surprising. In any event, through the second element of this general intentional contribution requirement, the awareness that the contribution is made towards the activities of the group or the criminal activities \textit{per se}, the approaches elaborated in \textit{Mbarushimana}\textsuperscript{626} and by the minority in \textit{Katanga}\textsuperscript{627} implicitly recognize that the general intentionality requirement cannot be limited to the conduct constituting the contribution, there must be some consciousness or volition to contribute towards the commission of the crime. An example of that is \textit{Mburishimana}\textsuperscript{628} where the court proclaimed that if the intent only applied to the acts of contribution it might lead to the imposition of criminal liability on persons whose intentional actions have an unintended, significant effect on a group that is acting with a common purpose.\textsuperscript{629} To address this difficulty, the court in \textit{Mbarushimana}\textsuperscript{630} incorporated into the analysis an element that is not disclosed by a plain reading of the article, the awareness of the activities of the group, while in

\textsuperscript{625} \textit{Katanga}, \textit{supra} note 375 at para 286 of Judge Christine Van den Wyngaert’s opinion.
\textsuperscript{626} \textit{Supra} note 532.
\textsuperscript{627} \textit{Supra} note 375.
\textsuperscript{628} \textit{Supra} note 532.
\textsuperscript{629} \textit{Ibid} at para 288.
\textsuperscript{630} \textit{Supra} note 532.


*Gbagbo*\(^{631}\) it simply gave effect to the words of the article (accused must have wanted to contribute to the commission of the crime while he was aware that his conduct contributed to the commission of crime.), but thereby runned the risk of encroachments. Therefore, neither choice is problem-free; the first one is not consistent with the article, the second renders nugatory other elements of the *mens rea*.

Overall, the fact that the contribution to the crime has to be intentional, which is the result yielded by the plain reading of the provision, seems to render superfluous the alternative elements: the aim of furthering the criminal activity or criminal purpose or knowledge of the group’s intent to commit the crime. Indeed, logic dictates that an intentional contribution to the commission of the crime automatically furthers the criminal activity or criminal purpose of the group and is necessarily made knowing the intent of the group to commit the crime. In *Katanga*\(^{632}\), the ICC Trial Chamber acknowledged and tried to resolve this difficulty saying that only the acts constituting the contribution must be intentional in the sense that these acts must have been the product of a conscious and deliberate choice on the part of the contributor.\(^{633}\) This solution seems to be the only workable one in the circumstances. However, on a theoretical point of view, this interpretation is not completely unflawed for the following reasons. If the intent only goes to the contribution itself then this *mens rea* element does not add anything to the analysis since the principle that acts constituting any *actus reus* must be voluntary, intentional, and conscious is a general principle of criminal law which was part of the analysis regardless of this element. This principle guarantees that the accused cannot be

\(^{631}\) *Supra* note 571.

\(^{632}\) *Supra* note 375.

\(^{633}\) *Ibid* at para 1638.
held criminally liable for an action for which he had no volition to commit. This prevents the criminal responsibility of, for instance, persons committing actions while suffering from epilepsy seizures or that of the sleep walkers or of that of the persons obliged to act by reason of coercion or duress. In other words, this interpretation of the court of this element of the mens rea makes the same superfluous and unnecessary. This concern is reinforced when put into perspective with other modes of liability of the Rome Statute\textsuperscript{634} notably aiding and abetting found at article 25(3)c). In effect, article 25(3)c) does not demand that the aiding and abetting conduct be intentional. However, it has to be so in virtue of the abovementioned general principle of criminal law, which demands that acts purported to be criminal must have been done consciously. Otherwise, it would be equivalent of saying that an accused can be found guilty for an involuntary act. Therefore, the act of aiding and abetting has to be intentional even if it is not specified in the words of the article. According to me, this argument shows that, while the interpretation of the court of the general intent requirement found in article 25(3)d) seems to be the only workable in the circumstances, it cannot be said to be theoretically unassailable. However, the court’s interpretation is probably the only way to give a logical meaning to this requirement so much so that the court cannot be castigated for adopting it.

\footnote{\textit{Supra} note 29.}
3. CHAPTER 3: SCHOLARSHIP AND INSTITUTIONAL VIEWS

3.1. Preliminary observations

The chapter above exhibits quite clearly the main problem of complicity in ICL: its lack of clarity and definiteness. In effect, the review of the jurisprudence of the contemporary tribunals denotes that complicated, unresolved issues are and will continue to be debated in the future. This reality undermines the principle of legality\(^{635}\) which notably ensures that the accuseds know what is the case to meet by the prosecution in order to obtain their conviction which in turn allows them to prepare their defence accordingly. Settling these issues and disagreements are even more important given the increased importance of complicity in ICL. Indeed, as explained above, international crimes are almost always committed by groups which tend to be aided and abetted from the exterior to maximize their efficiency. Cases like \textit{Perisic}\(^{636}\) and \textit{Taylor}\(^{637}\) reflect this reality. These two cases also demonstrated that the current situation is untenable and cannot perdure. From a legal standpoint, these cases were the same: an aider away from the battlefields provides help and assistance to a group committing the crimes while being aware of such deeds.\(^{638}\) One got convicted and was sentenced to 50 years in prison while the other was acquitted of all charges and is currently walking free. Such discrepancies must be tackled and eradicated as soon as possible lest ICL losing all its credibility and moral force and be considered as

\(^{635}\) See Kenneth S. Gallant, \textit{The principle of legality in international and comparative criminal law}, (New York: Cambridge University Press, 2009).
\(^{636}\) Supra note 34.
\(^{637}\) Supra note 35.
\(^{638}\) As stated above, in \textit{Perisic, supra} note 34, the accused, the most senior officer in the Yugoslav Army, was charged for having aided and abetted the crimes committed by the Bosnian and Croatian Serbs military forces between August 1993 and November 1995 by supplying the same with military and logistical assistance. In \textit{Taylor, supra} note 35, the accused, President of Liberia from 1997 to 2003, was charged with aiding and abetting the crimes committed by the Revolutionary United Front and the Armed Forces Revolutionary Council, two rebel groups who were waging a civil war against the Sierra Leonean government, by providing them with financial and military support.
nothing but the equivalent of Louis XIV’s court. In the face of such predicament, one
would be tempted to go back to the international custom to build an acceptable and
reasonable notion of complicity which would receive wide approbation from the different
states of the world. However, the first section of the second chapter demonstrated that the
custom is as plagued by uncertainty as the contemporary jurisprudence and, thus, is of no
use to articulate a palatable and coherent approach yielding reasonable results.

Mindful of this deadlock, it is now time to reassess the concept of complicity to bring
coherence and certainty into the analysis. A good starting point to ponder about an ideal
approach is to examine the prescriptions contained in the writings of learned authors in
the field. True, some articles analyzed below were intended to dwell on complicity in the
national setting, but there are enough theoretical similarities between the ICL and internal
criminal law to render their ideas worthy of consideration in the circumstances of this
paper. Moreover, authors in the field sometimes refer to or analyze the views of some
renowned institutions about complicity in ICL. I have chosen three of these institutions:
the Supreme Court of Canada (SCC), the International Court of Justice (ICJ), and some
American appellate courts at the federal level. Given their prestige and their impact on
the doctrinal discussions of the concept, their jurisprudence must receive some attention.

Therefore, in this chapter, I will first lay out the views expounded by these institutions on
the concept of complicity in ICL which will be followed by a commentary. Second, I will
describe and briefly analyze the views adopted on the concept of complicity by the main

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639 Notorious notably for its arbitrary character. This feature is evinced in quotes such as “it is legal because
I wish it” attributed to the famous Sun King. See Wikipedia online documentation about Louis XIV of
authors in the field of ICL. Third, I will review the specialised literature which analyzed complicity and tried to reconceptualise it in order to make fairer, more consistent with general principles of criminal law, and more efficient. This review will be accompanied by comments and reflections about the propriety and reasonableness of selecting the approach these articles propose in ICL. With a view to rendering the second and third sections easier to understand in the context of this thesis, I will proceed in decrescendo, from the more to the less stringent propositions. Fourth, given the particular magnitude of that case for ICL, I will detail and criticize Charles Ghankay Taylor defence team’s views about complicity. In the next chapter, with the light shed by these authors’ theories and the observations made in this and the second chapters, I will lay down my analysis about what could be an appropriate notion of complicity in ICL.

3.2. Some institutions’ views

In July 2013, the Supreme Court of Canada in *Ezokola v Canada (Citizenship and Immigration)*\(^{640}\) had to interpret section 98 of the *Immigration and Refugee Protection Act*. Strictly speaking this case is a refugee law case. However, as it specifies the views of the highest court in Canada on the very concept studied in this research, it cannot be ignored in the context of this thesis. Furthermore, through that case, the court explicitly stated that it wanted to “bring Canadian law in line with international criminal law (…), and the fundamental criminal law principles” (*ibid* at para 9); generally speaking, as far as refugee law is concerned, the judgment was well received by the Canadian legal community notably because the personal and knowing participation test hitherto used in these types of cases was replaced by a contribution-based approach. The SCC justified this modification to the law by saying that “the personal and knowing participation test has, in some cases, been overextended to capture individuals on the basis of complicity by association” (*ibid*). See Fannie Lafontaine, “La décision Ezokola de la Cour suprême du Canada et les limites de la complicité pour crimes internationaux : réflexions à chaud sur un jugement fondamental” (2013) (blog post posted on 19 July 2013) Blog of the International Criminal and Humanitarian Law Clinic of the Laval University Faculty of Law, online: <http://www.cdiph.ulaval.ca/blogue/la-decision-ezokola-de-la-cour-supreme-du-canada-et-les-limites-de-la-complicite-pour-crimes>; Canadian Civil Liberties Association, Press Release, “CCLA applauds SCC decision in Ezokola” (19 July 2013), online: Canadian Civil Liberties Association <http://ccla.org/2013/07/19/ccla-applauds-supreme-court-decision-in-ezokola/>; Canadian Council for Refugees, Media Release, “CCR welcomes Ezokola decision clarifying refugee exclusion” (19 July 2013), online: Canadian Council for Refugees <http://ccrweb.ca/en/bulletin/13/07/19>. Livio Zilli, a senior legal
Act, which directly referred to article 1F(a) of the Convention relating to the Status of Refugees which reads:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

The facts of this case were that Mr. Ezokola was a high-ranking official in the government of the Democratic Republic of Congo from 1999 to 2008, date at which he resigned and fled to Canada and claimed the refugee status. The Canadian Government argued that such a claim should fail given Mr. Ezokola’s background as an official of a government involved in international crimes which brought him under the purview of article 1F(a) of the Convention on Refugees. The court first noted that word “committed” in article 1F(a) encompasses not only actual commission, but also “a variety of modes of commission” among which can be found complicity. To assess the content of complicity, the court explicitly said that ICL had to be reviewed. After the examination of only the Rome Statute and its jurisprudence, and while stressing that it

adviser at the International Commission of Jurists, expressed a similar opinion in Livio Zilli, “Ezokola v Canada: The Correct Place of International Criminal Law in International Refugee Law-making” (2014) 12 Journal of International Criminal Justice 1217. Finally, Ned Djordjevic, counsel at the immigration law division of the Canadian Ministry of Justice, argued that the contribution-based approach crafted in Ezokola, supra note 640, could be employed in other cases involving article 1F of the Convention on Refugees, infra note 642, where the acts reproached to the claimant were committed by the group he was associated with. See Ned Djordjevic, “Exclusion under Article 1F(b) of the Refugee Convention: The Uncertain Concept of Internationally Serious Common Crimes” (2014) 12 Journal of International Criminal Justice 1057 at 1073-1074.

641 Immigration and Refugee Protection Act, RSC 2001, c 27.
642 Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137, (entered into force on 22 April 1954) [Convention on Refugees].
643 Ibid, art 1F(a).
644 Supra note 640.
645 Ezokola, supra note 640 at para 2.
646 Ibid at paras 28, 52.
647 Ibid at paras 42, 46.
648 Supra note 29.
was only one source in ICL.\textsuperscript{649} the court articulated complicity in ICL in the following way:

In sum, while the various modes of commission recognized in international criminal law articulate a broad concept of complicity, individuals will not be held liable for crimes committed by a group simply because they are associated with that group, or because they passively acquiesced to the group’s criminal purpose. At a minimum, complicity under international criminal law requires an individual to knowingly (or, at the very least, recklessly) contribute in a significant way to the crime or criminal purpose of a group.\textsuperscript{650}

The court further explained that “[a]n individual can be complicit without being present at the crime and without physically contributing to the crime”.\textsuperscript{651}

The views of the American federal courts on the concept of complicity in international crimes were expressed in the context of civil suits under the \textit{Aliens Tort Claims Act}\textsuperscript{652}. The \textit{Aliens Tort Statute}\textsuperscript{653}, adopted in 1789, contains one single jurisdictional provision which reads:

\begin{quote}
The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.
\end{quote}

As will become clear from the judgments cited below, the US courts’ interpretation of complicity is still in a state of flux and cannot be described in a definite manner.\textsuperscript{654} In the 2002 judgment of the US Court of Appeals for the Ninth Circuit \textit{Doe I v Unocal Corp}\textsuperscript{655},

\begin{footnotes}
\item[649] \textit{Supra} note 640 at para 51.
\item[650] \textit{Ibid} at para 68 [emphasis added].
\item[651] \textit{Ibid} at para 77.
\item[652] \textit{Aliens Tort Claims Act}, 28 USCA 1350 (Westlaw 2014) [\textit{Aliens Tort Statute}].
\item[653] \textit{Ibid}.
\item[654] The question of the content of aiding and abetting under international law for the purposes of the \textit{Aliens Tort Statute}, \textit{ibid}, is not likely to receive increased attention in the coming years given the April 2013 US Supreme Court decision in \textit{Kiobel v Royal Dutch Petroleum}, 133 US 1659 (2013) where the court said that the \textit{Aliens Tort Statute}, \textit{supra} note 652, has no extraterritorial reach so that the violation of international law has to be committed in the USA in order to be considered under the \textit{Aliens Tort Statute}, \textit{ibid}.
\item[655] \textit{Doe I v Unocal Corp}, 395 F 3d 932 (9th Cir 2002) [\textit{Unocal}]; Briefly summarized, the facts of this case are the following. During the 1990’s, Unocal and a wholly owned subsidiary, along with their partners notably a Myanmar state-owned company, were involved a business project consisting in the exploitation
\end{footnotes}
the majority of the court\textsuperscript{656}, inspired by the judgments issued by the ICTY and the ICTR,\textsuperscript{657} declared that, in international law, aiding and abetting was composed of the following elements: 1) “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime”\textsuperscript{658} coupled with 2) “actual or constructive (i.e., "reasonable") knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime”\textsuperscript{659}. In the 2009 judgment \textit{Presbyterian Church of Sudan v Talisman Energy Inc}\textsuperscript{660}, the court disagreed and expressed that the legal threshold for the aiding and abetting liability in international law was crossed with

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and transportation of natural gas situated off the coast of Myanmar. The gas was to be extracted and then transported by pipeline through the country’s interior to Thailand. The Myanmar military was providing security services for the project, notably in connection with the construction of the project’s infrastructure including the pipeline leading to Thailand. The plaintiffs, who were villagers from the rural area where the pipeline was built, sued Unocal and its leaders alleging that the Myanmar military subjected them to forced labor, torture, rape, murder at the behest or with the knowledge, consent, and support of Unocal and its business partners (see \textit{ibid} at paras 3-30). The District Court summarily dismissed the suit and rendered summary judgment in favor of the defendants. The plaintiffs appealed and the Court of Appeals reversed in part the first judgment and ordered that the case be remanded to the District Court for decision. An appeal of that decision was granted and the case was supposed to be reheard before an eleven-judge \textit{en banc} panel. That proceeding never took place as the parties settled the litigation out of court in March 2005.
\end{quote}

\textsuperscript{656} The minority did not disagree as to the content of the international criminal law laid down by the majority. Rather, it explained that international criminal law was not applicable to the facts of this case which should be governed by the US federal common law. See \textit{ibid} at paras 111-112, 117-126.

\textsuperscript{657} \textit{Ibid} at para 56.

\textsuperscript{658} \textit{Ibid} at para 57.

\textsuperscript{659} \textit{Ibid} at para 59.

\textsuperscript{660} \textit{Presbyterian Church of Sudan v Talisman Energy Inc}, (Docket No. 07-0016-cv) U.S.C.A. 2\textsuperscript{nd} Circuit, 2 October 2009 [\textit{Talisman}]; Briefly summarized, the facts of this case are the following. During the 1990’s, Talisman Energy Inc. was part of a consortium of businesses, which included the Sudanese government, that was exploring and extracting oil in the southern part of Sudan. The oil was then to be transported by the consortium through pipelines to the Red Sea. As a civil war was raging in the southern part of Sudan at that time, the consortium made arrangements so that the security of the facilities and operations be provided by the Sudanese government and its military forces. In doing so, the Sudanese military was using the consortium facilities to launch attacks on its enemies in the civil war. In this context, the plaintiffs alleged that the Sudanese government created buffer zones around the consortium’s facilities by clearing civilian populations which areas would later be used for oil exploration. More specifically, the plaintiffs alleged that they were injured and/or displaced by the government forces in military attacks on their communities. They also alleged that the consortium considered expanding exploration notwithstanding its knowledge of the government’s buffer zones strategy. The plaintiffs sued Talisman Energy Inc. and the Republic of Sudan arguing that Talisman aided and abetted or conspired with the Sudanese government in the abuses with a view to facilitating the development of their oil operations in southern Sudan (see \textit{ibid} at 7-17). The District Court dismissed the plaintiffs’ claim in September 2006. In October 2009, the US Court of Appeals for the Second Circuit affirmed the District Court’s decision as, in the court’s opinion, knowledge of the abuses was not enough to render Talisman liable for the Sudanese military’s human rights violations. Rather, only an aid given for the purpose of aiding the violations could have made Talisman liable for the same. In October 2010, the US Supreme Court refused to hear the appeal in this case.
practical assistance to the principal which has a substantial effect on the perpetration of
the crime and that is given with the purpose of facilitating the commission of that
crime. In July 2011, the Court of Appeals for the District of Columbia in Doe VIII v
Exxon Mobil Corp disagreed with the Talisman case and said that the statement of
the law laid down in Unocal was the good one, except that it is not clear whether the
court accepted as good law the constructive part of the knowledge standard. In October
2011, the majority of the US Court of Appeals for the Ninth Circuit in Sarei v Rio
Tinto refused to weigh in in the controversy and expressed that, at least, the purpose

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661 Supra note 660 at 37.
662 Doe VIII v Exxon Mobil Corp, No. 09-7125, Decided July 8, 2011 (D.C. Cir 2011) [Exxon Mobil];
Briefly summarized, the facts of this case are the following. At the beginning of the 2000’s, Exxon Mobil
Corporation and several of its wholly-owned subsidiaries operated a large natural gas extraction and
processing business in the Aceh province in Indonesia. The plaintiffs, 15 villagers from the Aceh province,
alleged that Exxon and its subsidiaries hired the Indonesian military to guard the facilities and
infrastructures of the companies and that, in discharging that duty, the Indonesian soldiers engaged in
various human rights violations such as murder and rape against the residents of the Aceh province. The
plaintiffs contended that the soldiers committing the violations were under Exxon Mobil’ direct control and
authority, that Exxon Mobil was aware of the violations, and the company provided logistical and material
support to the military guards nonetheless. In 2009, the District Court dismissed the plaintiffs’ claim
summarily; the plaintiffs appealed the ruling. In 2011, the Court of Appeals, while affirming that ruling in
part, disagreed and remanded the case to the District Court for decision. No decision has been rendered yet
by the District Court.
663 Supra note 660.
664 Supra note 655.
665 Sarei v Rio Tinto, 221 F Supp 2d 1116 (9th Cir 2011); Briefly summarized, the facts of this case are the
following. Beginning in 1960’s, the defendant Rio Tinto operated a mine on the island of Bougainville,
which is located in the South Pacific Ocean just off the main island of Papua New Guinea. To operate the
Bougainville mine, Rio Tinto required and received the assistance of the Papua New Guinea government.
The plaintiffs, current and former residents of Bougainville, alleged that, from the 1960’s onwards, Rio
Tinto displaced villages, razed massive swaths of rain forest, intensely polluted the air, land, and water of
the island, and discriminated against the Bougainvillian workers, who lived in slave-like conditions. In
November 1988, some Bougainville residents sabotaged the mine and forced its closure. Rio Tinto
demanded that the Pupua New Guinea government send the army to quell the rebellion which in fact
provoked the beginning of a protracted civil war. During the war, Rio Tinto requested that the country’s
military secure the mine which resulted in a ten-year military blockade of the island and other military
actions taken against Bougainvillians notably aerial bombings, rapes, and village burnings. The plaintiffs
claimed that 15,000 Bougainvillians died during the war and tens of thousands were displaced and suffered
health problems. In November 2000, the class action lawsuit was launched against Rio Tinto as the
plaintiffs alleged, inter alia, that it had aided and abetted the numerous human rights violations perpetrated
by the Papua New Guinea government against the island’s population. After a number of back and forths
between the District Court and the Court of Appeals, the case was finally dismissed in June 2013 by the
Court of Appeals.
standard was cognizable under the *Aliens Tort Statute*. One minority judge, Pregerson J, disagreed with the majority and maintained that knowledge was the applicable *mens rea* standard for aiding and abetting in international law. Finally, it is interesting to note that the *Talisman* and *Exxon Mobile* decisions both claim to apply customary international law according to the guidance provided to that effect by US Supreme Court in *Jose Francisco Sosa v Humberto Alvarez-Machain* which shows us that the customary precedents are in fact scant guidance that can be interpreted in many different ways.

The International Court of Justice in its 2007 judgment in *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* had notably to interpret the expression “complicity in genocide” found at article 3 paragraph (e) of the *Genocide Convention*. In this case, Bosnia and Herzegovina was claiming that Serbia and Montenegro, by its military, political, and financial assistance provided to the Bosnian Serbs, had been an

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666 *Supra* note 652.
667 *Supra* note 665 at 64.
668 *Supra* note 660.
669 *Supra* note 662.
670 *Jose Francisco Sosa v Humberto Alvarez-Machain*, 542 US 692 at 697 (2004) (“accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized” at 697); The facts of this case are as follows. In 1985, an American Drug Enforcement Administration (DEA) agent was tortured and killed in Mexico. The DEA in the USA thought that Alvarez-Machain was implicated in the torture and death of its agent and arranged for a group of Mexican citizens to forcibly bring Alvarez-Machain to the USA to stand trial which operation succeeded. In 1992, Alvarez-Machain was acquitted in the criminal trial. In 1993, he sued, notably under the *Alien Tort Statute*, *supra* note 652, many stakeholders who had been involved in his abduction including the US government and four DEA agents. The District Court granted judgment in favor of the plaintiff with regards to the *Alien Tort Statute* claim. The Court of Appeals affirmed that ruling. A divided *en banc* Court of Appeals came to the same conclusion. The US Supreme Court overturned this ruling and denied the plaintiff’s claim.
671 *Supra* note 18.
672 *Supra* note 123.
accomplice in the commission of the genocide in 1995. As to the legal test of complicity, the court referred to the rules applicable with respect to the responsibility of states for international wrongs and determined that the objective element of complicity was whether the alleged aider had provided “aid or assistance” to the commission of the crime, genocide in this case.\footnote{\textit{Bosnia v Serbia}, supra note 18 at para 419.} As to the mental element, the court refused to give an opinion as to the governing test, but declared that at least knowledge of the commission of the genocidal acts and of the perpetrator’s intent was necessary.\footnote{\textit{Ibid} at para 421.} Four out of the eleven judges deciding that case disagreed with that assertion. Among those dissenters, Judge Kenneth Keith asserted that “knowledge of the genocidal intent of the principal perpetrator (but need not share that intent) and, with that knowledge, to have provided aid and assistance to the perpetrator”\footnote{\textit{Ibid} at para 1 of Judge Kenneth Keith’s declaration.} was the legal test for the mental element of complicity. Another dissenting judge, Mr. Justice Mohamed Bennouna, went another way in describing the \textit{mens rea} of complicity. He did repudiate the proposition that the accomplice must harbour the same intent as the principal,\footnote{\textit{Ibid} at 361 of Judge Mohamed Bennouna’s declaration.} but he worded the mental element of complicity as follows “the intent on the part of the accomplice to assist the principal perpetrator where the accomplice has actual or constructive knowledge of the nature of the crime which the principal is preparing to commit”.\footnote{\textit{Ibid}.} This standard seems to have been applied by the judge as a recklessness standard, a situation which is illustrated by his usage of expressions such as “should have known”\footnote{\textit{Ibid} at 363.} and “could not have known”\footnote{\textit{Ibid}.} in his analysis. It is noteworthy that the renowned Antonio Cassese\footnote{\textit{Ibid}.} notably
former president of the ICTY, endorsed Mr. Justice Bennouna’s view on the grounds that it corresponds to the fundamental principles in criminal law.\textsuperscript{681}

\textbf{3.2.1. Commentaries on the institutional views}

The conclusion that we can draw from the views expressed by these institutions is the same as that made regarding the jurisprudence of contemporary international criminal tribunals: there is no unanimity or coherence.

As for the Supreme Court of Canada in \textit{Ezokola}\textsuperscript{682}, it expressly said that ICL had to be reviewed, but only looked at the \textit{Rome Statute}\textsuperscript{683} and some decisions issued under it and came up with a definition of complicity not supported by these authorities. Especially, it is difficult to decipher where the court saw the recklessness \textit{mens rea} in the judgments issued by the ICC. The court might have taken this element from the SCSL’s jurisprudence, but did not mention it in its decision. The origins of the version of the \textit{actus reus} chosen by the court, which is a significant contribution to the crime or criminal purpose of a group, are also obscure in four different ways. First, there is no mention of the substantial effect on the commission of the crime, but rather a significant contribution to the crime or the criminal purpose is needed. Some will ask whether this might indicate a departure from the causation principle, but that is doubtful since it is difficult to conceive how can one contribute to a thing without having some effect on it. Plus,

\textsuperscript{680} The famous jurist passed away on 23 October 2011 (see International Criminal Tribunal for the former Yugoslavia, Press Release, NJ/MOW/1454e, “Tribunal Statement on Death of Judge Antonio Cassese” (23 October 2011), online: ICTY <http://www.icty.org/sid/10830>.)
\textsuperscript{682} Supra note 640.
\textsuperscript{683} Supra note 29.
jettisoning the causation principle altogether would be unprecedented in modern ICL. Second, the contribution has to be to the crime itself or to the criminal purpose and not to the commission of the crime. The difference might be subtle, but it seems that the former formulation is narrower than the latter. Third, this formulation of a “contribution to the crime or the criminal purpose of the group” appears to be inspired from article 25(3)d)i) of the Rome Statute and as such, to be coherent, should include a contribution made to further the criminal activity of the group which the court might have wanted to do by simply saying “the crime”. Fourth, the court did not mention clearly why the aider’s contribution should be significant instead of substantial.

As for the US courts, the judgments focus most of their attention on the jurisprudence of the ICTY and the ICTR which should engender a stable *actus reus* with a *mens rea* hesitating between knowledge and recklessness. The objective part of the test is indeed stable as the jurisprudence has undoubtedly adopted the *ad hoc* tribunals’ standard, which is an assistance that has a substantial effect on the commission of the crime. As expected, the situation is murkier on the *mens rea* side, but in a peculiar way since the two currents in opposition are not knowledge and recklessness, but knowledge and purpose. Generally speaking, the ICTY, the ICTR, and the post-WW2-era jurisprudence support knowledge while the Rome Statute favours purpose. Given that the US courts rely heavily on the ICTY and ICTR jurisprudence, knowledge should have prevailed. Further, it is

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684 Supra note 29.
685 See the development about this dichotomy in the second chapter in the section analyzing the mental element set out by the SCSL.
686 Supra note 29.
interesting to note that in *Unocal*\(^{687}\), the court argued for “reasonable knowledge” to be the equivalent of knowledge which is, in my opinion, the inclusion of wilful blindness in the standard. This element can be said to import recklessness into the *mens rea* and thus might have inspired the SCC’s opinion.

As for the ICJ, the threshold set in the analyzed case appears to be lower than what is usually the case in ICL. The majority seems to have been significantly inspired by the rules prevailing for the responsibility of states for wrongs and gave more weight to these rules than to the jurisprudence in ICL. This is understandable because what was sought by the plaintiff was the responsibility of a state, Serbia and Montenegro, for the breach of a treaty, as opposed to the determination of the criminal responsibility of an accused. However, in the same time, the treaty had a strong criminal aspect and used ICL-related terms which seem to have received less consideration by the court. What’s more, the thoughts of the dissenters in this judgment are worth our attention. Judge Keith’s version of the mental element of complicity to the effect that only the knowledge of the genocidal intent of the perpetrator is enough to cross the threshold seems to come from article 25(3)d)ii) of the *Rome Statute*\(^{688}\). This view evinces concerns for the values of prevention and deterrence in the sense that if the aider knows that the perpetrator wants to commit genocide he should refrain from helping even if it is not sure that the crime will in fact be committed. The mental element designed by the other dissenter, Judge Bennouna, is more intricate: intent on the part of the accomplice to assist the principal perpetrator (intent) where the accomplice has actual (knowledge) or constructive knowledge (wilful

\(^{687}\) *Supra* note 655.

\(^{688}\) *Supra* note 29.
blindness, recklessness) of the nature of the crime which the principal is preparing to commit (intent to commit the crime). Intent, knowledge, and recklessness cohabit in the same statement. As I understand it, the aider has to have the intent to facilitate the commission of the crime knowing or being wilfully blind to the perpetrator’s intent to commit the crime. This combines intent with knowledge and recklessness and focuses on the mind of the aider at the time of the granting of its contribution. However, it appears to be contradictory as the first element, the intent to facilitate the commission of the crime, logically encompasses the second, the knowledge of the intent to commit the crime. Indeed, if the aider intends to facilitate the commission of the crime, he has to know about the perpetrator’s intent to commit it. Lastly, the judge himself seems to have not bothered himself with all these nuances and appears to have simply applied a recklessness-based standard.

3.3 The authors’ views

3.3.1. Views of the main authors in the field of ICL

It is now apposite to examine the conception of the accomplice liability formulated by the leading books in the field of ICL.

3.3.1.1. At the ad hoc tribunals

Many different opinions are found in the literature.
For Mohamed Elewa Badar, the *actus reus* of complicity is different between the ICTY and ICTR. At the ICTY, it is a broad singular concept taking the form of a “practical assistance, encouragement, or moral support to the principal offender of the crime”, provided that it “had a substantial effect on the commission of the crime by the principal offender”. At the ICTR, the case law views the two terms as different legal concepts. To that effect, aiding is “the provision of assistance to another in the commission of a crime” whereas abetting “is the facilitation of, or the provision of advice in relation to, the commission of an act”. As to the *mens rea* of the accomplice liability, Mr. Badar pointed the Oric ICTY Trial Chamber decision as a precedent worthy of consideration when it comes to identifying the said concept. In that judgment, the court ruled as follows 1) the aiding abetting liability must be intentional, 2) the aider and abettor must have “double intent”, namely both with regards to the furthering effect of his own contribution and to the intentional completion of the crime by the principal perpetrator, 3) the intention must contain a cognitive element of knowledge and volitional element of acceptance, whereby the aider and abettor may be considered as accepting the criminal result of his conduct if he is aware that in consequence of his contribution, the commission of the crime is more likely than not, and 4) with regards to the content of his knowledge, the aider and abettor must at least be aware of the type and the essential

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690 Ibid at 251.
691 Ibid.
692 Ibid.
693 Ibid.
695 Supra note 689 at 251-252; The author was also of the opinion that the jurisprudence of the ICTY and the ICTR differed with respect to the *mens rea* of the accomplice liability, but did not really go in depth as to the specifics of this difference.
elements of the crime(s) to be committed. For Kai Ambos, the *actus reus* of aiding and abetting is “any assistance, physical, or psychological, that had a substantial effect on the commission of the crime”. With regards to the *mens rea*, “[t]he accused must have been aware of the act of participation and conscious that such participation has had a direct and substantial effect on the commission of the crime” and that “the defendant intended to contribute to the commission of the offence”. For Robert Cryer et al., aiding and abetting at the *ad hoc* tribunals consists of acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain crime, the support given must have a direct and substantial effect on the commission of the crime, and the reproached acts must have been done by the aider knowing that they assisted the commission of a specific crime by the principal. On the specific direction issue, the authors noted the divergence between *Perisic* and *Sainovic* and *Taylor* and said

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696 *Supra* note 694 at para 288; as for the fourth element, the author however specified that “it is not necessary that he or she be aware of the specific crime that will be committed by the perpetrator. If the aider and abettor is aware that one of a number of crimes will probably be committed by the perpetrator, and one those crimes is in fact committed, then he or she has intended to assist or facilitate the commission of that crime and is guilty as an aider and abettor” (Badar, *supra* note 689 at 252). In addition, Mr. Badar even suggests that the *mens rea* of this mode of liability might differ depending if the actual conduct is considered aiding or abetting, but did not elaborate more on that idea (*ibid*).


698 *Ibid* at 130.


700 *Ibid*; Mr. Ambos buttresses that view with paragraph 692 of the trial judgment in *Tadic*, *supra* note 149, which does not support that view. That paragraph says “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”. Plus, this *mens rea* is problematic in that the intent criterion subsumes the knowledge criterion and in that knowledge part demands the knowledge of a consequence which implies recklessness and thus the issue mentioned in the section about the SCSL’s conception of the *mens rea* of aiding and abetting. Moreover, it is fairly obvious that this *mens rea* is not in line with the jurisprudence of the *ad hoc* tribunals.

701 *Supra* note 25.

702 *Ibid* at 371.

703 *Supra* note 34.

704 *Supra* note 151.

705 *Supra* note 35.
“[w]hichever view is taken on the more appropriate standard, the recent disjunction the jurisprudence of the Tribunals and between differently constituted Appeals Chambers of the ICTY at such a late stage in their existence is not a welcome development”.706 As to the mens rea, they remarked that knowledge was the main standard and that the SCSL “awareness of the substantial likelihood” was an isolated view.707 For her part, Elie Van Sliedregt708 cited ICTY Appeals Chamber decision Simic709 as a leading precedent and articulated the actus reus of aiding and abetting as 1) the accused must lend practical assistance, encouragement, or moral support support which 2) must have had a substantial effect on the commission of the crime.710 As to the mens rea, the accused must have knowledge or awareness that his own acts assist the commission of the crime and he must know and be aware of the essential elements of the crime, including the mens rea of the perpetrator.711 The author remarks that the tribunals embrace a knowledge approach for aiding and abetting crimes and that this excludes recklessness, but recognizes that the law might suffer some obscurity in that respect.712 To that effect, she suggests that it is possible to reconcile the two ideas (knowledge and recklessness) by saying that one can be aware of the specific intent and, in general, of the specific crime and still not know

706 Supra note 25 at 373.
707 Ibid at 374.
709 Supra note 280.
710 Supra note 708 at 122.
711 Ibid.
712 Ibid; As explained notably in the section about the SCSL’s interpretation of the concept of complicity, the uncertainty arises from the fact that most courts claim that the standard is knowledge, as opposed to recklessness, while in the same time saying that this standard will be satisfied if the aider knew that a number of crimes might be committed and one of them was in fact committed. These two averments are difficult to reconcile because the former describes a knowledge standard and the latter, a reckless standard.
exactly how the intent will manifest itself. She adds that “the crime anticipated may have been one of the several crimes in respect of which the accused provided assistance. This is most likely with crimes that have a common “gravamen” or crimes that can be committed consecutively, such as imprisonment and deportation”. Gideon Boas, James L. Bischoff, and Natalie L. Reid are of the opinion that, in the context of the ad hoc tribunals, the accomplice liability is composed of the four following elements 1) “the accused must lend practical assistance, encouragement, or moral support to the physical perpetrator or perpetrators in committing a crime”, 2) “such practical assistance, encouragement, or moral support must have a substantial effect on the commission of the crime by the physical perpetrator or perpetrators”, 3) “knowledge or awareness that his own acts assist the physical perpetrator in the commission of the crime (…) such awareness need not to have been overtly expressed, but may be inferred from the circumstances”, 4) “the accused aider and abettor must be aware of the essential elements of the crime ultimately committed by the perpetrator”. For Antonio

713 Supra note 708 at 122; In other words, the knowledge goes on the intent to commit the crime and not to its manifestation. I am uncertain as to how such an assertion would reconcile knowledge and reckless; in my opinion, it seems more like a new standard: knowledge of the intent to commit the crime.
714 Ibid; This is the equivalent of the recklessness standard and does not seem to reconcile knowledge and recklessness. Rather, it appears to point towards the idea that recklessness is not taking any risk possible in the world, but risks that can be foreseen given the assistance and other circumstances of the case.
716 Ibid at 304; The authors however denied that this assistance, encouragement, or moral support could be provided through an omission. Citing decisions of the ICTY and ICTR, they concluded that “there is no true support for aiding and abetting by omission as a form of responsibility in international criminal law” (ibid at 315).
717 Ibid at 304.
718 Ibid at 319-320; It is worth noting that the authors have titled this section on the mental elements of the aiding and abetting liability “the accused acted intentionally with knowledge or awareness that his act would lend assistance, encouragement, or moral support to the physical perpetrator” (ibid at 319), but made clear that the actual wording of the criterion is the one identified in the passage quoted in the text and that the volitional element is included in the fact that the accomplice carries out his help knowing that it helps the perpetrator (ibid at 321).
719 Ibid; The authors took note of the discrepancy between knowing the assistance to the specific crime committed by the perpetrator (Aleksovski’s formulation, supra note 239) and being aware that the
Cassese’s international criminal law, 3d ed revised by Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell, and Alex Whiting (Oxford: Oxford University Press, 2013) [Cassese, Cassese’s international criminal law].

Antonio Cassese, Cassese’s international criminal law, 3d ed revised by Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell, and Alex Whiting (Oxford: Oxford University Press, 2013) [Cassese, Cassese’s international criminal law].

Ibid at 193.

Ibid.

Ibid at 193-194; By that statement, the author thereby approves the statement of the rule made by the SCSL Appeals Chamber.

Ibid at 194.


Ibid at 329.

of all acts that are “specifically directed to assist or lend moral support to the perpetration of a specific crime [a single crime, such as murder or rape and not a criminal design] and this support has a substantial effect upon the perpetration of the crime.” The author’s statement about the subjective element of aiding and abetting is rather unclear:

It must be demonstrated that the aider was aware of the essential elements of the crime which was ultimately committed by the principal. In other words, the law is interested in ascertaining the particular intent of the aider as to the act of the principal and his participation therein and in this sense it is not necessary for the aider to know the precise crime that was intended and ultimately committed, as long as he is aware that one of a number of crimes will probably be, and are in fact, committed and has intended to facilitate the commission of any one of those crimes. If, however, the aider facilitates only a single crime of the principal, he must be found to be aware of the essential elements of the principal’s crime, including his relevant mens rea. Unlike other forms of participation in crime, the mens rea for aiding and abetting requires only direct intent (...) as to the act of the principal and awareness as to the significance of one’s contribution. As a result, the relevant test is not satisfied with the demonstration of foreseeability as to the result or the effect of the contribution (dolus eventualis or recklessness).

For Olivier De Frouville, the actus reus of complicity is the same at both the ICC and the ad hoc tribunals: the acts, which can be omissions where the accused has the legal duty to act, must have contributed substantially to or had a substantial effect on the commission of the crime. At the ad hoc tribunals, the mens rea is twofold 1) knowledge by the accomplice of the fact that his act or omission helped in the commission of the crime by the principal, 2) knowledge by the accomplice of the

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728 Supra note 727 at 67; The author remarked that these acts need not to be causal to the perpetrator’s crime and they do not need to serve as a condition precedent to the commission of the crime (ibid at 67-68). He also added that omissions can be the basis upon which an accusation of aiding and abetting a crime is based “where a particular duty to act exists and the omission itself had a substantial effect on the commission of the crime, provided that the accused possessed the appropriate volitional and cognitive elements relative to the crime under consideration” (ibid at 68).

729 Ibid at 69; The standard is understandable if only one crime is committed by the perpetrator in which case the aider must have known about the essential elements of that particular crime. However, if many crimes could have been committed with the aid given, the author explains that it will only be necessary that the aider had foreseen that one of these crimes might materialize and one of them actually occurred, but then states that foreseeability cannot fulfill the test. Those two ideas are manifestly contradictory and should be clarified in a subsequent version of the book.


731 Ibid at 391-392.
essential elements of the crime committed or to be committed by the perpetrator.\textsuperscript{732} The author adds that in the hypothesis that many crimes are envisaged by the perpetrator, it is not necessary for the accomplice to know the precise crime that is contemplated and actually committed. If the accomplice knew that one of these crimes will probably be committed and one of these was actually committed, he had the intention to facilitate it and is liable for it as an accomplice.\textsuperscript{733} Lastly, for Joseph Rikhof\textsuperscript{734}, analyzing complicity in international crimes in the context of refugee and immigration law, the \textit{actus reus} of aiding and abetting consists of “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of an international crime”.\textsuperscript{735} The \textit{mens rea} is “the knowledge that the practical assistance, encouragement, or moral support assists or facilitates the commission of the offence”\textsuperscript{736} and “[i]t is not necessary that the aider and abettor knows the precise crime that was intended and that was committed but he must be aware of the essential elements of the crime committed by the principal offender, including the principal offender’s state of mind”.\textsuperscript{737}

\textsuperscript{732} Supra note 730 at 392-393.
\textsuperscript{733} Ibid at 393; By this differentiated standard, the author probably tried to reconcile the knowledge and recklessness tension present in the \textit{ad hoc} tribunals’ jurisprudence about the \textit{mens rea}. Further, Mr. De Frouville argues that this approach is in conformity with that adopted in the \textit{Zyklon B} case, supra note 19, (supra note 730 at 393) which is rather bizarre because knowledge was the only \textit{mens rea} mentioned in that decision.
\textsuperscript{734} Rikhof, \textit{The Criminal Refugee}, supra note 181.
\textsuperscript{735} Ibid at 191.
\textsuperscript{736} Ibid at 193.
\textsuperscript{737} Ibid; That formulation is difficult to understand as the two propositions separated by “and” appear to be equivalent. Probably, what the author wanted to say is that it is not necessary for the aider to know the precise crime intended by the perpetrator; rather, the standard will be satisfied if the aider was aware that a number of crimes might be committed with the aid provided and of them actually occurred.
3.3.1.2. At the ICC

3.3.1.2.1. Article 25(3)c: general complicity provision

For Gerhard Werle\(^{738}\), the elements of the accomplice liability of article 25(3)c are 1) anyone who aids, abets, or otherwise assists in the commission or the attempted commission of a crime under international law,\(^{739}\) 2) the assistance must have had a substantial effect on the commission of the crime,\(^{740}\) 3) the assistor must have been aware that his or her contribution was supporting the commission of the offence, and 4) the assistance must have been afforded for the purpose of facilitating the commission of the crime.\(^{741}\) For Robert Cryer et al.\(^{742}\), with respect to article 25(3)c of the *Rome Statute*\(^{743}\), the authors said “the ICC has taken the view that assistance does have to reach that level [make a substantial contribution to the crime]”.\(^{744}\) As to the *mens rea*, they conceived it as “the accomplice’s conduct was for the purpose of assisting”\(^{745}\) and expressed the view that it was a higher standard than simple knowledge which would render difficult the prosecution for neutral acts such as arms selling for profit only.\(^{746}\) For Elie Van

\(^{738}\) *Supra* note 16.
\(^{739}\) *Ibid* at 183.
\(^{740}\) *Ibid*; The author acknowledges that this requirement is not found at article 25(3)c of the *Rome Statute*, *supra* note 29, but argues that “it is reasonable to exclude quite distant assistance” (*supra* note 16 at 183). At first blush, this argument does not convince me of the necessity of including this element in the analysis as it seems reasonable to think that “quite distance assistance” will be excluded by the fourth element (purposeful assistance); indeed, how could a contributor argue that his contribution was too distant from the perpetration of the crime when he made it for the purpose of facilitating it.\(^{741}\) *Ibid* at 182-184; The author only uses the jurisprudence of the ICTY and the ICTR to support the existence of these elements. It is unclear what is the nature of the legal argumentation at the basis of the claim to the effect that the assistor must be aware that his or her contribution supports the commission of the offence (number three in the list). This element appears to be subsumed in the fourth one, which is that the aid must be given with a view to facilitating the commission of the crime. Indeed, if the aider gives the assistance in order to facilitate the commission of the crime, he is aware that his contribution supports the commission of the offence.\(^{742}\) *Supra* note 25.
\(^{743}\) *Supra* note 29.
\(^{744}\) *Supra* note 25 at 374.
\(^{745}\) *Ibid*.
\(^{746}\) *Ibid*; This idea was echoed by Antonio Cassese who noted the following on the *mens rea* of article 25(3)c “[b]ased on this language [that of article 25(3)c]), it is possible that the ICC will interpret Article
Sliedregt, the actus reus of article 25(3)c) of the Rome Statute consists of acts that “aid, abet or otherwise assist in its commission [the crime] including providing the means for its commission”. The author also explained that, at this stage, it is rather uncertain and remains to be seen whether moral support could qualify under that phrasing. As to a potential causation requirement, Ms. Van Sliedregt submits that the substantial contribution requirement should be adopted since “it is suited to limiting aiding and abetting to the extent that it provides for an appropriate standard of culpable assistance to crime”. According to her, the mens rea for that article is that the conduct be done for the purpose of facilitating the commission of the crime. For Olivier De Frouville, for article 25(3)c) to apply, the accomplice’s acts, which can be omissions where the accused has the legal duty to act, must have contributed substantially to or had a substantial effect on the commission of the crime and been made with the intent to facilitate the commission of the crime. For his part, Helmut Satzger defines the actus reus of 25(3)(c) as introducing an additional requirement that the aider and abettor act “for the purpose” of facilitating the principal’s crime. This would narrow the concept of aiding and abetting as currently established in ICL. Arguably, this is an unfortunate outcome: a person who sells a gun to a known thug with knowledge that he is going to commit a crime should be criminally responsible for aiding and abetting. He should not be able to avoid conviction by showing that he sold the gun for a “purpose” other than facilitating the crime, such as profit. Requiring the aider and abettor to act with purpose to facilitate the crime is tantamount to requiring shared intent (Cassese, Cassese's international criminal law, supra note 720 at 195).

\[\text{Supra note 708.}\]
\[\text{Supra note 29.}\]
\[\text{Supra note 708 at 127.}\]
\[\text{Ibid; The author however added that it should be included therein provided that such an aider is under a duty to intervene or act (ibid at 130).}\]
\[\text{Ibid at 128.}\]
\[\text{Ibid; Ms. Van Sliedregt said that this standard was stricter than the one provided by the international custom and by the jurisprudence of the ad hoc tribunals, but that it was likely to be applied literally notably because of the hierarchy set out in article 21 of the Rome Statute, supra note 29, (supra note 708 at 129). The author said that this mens rea criterion will make it difficult to prosecute those entrepreneurs who played a role in financing violent conflicts in which international crimes have been committed (ibid).}\]
\[\text{Supra note 730.}\]
\[\text{Supra note 708 at 391-392.}\]
\[\text{Ibid at 394; Like other authors, Mr. De Frouville submits that, interpreted this way, article 25(3)c) would not permit the conviction of the arms seller who simply wants to make a profit out of his sale to the}\]
25(3)c) as “all contributions that facilitate the commission of a crime or have some other substantial effect on the commission of the crime by the principal offender”. 757 He formulates the mens rea in these words “the assistance has to be conducted for the purpose of facilitating the commission of the crime”. 758 For Kai Ambos 759, as to article 25(3)c), the author said that the predominant opinion in the literature, which was confirmed in that by Mbarushimana 760 at paragraph 280, is to the effect that its actus reus includes the substantial effect on the commission of the crime requirement. 761 As to the meaning of the word substantial, the author proposed that “to incur criminal responsibility the assistant, by way of his contribution, create or increase the risk that the crime be committed” 762 which contribution “must be causal for the commission of this crime”. 763 In that regard, in his opinion the word “otherwise” found at article 25(3)c) cannot be interpreted “as renouncing any objective threshold for accomplice liability” 764 For his part, William Schabas 765 first remarks that the word “abets” contained in article 766 Helmut Satzger, *International and European criminal law*, Oxford, United Kingdom: Hart, 2012).

757 *Ibid* at 240.

758 *Ibid*.

759 *Supra* note 697.

760 *Supra* note 532.

761 *Supra* note 697 at 164; Bizarrely, the paragraph 280 of the Mbarushimana decision, *supra* note 532, does not buttress this view as it simply says “[t]he ad hoc tribunal jurisprudence can be of assistance in defining contributions "in any other way". In particular, the Chamber notes that the current formulation of JCE liability at the ad hoc tribunals only requires a significant contribution to give rise to liability; the contribution need not be substantial as a matter of law”.

762 *Supra* note 697 at 164.

763 *Ibid* at 165; These assertions are rather difficult to interpret because creating or increasing the risk that the offence be committed appears to be different from causing the crime to occur. The former expression points towards a negligence-based concept whereas the latter contains a much stronger causation element. In other words, the former expression, creating or increasing the risk, is much more expansive than the latter, causing the crime to occur.

764 *Ibid*.

25(3)c) appears to be already covered in article 25(3)b)\textsuperscript{766} so much so that he considers that these two articles might have been an attempt by the drafters to completely cover complicity.\textsuperscript{767} As to article 25(3)c), he points out that the fact that the drafters did not include any threshold requirement for the \textit{actus reus} despite what was found in the \textit{ad hoc} tribunals’ jurisprudence and in the \textit{Code of Crimes}\textsuperscript{768} might indicate that the substantial effect requirement was rejected, but he puts the caveat that case law of the \textit{ad hoc} tribunals will be influential and persuasive in that regard.\textsuperscript{769}

\textbf{3.3.1.2.2. Article 25(3)d)i)-ii): contribution to a group crime}

For Elie Van Sliedregt\textsuperscript{770}, as for article 25(3)d) of the \textit{Rome Statute}\textsuperscript{771}, the author’s statement of the \textit{actus reus} is simply that “the contribution must be towards a crime or attempted crime”.\textsuperscript{772} As to the \textit{mens rea}, she was of the opinion that it was twofold: 1) one part relating to the contribution, 2) the other part relating to the subsequent crime.\textsuperscript{773} As to the part relating to the contribution, the \textit{Rome Statute}\textsuperscript{774} says that it should be intentional which Ms. Van Sliedregt said that it should be understood as “general intent” meaning “that when it relates to criminal consequences “awareness that it will occur” (Article 30 of the Statute) qualifies as “intentional” in the sense of subparagraph (d)”\textsuperscript{775}

\textsuperscript{766} Schabas, \textit{Introduction to the International Criminal Court}, supra note 765 at 228.
\textsuperscript{768} \textit{Supra} note 143.
\textsuperscript{769} Schabas, \textit{A Commentary on the Rome Statute}, supra note 767 at 439; Furthermore, he declares that the \textit{ex post facto} assistance might not be covered by this provision as it was not explicitly included in the article despite the shortcoming to that effect being pointed out to the drafters (\textit{ibid} at 435).
\textsuperscript{770} \textit{Supra} note 708.
\textsuperscript{771} \textit{Ibid}.
\textsuperscript{772} \textit{Supra} note 708 at 145.
\textsuperscript{773} \textit{Ibid}.
\textsuperscript{774} \textit{Supra} note 29.
\textsuperscript{775} \textit{Supra} note 708 at 145; That is an interesting interpretation of the general intentionality requirement of article 25(3)d). Nevertheless, it contains three significant issues 1) it is uncertain whether the contribution is
With regards to the second part relating to the subsequent crime, Professor Van Sliedregt is of the view that 25(3)d)i) “requires proof that the person intended to further the group’s general criminal activity”\textsuperscript{776} while 25(3)d)ii) “requires proof that the person knew the crime the group intended to commit”.\textsuperscript{777} For Kai Ambos\textsuperscript{778}, as to article 25(3)d), the German jurist is of the view that the substantial contribution should also be applied just like for article 25(3)c) because their wording is similar (otherwise assist and contribute in any other way) and of the principle of culpability and the gravity threshold found at articles 17(1) and 53(1)b)c) and 53(2)b)c) of the Rome Statute\textsuperscript{779}; otherwise, 25(3)(d) would “turn into a limitless, hardly measurable mode of responsibility”.\textsuperscript{780} As for the \textit{mens rea} of this article, Professor Ambos states that its requirements are not clear, but argue that article 30 is to be applied to decipher its meaning.\textsuperscript{781} With regards to article 25(3)d)i), “the specific intention to promote the practical acts and ideological objectives of the group” is what should be demonstrated by the prosecutor to satisfy the standard.\textsuperscript{782}

With regards to article 25(3)d)ii), on the question whether the contributor must know the

\textsuperscript{776} Supra note 708 at 146.
\textsuperscript{777} Ibid.
\textsuperscript{778} Supra note 697.
\textsuperscript{779} Supra note 29.
\textsuperscript{780} Supra note 697 at 167.
\textsuperscript{781} Ibid at 169; Mr. Ambos probably refers here to a reasoning similar to that of Elie Van Sliedregt with regards the general intentionality requirement of article 25(3)d), i.e. the contribution to the crime will be deemed to have been purposefully made when it can be shown that it was made while the contributor knew that the contribution to the group crime would occur in the normal course of events.
\textsuperscript{782} Ibid.
specific crime intended or if it is sufficient that the contributor be aware that a crime will probably be committed, the author says that the Furundzija precedent is applicable only to 25(3)c) and not to 25(3)d)ii). Further, given that article 25(3)d)ii) says “knowledge of the intention to commit the crime”, it follows, according to Mr. Ambos, that the contributor “must be aware of the specific crime intended by the group”. For Gerhard Werle, with regards to article 25(3)d), the author explains that the objective elements of this mode of liability are 1) a crime was committed by a group (at least three persons) who was acting in furtherance of a common purpose, and 2) the aider provided any type of contribution to the group crime, this contribution can notably be financing or other forms of indirect support. As regards the subjective element, Mr. Werle states that “the contribution to the crime must be made either with the aim of furthering the group’s criminal activity or common purpose, to the extent these relate to commission of the crime under international law, or with knowledge of the group’s intent to commit the crime”. For Helmut Satzger, as for article 25(3)d), the actus reus would be any contribution to the commission of the crime and the mens rea, “[t]he contribution to the

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783 Supra note 296; This ICTY judgment advocates for the proposition that the aider does not need to know the precise crime intended by the principal; rather, he needs only to have been aware that a number of crimes might be committed with the aid provided and one of them was actually committed.

784 Ibid.

785 Ibid.

786 Supra note 16.

787 Ibid at 184-185.

788 Ibid at 185; The author is of the opinion that the general intentionality applicable to the contribution to the commission of the crime by the group of article 25(3)d) “is merely a declaratory allusion to the general subjective requirements under the ICC Statute, Art. 30” (ibid). The meaning of this phrase is rather unclear and only allows for speculation as to its true meaning. However, I would hazard to guess that, with this statement, the author was alluding to a reasoning akin to the one developed by Elie Van Sliedregt through which this intentionality should be satisfied when it is established that the contributor knew that the contribution to the group crime would occur in the normal course of events.

789 Supra note 756.
crime not only has to fulfill the general subjective features of a crime along with “the contribution be made with the aim of furthering the criminal activity or criminal purpose of the group or in the knowledge of the group’s intention to commit the crime”. For William Schabas, as for article 25(3)d), the author does not dwell extensively on its specific elements, except for the following. The group’s purpose or criminal activity “must be to commit a crime within the jurisdiction of the court”, which is contrary to a literal interpretation of the Rome Statute, which, for these matters, specifies “involves the commission of a crime [as opposed to to commit a crime]”. Furthermore, Mr. Schabas believes that the contribution evoked at 25(3)d) “need [not to] involve the intent to commit the specific crime, as long as it is 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 “in the knowledge of the intention of the group to commit the crime”.

Finally, some authors treated perfunctorily or did not treat of the question of complicity even though their book was about general ICL.

\[790\] Supra note 756 at 241; The meaning of that sentence is unclear. As I read it, it would mean that, while providing the contribution, the contributor should harbor the same mens rea as the principal which does not make sense.

\[791\] Ibid; The author underlined that article 25(3)d(iii) seems to aim at “the trafficking of weapons as well as financial and other ways of indirect assistance in the commission of crimes” (ibid).

\[792\] Schabas, Introduction to the International Criminal Court, supra note 765.

\[793\] Ibid at 230.

\[794\] Supra note 29.

\[795\] Ibid, art 25(3)d(i).

\[796\] Schabas, A Commentary on the Rome Statute, supra note 767 at 436.

3.3.2. Views expounded in the specialised literature

For James G. Stewart, complicity as it now stands in ICL is an illiberal instance of vicarious liability and “consequently, it should collapse along with all other modes of liability into a single broad notion of perpetration”. His theoretical framework stresses the importance of two elements: the blameworthy choice and the causation principle. As to the former, analyzing the shortcomings of one type of joint criminal enterprise liability, he concludes that, in order to uphold the guilt principle, to ensure a fair labelling, and to preserve analytical consistency, “all modes of liability must require subjective standards that are the same as those announced in the definition of each particular crime”. As to the latter, grounding its analysis in the superior liability, the author explains that “[i]f international criminal justice is to become coherent, not harsh, causation is an indispensable element for the perpetration of all harm-type offenses [offences that include a consequence in their definition]”. After extending that statement to conduct-type offences, which do not require a consequence to happen to commit them, he reasoned that “causality must be an element of all ‘modes of liability’ within the

detail at length the elements composing this mode of liability in ICL, except to repeat the dicta found in ICTY judgments such as Blagojevic, supra note 245, Aleksovski, supra note 239, and Kvoeka, supra note 313. In John Dugard & Christine van den Wyngaert, eds, International Criminal Law and Procedure, (Brookfield, VT: Dartmouth, 1996) no article treats of complicity. For its part, the book by Didier Rebut, supra note 60, provides a very cursory outlook on the notion of aiding and abetting at the ad hoc tribunals under which the accomplice’s acts must have an important effect, but not a causal effect, on the perpetration of the crime accompanied by the knowledge on the part of the accomplice that he is associating himself to the consummation of the crime at issue (ibid at 545). In Beth Van Schaack & Ronald C. Slye, International criminal law and its enforcement, 2d ed (New York: Thomson Reuters/Foundation Press, 2010), the authors do not set out their own conception of the complicity. Instead, they cite a long excerpt of the trial decision in Furundzija, supra note 296, and present the different approaches found in various decisions and academic pieces (supra note 797 at 791-815). The book by Robert J. Currie, International & transnational criminal law, (Toronto, ON: Irwin Law, 2010) does not dwell upon the modes of liability in ICL, including the aiding and abetting liability.

798 Stewart, “End of Modes of Liability”, supra note 461.
799 Ibid at 166.
800 Ibid at 178.
801 Ibid at 184.
Applying the foregoing, he argues that the two abovementioned principles are necessary and sufficient when it comes to allocate blame to the perpetrator and the accomplice. These observations lead Mr. Stewart to his main proposition: a unitary mode of liability should replace all current modes of liability for which the objective and subjective elements should respectively be “a substantial contribution to a prohibited harm” “while harbouring the mental element necessary to make him responsible for that crime”. To buttress this theory, Professor Stewart emphasizes that a unitary theory of perpetration would: 1) “preclude the uncertainties of custom infiltrating the criminal process”, 2) do away with the current “ill-defined set of differentiated ‘modes of liability’” that might “violate the principle of legality”, 3) remediate to the “seriously fragmented” notion of complicity, 4) “allow a principled determination of criminal responsibility and flexible opportunities to describe the nature of the contribution without legalese”, 5) provide for “substantive restraints on the scope of international modes of liability”, 6) “preserve culpability as the benchmark for international criminal responsibility”, 7) “simplify a body of rules governing international modes of liability”, 8) “promote accountability”.

802 Stewart, “End of Modes of Liability”, supra note 461 at 185.
803 Ibid at 205.
804 Ibid at 207.
805 Ibid.
806 Ibid at 214.
807 Ibid.
808 Ibid.
809 Ibid at 215.
810 Ibid.
811 Ibid.
812 Ibid at 216.
813 Ibid.
814 Ibid at 217.
Professor Stewart’s theory is certainly appealing notably for its simplicity and its potential to get rid of many problems plaguing the current concept of complicity in ICL. The clear definition that he proposes would allow accuseds and other stakeholders in the system to know what is the case to meet and, thus, would further the very important legality principle. Also, it would permit to refocus all the attention that has been put towards understanding these complicated modes of liability to more vital notions such as the definition and the interpretation of the different crimes. Be that as it may, I do not share the learned author’s diagnostic to the effect that the current notion of complicity is “an illiberal instance of vicarious liability”. As I made clear above, the notion of complicity in ICL is fragmented, unclear, and afflicted by unresolved issues and disagreements, which undermine its efficiency and have a negative impact on the respect of the legality principle. Despite these significant shortcomings, and said with deference for the erudite author, it seems excessive to maintain that complicity is equivalent to vicarious liability or that it is illiberal. As for the first element, vicarious liability implies the responsibility of a person for the acts of another. However, this reasoning does not apply with complicity for the simple reason that the accused aider is punished for his very own acts of aiding the commission of a crime. If vicarious liability applied, the aider would receive the blame for the acts of another while being himself blameless. That is obviously not the case with complicity in its current version since it demands at least that the aider does something with the knowledge of the consequence of his actions, thus to act in a blameable way, before imposing any punishment. As for the second element, one of the core values of liberalism is the individual freedom of the members of the community under the rule of law. Complicity as it now stands does not impinge on this

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815 Stewart, “End of Modes of Liability”, supra note 461 at 166.
value. In its widest version, complicity simply requires that individuals do not provide aid that has a substantial effect on the commission of crimes by others while being aware of the substantial likelihood of the commission of the said crimes (SCSL). This restriction on the freedom of individuals can surely be theoretically contested, but it is difficult to contend that it is not reasonable to put such a limit on one’s freedom of actions, especially given the particular magnitude of most of the international crimes. Aside from these theoretical points which explain my disagreement as to the diagnostic, I have to make some pragmatic comments on aspects of Professor Stewart’s theory. The crux of his theory is to jettison all the current modes of liability to adopt a single notion of perpetration for which the *actus reus* and *mens rea* would respectively require “a substantial contribution to a prohibited harm” “while harbouring the mental element necessary to make him responsible for that crime”. Such a course of conduct should not be adhered to by the international community, for the good reason that it is too narrow and wrongfully leaves many people off the hook. If applied, this theory would allow basically all aiders, abettors, inciters, to name just a few, to walk free and enjoy liberty without answering for their contribution to crimes supposed to be of concerns to the entire world because they did not share the *mens rea* of the actual perpetrator. Furnishing all the help necessary to commit the worst crimes would go unpunished even though the aider wanted to help and did so in full knowledge of what would be the results of its conduct. In that sense, this theory seems to be an instance where the great principles took much of the place in the analysis of the author to such an extent that it rendered the theory proposed unusable in the concrete world. Put it another way, making sure that the rules comport with the fundamental theoretical underpinnings of the ICL is a noble
undertaking that should be pursued, but when such an exercise strips the same subject of its core values and goals (notably prevention and that desert must be met with punishment) so much so that they cannot be fulfilled in a meaningful way, it is a sign that the proposition is probably unworkable. What is more, the benefits of collapsing all the modes of liability into single notion of perpetration are maybe overstated by the author. In that regard, ICL will continue to be a complicated domain of law with complicated facts to which the law must apply and there will still be disagreements as to the interpretation of legal concepts despite their simplicity and singularity. This is even truer with a notion supposed to be broad and meant to be applied to a wide array of situations like that advocated by the author. Furthermore, sometimes, complex realities and phenomena such as international crimes cannot be analyzed with a simple framework. To that end, the author gives the example of the Austrian penal code which contains a single mode of liability,\textsuperscript{816} but this does not prove that such a way to proceed would be workable and efficient on the international scale with its international crimes committed by intricate webs of entities and individuals. To grapple with such situations and their subtle realities and distinctions and to deal fairly with the case of each of the person involved, it is doubtful that a single, broad, and all-encompassing mode of liability would be adequate. Rather, a pluralistic, nuanced, and multi-factored set of modes of liability appears to be more adequate in the quest for a fair appraisal of the very variable contributions that can be provided for the commission of an international crime. All in all, Professor Stewart’s theory has a strong theoretical underpinning, but lacks nuances and a pragmatic analysis proves it unworkable and inefficient.

\textsuperscript{816} Stewart, “End of Modes of Liability”, supra note 461 at 205.
For Christopher Kutz, causation is relevant to the theory of criminalization, but not to the theory of responsibility; thus, the objective element of complicity should be expunged of any causation element. The crux of his argument is that “[w]e can be complicit in other’s wrongs without making a difference to the occurrence of those wrongs”. According to him, that shows that the relation between the aiders and perpetrators is not based on causality. He buttresses his thesis mainly with three arguments. Firstly, causality is appropriate and workable only in paradigm cases which are in fact the foundation of the law of complicity at common law, but not in many other types of cases. He explains that “[t]hese paradigm cases (…) mark the limit of causality’s role. For in many more cases, causal relationships between the accomplices and principals are too indeterminate (or undetermined) epistemologically, physically, and metaphysically to satisfy any real doctrinal requirement”. Secondly, he contends that “a too-insistent focus on a causal requirement, even if it could be proved, would distort complicity doctrine by rendering it oblique to the expressive and preventative dimensions of principal liability”. Thirdly, pre-emption (the accomplice’s aid does not cause any damage because of a factor independent of his contribution pre-empted it), overdetermination (many causes that can all cause the damage by themselves alone while it is not possible to identify which was the actual one), and underdetermination (many causes that lead to a damage only because they acted together, each of them being unable to cause the damage by itself) are all issues arising in the context of complicity which are

818 Ibid at 300.
819 Ibid at 290.
820 Ibid at 294.
821 Ibid.
not properly addressed by the causation analysis. As a result of the above, the author concludes:

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\text{[L]iability overflows the causal relationship. (\ldots) There are various ways in which one can attach oneself responsibly to another’s acts, before, during, or after the fact, and complicity doctrine recognizes a limited variety of these ways. While some are causal, not all are; and while most involve physical action, speech or otherwise, not all do, for a guard can render himself complicit in a burglar’s theft by doing nothing, deliberate failing to sound the alarm.}^{822}
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In this perspective, he invites the reader to refocus the complicity analysis to its \textit{mens rea} element saying that the common thing in all complicity cases is the mental state of the accomplice,\textsuperscript{823} which should be “directed both towards the accomplice’s own agency (\ldots) and towards the agency of the principal”.\textsuperscript{824} The meaning of that passage is not entirely clear from the text, but the context indicates that it probably means that the mental element of complicity should be an aid furnished with the intent to help in the commission of the crime. Finally, the author justifies the propriety of his theory contending that risk-control values are important and that removing causality in complicity would be no harsher than inchoate liability which is another form of causeless criminality.\textsuperscript{825}

This author’s theory focuses on a troublesome and interesting quandary of complicity: whether the consequence of the aid furnished by the aider should be taken into account when assessing the blameworthiness of the accomplice. A compelling argument made by the author under the pre-emption concept is that the result or the consequence of the aid is not important because, after all, the outcome of one’s actions is determined by many

\textsuperscript{822} Kutz, \textit{supra} note 817 at 299 [emphasis added].
\textsuperscript{823} \textit{Ibid} at 300.
\textsuperscript{824} \textit{Ibid}.
\textsuperscript{825} \textit{Ibid} at 302.
factors that are outside the reach and control of that person. For example, the aider provides ammunitions and equipment to a militia knowing its intent to perpetrate a massacre in a nearby village and with the aim to help it to do so in a more efficient way, but the militia, *en route* to the village, is ambushed and captured by a rival faction. The aider’s actions in this example did not have any effect on the commission of the crime, but he is hardly less morally blameable than if the militia’s operation had succeeded. However, notwithstanding the valid criticisms and observations made by the author on the shortcomings of causation, his general theory which amounts to lowering the *actus reus* threshold, by removing causation from the analysis, while augmenting the *mens rea* threshold, by focusing on the mental state of the aider, should not be abided by for the following reasons. Concerning the *actus reus*, it is difficult to see how the causation principle could be completely booted out of the complicity analysis because causation addresses the potential over breadth concern in the objective element of the said mode of liability. Otherwise, the person who is cooking for the criminal militia mentioned above would run the risk of being prosecuted as an accomplice for the militia’s crimes. True, the refocus on the mental element of the aider proposed by the author would, to a certain extent, come to tackle this over breadth concern and limit the scope of the accomplice liability. But this mental element is not adequate either. Indeed, what the author probably means when he pleads for a ‘refocus’ on the accomplice’s mindset is to inquire whether he had the intent to aid or contribute to the commission of the crime. It can hardly be otherwise since if only recklessness or knowledge was applied in his causeless complicity theory, its ambit would be too large. This intentionality requirement should not be applied to complicity in ICL because it is too narrow and would leave off the hook many
accomplices who provide aid and contribution to the commission of the crimes in full knowledge that the crimes are being or will be committed in the normal course of events, but without harbouring the formal intent of helping the commission of the crime. These persons know that crimes are being or will be committed, do not want to further their commission per se, but do not care and supply their aid to the perpetrator anyway. Demanding that intent to aid be found as a fact would allow these persons to walk free while their knowing contribution to the commission of a crime might be substantial. While leaving these people off the hook, it would punish the aider who purposefully provided a minimal or insignificant aid towards the commission of the crime which might theoretically make sense, but does not when compared to the knowing substantial aider’s situation. Such an approach would discourage and deter purposeful aid of any type, size or volume, but would not be hard enough with reckless, knowing or wilfully blind aiders by allowing them to get away despite their substantial aid to the commission of the crime which is not an efficient approach. Furthermore, intent cannot be said to be the appropriate mens rea in ICL for another reason. While it is true that purposefully helping is worse than knowingly helping in moral and ethical terms, the aiders acting with either of these states of mind cannot be held as morally innocent and should not be permitted to walk free. Knowledge is sufficient to render one’s aid culpable. To sum up, in ICL, it is difficult to disregard the extent of the aid or its consequence on the commission of the crime and remain coherent.
For Joshua Dressler, the focus in the law of complicity should be redirected towards the level of contribution to the crime by the accomplice. In other words, the accomplice’s crime and punishment should be linked to the strength of the causal connection between the assistance given by him and the harm ultimately caused. In order to materialize this idea, the author proposes the “causation test” under which accomplices would fall into two categories: 1) causal accomplices, one but for whose assistance the harm would not have occurred when it did and who deserves to be convicted and punished in the same way as the perpetrator, and 2) non causal accomplices, one who “renders unnecessary assistance” in the sense that the “harm would have occurred when it did even without” his assistance and who would not be convicted of the same crime as the perpetrator. Hence, the author submits that the foregoing ideas should be inserted in the criminal legislation through either of two provisions which are, in their essence, the same and, therefore, only one needs to be cited:

LIABILITY FOR THE CONDUCT OF ANOTHER

(1) A person is guilty of any offense specified in this Code if, acting with the kind of culpability that is sufficient for the commission of the offense, he:

(a) personally commits the harm specified by the offense;

(b) causes an innocent or irresponsible person to engage in such conduct; or

(c) is an accomplice of such other person in the commission of the offense.

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827 Ibid at 92.
828 Ibid at 93.
829 Ibid at 124.
830 Ibid at 125.
831 Ibid.
832 Ibid at 124-125.
(2) A person is an accomplice in the commission of the offense if, with the purpose of promoting or facilitating the commission of the offense, he assists, or influences another in the commission of the offense.

(3) Any person held accountable as an accomplice to the offense, pursuant to subsections (1)(c) and (2) above, but whose conduct did not cause to be committed the harm specified by the offense, shall be punished [at some specified level less than is otherwise specified for the offense].

The author’s main proposition can be summarized as follows: the consequence of the accomplice’s aid will dictate his fate. If the accomplice’s aid caused the crime to occur when it did, the accomplice is fully responsible for the crime committed whereas if the crime would have occurred when it did even without the aid provided, the accomplice will be punished to a lesser degree. I see a few defects in this theory. Firstly, as explained above, causation has an important weakness which is that the accomplice, once his aid is given, has often no bearing on the consequence of his contribution. The same contribution of 100 guns, ammunition, and explosives for the purpose of committing a crime, may or may not result in the crime depending of a wide variety of circumstances outside the grasp of the aider. True, causation has a role to play in the complicity analysis notably to circumscribe the purview of the said mode of liability, but to put such weight on this factor and make it the lynchpin of the analysis is probably not the best method. Secondly, the author’s articulation of the concept of causation, which is that the accomplice’s aid made the prohibited harm happen when it did, appears to be problematic. Indeed, such a criterion seems to me a bit weak to make the difference between a causal accomplice, who will receive the full punishment for the crime aided, and a noncausal accomplice who won’t. The causation theory should include some characteristics more intimately connected with the aider’s contribution such as the size of it given what he

833 Dressler, supra note 826 at 139.
knew about the intent of the perpetrator and the other circumstances surrounding the commission of the crime, as opposed to simply inquire whether the aid caused the crime to be committed when it was committed. Further, it is rather bizarre that the author deemed appropriate to set out his ideas clearly in a proposed legislation, but did not include in it such a central element that is his definition of causation. The suggested provision should define clearly what it is to “cause” something to happen. Thirdly, the mental element of the suggested legislation is too high and is not manageable. As I understand it, the aider has to provide the aid with the purpose of promoting or facilitating the commission of the offense and while acting with the kind of culpability that is sufficient for the commission of the offense, which is in fact the *mens rea* of the crime aided.834 As explained above, each of these two elements taken alone is not adequate and unworkable in ICL. Assembling them together in one provision does not make them more adapted to the purposes, goals and principles in force in ICL. An example of this is that the aider who provides substantial help to the commission of the crime with the intent to do so and while being aware that the crime, in the normal course of events, will very probably be committed, but without having the intent specified in the definition of the aided crime would be off the hook with this proposition. Instinctively,

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834 This *mens rea* comes from the interplay between the *chapeau* of paragraph 1 which states “acting with the kind of culpability that is sufficient for the commission of the offense” and of paragraph 2 which declares “with the purpose of promoting or facilitating the commission of the offense”. Also, paragraph 2 describes what is an accomplice, but does not make clear that the paragraph one’s *chapeau* does not apply in that regard. Plus, paragraph 3 appears to say that complicity is established with both paragraph 1 and 2. Some might say that this interpretation is erroneous and that precedence should be given to paragraph 2 which says that the accomplice liability is an assistance provided for the purpose of facilitating the commission of the crime. I am not convinced that such an interpretation would in practice be applied as the defence side, confronted with this article, would argue for an interpretation of that article akin to the one I made and, given the ambiguity, it is probable that the court would interpret the uncertainty to the benefit of the defence. Nevertheless, I admit that arguing for the exclusive application of paragraph 2 would be a valid argument in this debate and that that interpretation might be the correct one. However, even in that scenario, as I explain in the paragraph and elsewhere in this thesis, a *mens rea* of purposeful assistance is not adequate for complicity in ICL.
logically, and morally, this does not make sense and should not be allowed to happen in order to safeguard coherence and credibility in ICL. Finally, I am uncertain whether connecting causation with the harshness of the punishment is suitable, for one of the major element that has to be taken into consideration when assessing the penalty to be awarded to a contravenor is the mental disposition that he had when he committed the prohibited action. Consider this: two persons who wanted the same harm to occur, who provided the same contribution in order to do so, while being aware of the same underlying circumstances, but whose contribution had opposite results will receive different punishment for something that might have been wholly outside their control. The punishment of a convict should always be personalized and take into account all the circumstances of the offender and in which his crime was committed, notably and importantly, his mental state at the time of the events. Be that as it may, taking into account the result of the conduct is certainly a relevant factor in this analysis and should not be disregarded. After all, the aider is a risk-taker and should be punished accordingly which includes not turning a blind eye on the foreseeable outcomes of one’s conduct. However, for the reasons above, the mental state at the time of the reproached events should have priority over the aid’s outcome.

For Andrea Reggio\textsuperscript{835}, “[c]omplicity is not a legal issue easy to define in a single way, resolving all of the possible questions”.\textsuperscript{836} With regards to the dilemma between the unitary perpetration and differentiated participation models, he favours the latter on the grounds that “[w]hile the unitary perpetrator model is simple and does not raise

\textsuperscript{835} Supra note 23.
\textsuperscript{836} Ibid at 629.
complicated evidentiary problems, the differential participation model grasps the nuances of reality and is more in conformity with the principle of legality”. 837 As to the philosophical underpinnings behind any conception of complicity in ICL, Mr. Reggio declares:

Solidarity obligations and common welfare protection prevail over protection of individual rights and privileges. This lays at the very foundation of international criminal law, a branch of law created to safeguard the most important values of humankind. Moreover, retribution and general and special deterrence have a peculiar importance in comparison with national systems. 838

Concerning the actus reus of the aiding and abetting liability, the author suggests that the assistance provided by the accomplice should “contribute directly to the commission of the crimes; not any contribution is enough but a substantial contribution is needed. (...) [t]he causal contribution must be real”. 839 With respect to the mens rea of the same mode of liability, he contends that “knowledge by the accomplice of the commission of the crimes by the principal should suffice without any doubt. But also inadvertent recklessness should be considered enough”. 840 This knowledge “should not be of the specific crime committed by the perpetrator, but of the category of crimes to which the crime committed belongs”. 841 He adds that wilful blindness should amount to knowledge or inadvertent recklessness. 842 For his part, Norman Farrell 843 makes some interesting observations while looking at modes of liability most applicable to corporate crimes from which it is possible to extrapolate the following information. As to the actus reus of complicity, he underlines that specific direction should not be part of it and says that this

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837 Supra note 23 at 629-630.
838 Ibid at 691-692 [emphasis added].
839 Ibid at 692.
840 Ibid.
841 Ibid at 681.
842 Ibid at 692.
element is confusing as it seems to infringe on the mens rea realm.\textsuperscript{844} As to the mens rea, after examining the motives of the court in Talisman\textsuperscript{845}, which advocated for a purpose standard for the mens rea of complicity, he repudiates this approach stating that the knowledge standard is the one in force in international law.\textsuperscript{846} He supports his view saying that “it seems unnecessarily onerous to include an additional mens rea requirement that the assistance be provided with the purpose of aiding or abetting a crime”.\textsuperscript{847} He adds that “[t]his difficulty would be heightened if the purposive element requires the aider and abettor to act with the sole purpose of contributing to the commission of crime”.\textsuperscript{848}

I analyzed these two authors because I wanted to have the pragmatic point of view of practioners in the field. In that perspective, these authors do not try, as opposed to the other authors, to profoundly modify the concept of complicity to make it more in accordance with founding ICL principles. Their articles are more aimed at assessing and giving their thoughts about issues of complicity within the legal framework established by the contemporary tribunals. In that context, Andrea Reggio’s opinion contains deep concern for the values of deterrence and prevention which is visible in his advocacy for negligence (inadvertent recklessness) to be added to knowledge as the mental element of complicity. This would significantly enlarge the aiding and abetting liability and is arguably unprecedented in the field. By pleading for a less demanding standard, the author shows his support for the abovementioned values, but in a way that might violate

\textsuperscript{844} Supra note 843 at 890.
\textsuperscript{845} Supra note 660.
\textsuperscript{846} Supra note 843 at 889.
\textsuperscript{847} Ibid.
\textsuperscript{848} Ibid [emphasis in the original].
the guilt principle. Otherwise, it is noteworthy that Mr. Reggio is the only author to mention an important element which is that wilful blindness should be taken as the equivalent of knowledge. Indeed, it seems difficult to contest that wilful blindness should not receive the same treatment by the law as knowledge. Concerning Mr. Farrell’s views, his repudiation of the purpose mental element is interesting notably to the extent that it contains an issue which will surely receive attention by the ICC when it will come to examine more closely the purview of article 25(3)c) (aid to non-group perpetrator). The question will be the following: article 25(3)c) calls for an aid made with the intent to facilitate the commission of the crime, but does it have to be the sole purpose of the aid or being one among others is sufficient? To that question, the author is right in saying that if the first option prevails, the prosecution will face a significant challenge to obtain convictions under this article.

For Daniel Yeager849, complicity in its current form is inadequate and unnecessary. According to him, the focus that is generally put towards deciphering the intricacies of the causal relation between the aid provided by the aider and the commission of the crime by the perpetrator is inapposite. Instead, the author proposes to shift the attention towards the relation existing between the aider/abettor and the principal. To that end, he argues that complicity is a risk-based offence “expressing the helper’s antisocial or dangerous character”850 as opposed to a consequence or harm-based mode of liability.851 He contends that these ideas should be reflected in the legislation by treating complicity as a separate inchoate offence instead of the current system which derives the accomplice’s

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850 Ibid at 25.
851 Ibid.
responsibility from the actual perpetrator’s conduct. The author vindicates his theory in these words:

Our instincts are correct about the propriety of punishing the helper, but our instincts are flawed if they divert our attention to the harm, which might have nothing that can be demonstrated, or nothing whatsoever, to do with the helper. The helper is an excessive risk-taker whose subjective (…) criminality is what warrants punishment, regardless of whether his aid or encouragement informs or merely glances off of his principal.

Professor Yeager also adds that punishing complicity is all the more justified given “[c]riminal associations tend to succeed more than solo ventures do” and to discourage the evident risk that these associations pose to the community. According to the author, this new approach would also solve the problem of unfair labeling which arises when the accomplice is condemned of the crime he aided just like the actual perpetrator. On that point, the author recalls that helping is objectively different than committing, that helping is not morally identical to perpetrating, and because these actions are distinct they should not be treated the same way. Mr. Yeager’s article however stops short of suggesting the legal framework or the elements or the nature of the punishment for this new offence.

The author’s theory is not that much dissimilar to the one advocated for by Christopher Kutz. Essentially, both authors want to take away the causation analysis from the elements forming complicity notably to better denounce and deter the risk taken by the aider in providing the aid. Also, their theories, either implicitly or expressly, both argue

852 A similar idea of drafting a separate crime was put forward by Professor Sanford Kadish in cases where the aider recklessly assists the perpetrator who commits an offence which requires purpose as mental element. In these cases, the aider could not be guilty of the crime of the perpetrator since he does not fulfill the mental element to commit the crime, but could be punished for its criminal behavior. See Sanford Kadish, “Reckless Complicity” (1997) 87 Journal of Criminal Law and Criminology 369 at 389.
853 Supra note 849 at 31 [emphasis added].
854 Ibid.
855 Ibid.
that a simple contribution or aid should be the sufficient element of the *actus reus* of complicity. Where they part company is on the *mens rea* accompanying this objective element. Mr. Kutz puts forward that intent to help in the commission of the crime should be the norm whereas Mr. Yeager appears to plead for some standard lower than intent. This can be deduced from the fact that Mr. Yeager states that complicity is a risk-based concept and, perhaps to a lesser extent, that it should be deterred and discouraged because of the risk the aiders pose to society. Therefore, to recap the above, Professor Yeager would support an *actus reus* formed of an aid coupled with a *mens rea* consisting of something short of intent, either negligence or recklessness. Such a threshold is probably too low and would render culpable, and thus subject to prosecution, any aid without paying due regard to the risks involved. Very important general tenets of law such as the freedom and liberty of persons, individual responsibility, and the guilt principle would be unduly diminished were we to adopt such a definition of complicity in ICL. As for the guilt principle, which ensures that only the guilty will be punished, it would be difficult for the prosecutor to assert its adherence to it and, in the same time, plead that the aider be convicted when he did not know about or intended to help the commission of the crimes and it was not almost inevitable that the crime would ensue from the aid in normal circumstances. Simple negligence brings the proposed definition close to an “illiberal scheme of vicarious liability” 856 which would probably violate the individual responsibility principle. Besides, the author’s theory of complicity as a risk-based offence also implies that actual knowledge is not an appropriate mental element standard for the accomplice liability; an idea which should be considered for ICL. This is so because in the commission of international crimes, the aid is often provided before the crime

856 See Stewart, “End of Modes of Liability”, *supra* note 461 at 166.
happens and the aider, aware of circumstances which render the commission of the crimes very probable or almost inevitable in the normal course of events, decides nonetheless to run the obvious risks and provides the aid to the potential perpetrator. In these circumstances, a mental element based on actual knowledge of the commission of the crime is of no help because the commission of the crime has not yet started when the aid is given. To address this issue, it cannot be said that a recklessness-based mental element could not be adequate under certain specific circumstances. As for the idea of elevating complicity as a new offence separate from the perpetrator’s crime, it is with considerable pain that I am able to pinpoint some tangible enough benefits that could justify the rigmarole involved in operating such a modification of the law. It would possibly help to clarify the composing elements of complicity because the change would force the stakeholders to set out clearly the elements of complicity in one substantive provision. Also, it would enable the drafter of the new crime to set a penalty for complicity as an offence which might be preferable compared to the actual situation which is denounced by some as arbitrary. It would also solve the labelling problem as the aiders would not be culpable of the crime aided, but of the crime of complicity. However, in that regard, it would put under the same label aiders who provided very different kinds and amounts of help to very different crimes so much so that it might not even properly address the labelling problematic. On that latter element, I am not sure that cutting all the ties between the aider and the crime which he helped the commission of really furthers the settlement of the fair labeling issue. In short, labeling all aiders accomplice regardless of the crime aided might create another labeling problem. Indeed, the aider of genocide will be labelled and will be condemned to the same punishment as the aider of a war
crime regardless of the difference of moral guilt. Finally, I am unsure whether and how the deterrence idea cherished by the author would be advanced by making complicity a separate offence. Lastly, making complicity a separate offence would probably entail that the same be done with some other modes of liability so much so that it remains unclear if all the troubles engendered by such a change would really yield benefits significant enough to justify going through the rigmarole involved in the procedure.

3.4. The defence team in Taylor

For its part, the defence team in Taylor\(^857\) in its “Appellant’s Submissions”\(^858\) (arguments of the defense) has brought forward interesting arguments about complicity in ICL. As to the mens rea, it argued that customary international law mandates that the actus reus be performed with nothing less than purpose, viz. the acts of assistance must be done for the purpose of facilitating the commission of the crime. To support this assertion, Mr. Taylor’s attorneys invoked that 1) the content of the Rome Statute\(^859\) should prevail,\(^860\) 2) no other state practice or opinio juris demonstrates that the international community has accepted that mere knowledge suffices,\(^861\) 3) the civil responsibility of states in international law is applied through a purpose-based mental element,\(^862\) 4) the knowledge requirement of the Code of Crimes\(^863\) should be disregarded given the greater legitimacy of the Rome Statute\(^864,865\) and 5) the ICTY is wrong in applying the knowledge

\(^857\) Supra note 35.
\(^858\) Appellant’s Submissions, The Prosecutor v Charles Ghankay Taylor (case no. SCSL-2003-01-A,) Appeals Chamber of the Special Court for Sierra Leone, 1 October 2012.
\(^859\) Supra note 29.
\(^860\) Supra note 858 at paras 290-297.
\(^861\) Ibid at para 298.
\(^862\) Ibid.
\(^863\) Supra note 143.
\(^864\) Supra note 29.
requirement.\textsuperscript{866} Mr. Taylor’s defence team also stressed that, as part of the \textit{mens rea}, the aider must know that his assistance will have a substantial effect on the crime.\textsuperscript{867} As to the \textit{actus reus}, the defence team emphasized that there must be substantial assistance to the crime as such\textsuperscript{868} which the court interpreted as that the assistance must be provided to the person who committed the crime and that the assistance was used to commit the crime.\textsuperscript{869} On more general way, the defence team pleaded that the aiding and abetting liability as interpreted by the SCSL Trial Chamber (knowingly or recklessly provided substantial assistance to the commission of the crime) would have far-reaching consequences and is unworkable as it would criminalize any assistance provided to a party involved in an armed conflict because violations of ICL are present in nearly all military conflicts (which makes them probable and therefore satisfies the \textit{mens rea} automatically).\textsuperscript{870}

Generally speaking, the test suggested by the Charles Taylor’s defence team is too narrow even though it is not bereft of thought-provoking elements. As for the twofold \textit{mens rea}, the first element, the purpose requirement, is groundless and unprecedented in ICL except for the fact that it was the standard adopted by the \textit{Rome Statute}\textsuperscript{871}. This of course includes customary international law which, as shown above, does not support such an assertion, quite the contrary actually. Pragmatically, and as stated above, the purpose requirement is not capacious enough as it would not encompass aiders who act

\textsuperscript{865} \textit{Supra} note 858 at para 300.
\textsuperscript{866} \textit{Ibid} at para 301.
\textsuperscript{867} \textit{Ibid} at paras 394-396, 441.
\textsuperscript{868} \textit{Ibid} at paras 399-400.
\textsuperscript{869} \textit{Taylor, supra} note 35.
\textsuperscript{870} \textit{Supra} note 858 at paras 396-398.
\textsuperscript{871} \textit{Supra} note 29.
knowing full well of the consequences of their deeds. Morally, aiders in this type of situations cannot be said to be innocent as they knowingly contribute to the commission of the crime. The important values of deterrence and prevention also militate in favour of the rejection of the purpose standard. Concerning the second element, the aider must know that the assistance will have a substantial effect on the crime, it has to be considered to address the concern that knowledge is not high enough a standard to make the aider criminally responsible for his aid and in the context of the specific direction debate. I will deal with these questions in the next chapter. With respect to the actus reus, the submission that the threshold should be a substantial assistance concentrated on the person who committed the crime and that it must be used to commit the crime must be unequivocally rejected, for accepting it would have profound and radical consequences for ICL. Basically, given the state of chaos which most of the time prevails when international crimes are committed, it would almost mean the end of the accomplice liability as the proof that the perpetrator received the aid and committed the crime with it would almost be impossible to make. The same impossibility would ensue when the aid provided would consist of certain goods that can be mixed and mingled such as guns or fuel. This contention also overlooks the fact that assistance provided in international contexts is often made through complicated web of intermediaries who cannot precisely inform the suppliers about the purposes of the aid requested and much less about who will use it. In this setting, that crimes end up being committed especially with the help supplied by the intended recipient of the aid would be a very-seldom-happening accident. Finally, some merit cannot be denied to the defence’s general averment that complicity interpreted as a knowingly or recklessly provided substantial assistance to the
The commission of the crime would criminalize nearly any assistance given to any party involved in a military conflict. Indeed, it is difficult to rebut that international crimes are almost always committed in any war so much so that the said mental element would be automatically satisfied upon the transfer of the aid. Therefore, any substantial assistance would be at significant risk to be later adjudged criminal regardless of the aider’s intent which might violate the guilt principle. The only escape given to the aider would be to give as little assistance as possible to avoid the fulfilment of the *actus reus* which is not that efficient since the aid can still have a substantial effect on the commission of the crime despite its small size which would further damage the guilt principle. Some will oppose that the recklessness standard imposed by the SCSL is reasonable because it actually forestalls any aid to be provided to any belligerent involved in any war. This argument has some force, but it has to be weighted against the importance of the founding principles of criminal law which must be safeguarded so that ICL keeps its legitimacy and credibility. Deterrence and prevention cannot justify any measures to curb criminality. Also, in some very peculiar situations, it might be justified to furnish aid to entities suspected of committing international crimes when the harm thereby caused is substantially outweighted by the expected benefits. In this context, it seems reasonable to further evaluate whether some elements should be added to the recklessness to make sure that the aider had an appropriate criminal mindset to make him bear the consequences of the deeds committed by the perpetrator. I will also treat these concerns in more details in the following chapter.
3.5. The takeaway

To conclude, none of the abovementioned theories can be said to be entirely satisfactory to the extent that it should be integrally imported to the ICL realm. That is not to say that many of the points made by the authors and institutions did not inspire me in my quest to articulate an ideal definition of complicity. Consequently, in the next chapter, I suggest what I believe is one ideal definition of complicity for ICL using the teachings dwelled upon in the current chapter.
4. CHAPTER 4: ANALYSIS AND CONCLUSION

4.1. General remarks

The literature furnishes two analytical methods that could be used with a view to articulating a better standard for complicity in ICL. Firstly, there is the approach advocated for by authors like Marina Aksenova\(^\text{872}\) for which the comparativist theory should be considered. According to Ms. Aksenova, this exercise should not be restricted to simply discussing the jurisprudence and statutes of the various international criminal tribunals, but should include a review and assessment of the notion of complicity in national legislations. To justify this method, the author maintains that general principles of law such as complicity can be better understood by comparing their meaning in the different legal systems of the world, that ICL is ultimately based on national criminal law so much so that it is advisable to be knowledgeable in the latter, and that comparing the national legislations allows to discover the best practices to be incorporated in ICL. The idea underlying this method is that it is preferable to determine the correct meaning of complicity in ICL with the insights provided by the national experiences. At variance with this first theory is the one arguing that solutions for ICL should be found in ICL itself. Hence, for Markus D. Dubber\(^\text{873}\), searching for answers to the problems of complicity in ICL in the national legislations is flawed because 1) “it is not clear which national approaches to complicity warrant closer examination”,\(^\text{874}\) and 2) “no domestic criminal law system can be said to have worked out an entirely satisfactory doctrine of


\(^{874}\) Ibid at 977.
complicity”. Given these limitations, he advocates that “[r]ather than choosing one domestic ‘model’ over another, international criminal law ought to strike a better balance between differentiation and simplification”. The crux of Professor Dubber’s thesis is that when it comes to solving quandaries of complicity, searching in national legislations is of limited help and “international criminal law must find its own way in the doctrine of accomplice liability”. For this author, this approach is apposite notably because of the tension peculiar to ICL between the urge to punish those connected to enormous crimes and the persistent legitimacy deficit.

From these two modus operandi, the second one seems more adequate simply because of the particular nature of the ICL offences. Indeed, these infractions have to be dealt with an adapted approach designed to tackle fairly and efficiently large-scale crimes. It is doubtful that the national legislations can fulfill that mandate as they are aimed at another kind of criminality. This is why I did not review any national legislation in order to pinpoint the elements to include in my conception of complicity. Rather, I concentrated my reflection on and was inspired by the law articulated by the various tribunals and thinkers of ICL.

875 Supra note 873 at 978.
876 Ibid.
877 Ibid at 1001.
878 Such an idea was also expressed in Lubanga, supra at note 515, where court said at page 423 “both the Romano Germanic and the Common Law legal systems have developed principles about modes of liability. However, at their inception, neither of these systems was intended to deal with the crimes under the jurisdiction of this Court, i.e. the most serious crimes of concern to the international community as a whole”. However, it should be acknowledged that, in recent years, due to the adoption of the Rome Statute, supra note 29, and the complementarity principle embedded at its article 17, national legislations have been passed to try locally persons accused of having participated in international crimes. Currently, 65 countries have enacted legislation containing either complementarity or cooperation provisions, or both, into their domestic law. See Coalition for the International Criminal Court, Implementation of the Rome Statute, online: Coalition for the International Criminal Court <http://www.iccnow.org/?mod=romeimplementation&lang=en>.
4.2. One reasonable conception of complicity in ICL

With the benefit of the analysis of the different theories outlined above, I can now formulate a refurbished definition of complicity for ICL. As illustrated above, complicity in ICL needs clarifications, certainty, and accuracy in a definition that safeguards general principles of criminal law while promoting accountability and fairness for the accuseds. This is of course a significant challenge which can only be fulfilled after having carefully reflected on the competing values and principles outlined in this thesis and with great consideration for the workability and practicability of the chosen approach. In short, the approach must be theoretically and pragmatically defendable. In this context, the selected definition must be inserted within a framework aimed at making complicity a clear and flexible concept that can be used in a predictable way in all cases without having to be modified by judicial interpretation.

The theories reviewed in the last chapter informed quite eloquently that a radical modification of the notion of complicity in ICL would be a difficult thing to achieve successfully. Many elements would have to be taken into consideration and one subtle aspect that might go unnoticed could entail unforeseen consequences. What’s more, changing in a substantial way one mode of liability might cause an imbalance with the other modes of liability to such an extent that all of them need reconsideration thereby provoking more incertitude. For these reasons, I do not think that it is suitable in ICL to reinvent the wheel and come up with an entirely new concept of complicity with never-seen-before elements. Drastic changes are seldom the approach to be adopted to solve problems, for the risks involed almost always outweigh the benefits that are sought to be
gained by dramatic changes. It is better to build on an existing approach and its good aspects and try to fix the problems in an incremental and efficient way. The enduring success of common law in countries where it has been implemented is a strong argument in favour of this approach. Mindful of these observations, what I describe in this chapter as an ideal view is one that, I think, addresses a maximum of issues present in the law of complicity. This expression should in no way be interpreted as thinking that my version of complicity is the best of all, is flawless, or settle all problems for good.

An important goal that I try to further with my proposition is to put an end to the courts’ practice to add substantive elements to the complicity provision for interpretative purposes. This is symptomatic of an ill-conceived and detail-lacking provision. With that in mind, I tried to make my provision as clear as possible and embed in it all the elements that need to be found beyond reasonable doubt to convict an individual under this mode of liability. Were I to proceed like Joshua Dressler and set out my proposition in a suggested legislation, it would contain a subsection saying that the elements set out in the section are the only to be found and interpreted by the court which cannot add any substantive point to them. In other words, the provision would make sure that the accomplice liability cannot be judicially modified.

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879 This point should not be interpreted as a remonstrance or a criticism against the international criminal tribunals as, except for the ICC, they were obviously obliged to formulate the elements of the accomplice liability because the provisions on the same were written in the statutes to be interpreted in terse language such as “aided or abetted” or “take consenting part”. Rather, what I mean here is that I would like the elements I propose for an ideal definition of complicity in ICL to be the only ones interpreted by the court without it having to add elements for interpretation purposes.

880 Supra note 826.
The above would put an end to the incertitude engendered by the amorphous state of the
custom and to the disagreements seen in the jurisprudence of the modern tribunals and
would further the legality principle which advocates notably for clear and simple rules
that everyone can easily understand and apply. Also, this rule would ensure that the
military commanders, political leaders, and other stakeholders in the field are able to read
the provision and figure out exactly what is the conduct prohibited by the law which
would enhance the predictability and certainty in ICL. The current situation is
unacceptable in this respect because the reader cannot assess with sufficient details what
is forbidden by the law. Some might say that such a strict approach is not possible, that it
would inevitably undermine the need for flexibility of ICL provisions, and that it would
be better to keep wide formulations that can be adapted to all factual situations with
shrewd judicial interpretation. I disagree. First, continuing with the current situation
would be unworkable as ICL is to be applied by the states\textsuperscript{881} and therefore some guidance
must be given to them so that they can meaningfully accomplish their duty and avail
themselves of the right to protect their citizens from international prosecution. Second,
elemental fairness for the stakeholders in the field commands that all the elements of the
accomplice liability be clearly laid down so much so that the person is able to tailor his
conduct to avoid falling within the ambit of the law. Third, a restrictive and easy to
understand definition does not preclude the court to adopt a common sense interpretation
of the law and to adapt the application of the provision so that a reasonable and fair
outcome is reached in all instances.

\textsuperscript{881} Notably through the complementarity principle provided for at article 17 of the \textit{Rome Statute}, supra note 29.
In keeping with the above, I think that one good definition of complicity in ICL would be composed of the following elements. *Actus reus:* a contribution, aid or support that has a substantial effect on the commission of the crime. *Mens rea:* if the aid is given as the crime is being committed: actual knowledge or wilful blindness that the crime is being committed. If the aid is given before the crime is committed: actual knowledge or wilful blindness that the aided entity wanted to commit the crime (or, if it is not a crime requiring intent as *mens rea*, had the requisite mental element required by the definition of the aided crime) and it was almost inevitable that, in the normal course of events given notably the known intent of the perpetrator and other known relevant circumstances, the crime was going to be committed. I chose this definition which is strongly inspired from the ones set out by the *ad hoc* tribunals over the ones laid down in the *Rome Statute* because I think that the former are easier to apply, more efficient and workable, and I do not see the need for the divide made between aiding a group crime or a non-group crime found in the latter. Thus, I think that the *ad hoc* tribunals definitions of complicity are the ones on which our focus should be directed in order to come up with an improved definition that addresses the shortcomings identified above. I now turn to the in-depth examination of the issues flowing from the proposed definition.

### 4.2.1. The objective element

The objective element consists of two things: 1) a contribution, aid or support, 2) that has a substantial effect on the commission of the crime. The contribution, aid or support element is uncontroversial, is the basis of complicity, is so obvious as to be incontestable, and therefore does not require any additional observations. Concerning the substantial

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882 *Supra* note 29, art 25(3)c)(d).
effect requirement, it cannot be circumvented otherwise, as argued in one ICC decision\textsuperscript{883}, every contributor no matter how insignificant his contribution might be could satisfy the *actus reus* of complicity which would render the same almost meaningless. Unfortunately, this component comprises an element of randomness because, as made clear above, one does not control all the factors that determine the effect of one’s actions. Despite this shortcoming, the substantial effect requirement is necessary to address the abovementioned over breadth concern which, as far as the *actus reus* is concerned, cannot really be meaningfully tackled otherwise. Nevertheless, that is not an argument in favour of staying idle in front of the potential injustices that might be caused by the randomness causation carries within its core. This downside has to be dealt with not by changing the elements of the definition, but by carving a narrow, strictly-defined exceptional defence applicable only in specific circumstances. To that end, in the exceptional cases involving a contribution, which is insubstantial given the circumstances surrounding the commission of the crime known by the aider when he delivered his aid, turns out to have a substantial effect on the crime, it would be harsh to find the defendant guilty for a consequence that is, on any reasonable point of view, nothing but a pure accident (the aid had a substantial effect on the commission of the crime). For example, the aider, knowing about crimes being committed by the perpetrator, furnishes an insubstantial amount of equipment to the entity which, according to what he knew of the circumstances of the commission of the crime, was almost impossible to have a substantial effect on the commission of these crimes, but, through circumstances which everyone would say amount to a pure accident, the aid has a substantial effect on the commission of the crimes. In this kind of cases, the court should envisage an acquittal.

\textsuperscript{883} *Mbarushimana*, supra note 532.
Such a defence should only apply in the clearest of the circumstances where it can be said that it was a total and complete accident that the contribution had a substantial effect on the commission of the crime. Besides, the determination of the substantiability of the effect on the commission of the crime should be appraised on a case-by-case basis keeping in mind all the relevant circumstances of each case.

I now turn to the predicament related to the specific direction requirement which is the main contentious aspect present in the objective element of complicity in ICL. For the reasons outlined below, I believe that specific direction should be left out of the *actus reus* of the accomplice liability.

**4.2.1.1. The debate on specific direction**

I reviewed the literature on specific direction and my findings are separated in two sections; the first outlines the arguments made on either side of the debate, the second discloses some authors’ views about the elements of the aiding and abetting liability. These observations were made in the context of the debate about whether to include specific direction in the definition of the aiding and abetting liability at the *ad hoc* tribunals and do not address this issue in relation to the ICC jurisprudence. Despite this shortcoming, these reflections are pertinent and need to be considered.
4.2.1.1.1. The authors’ view on the debate

4.2.1.1.1. Against the specific direction requirement

Norman Farrell is against the specific direction requirement\(^{884}\) and voiced his support for that solution with the following reasons:

> [The specific direction element] was confusing as it seemed to incorporate a \textit{mens rea} aspect. The requirement that the act be “specifically directed” would appear to require an analysis not only of whether the act of the accused – objectively analysed – constituted assistance to the commission of the crime, but also an analysis of the accused’s purpose in performing those acts.  

Christopher Jenks took the same stance in his short summary/commentary about the \textit{Perisic}\(^{886}\) decision.\(^{887}\) His main argument was that, despite the disclaimer made by the majority to that effect, adopting specific direction sends the wrong message about “not allowing the subcontracting of grievous crimes”.\(^{888}\) He finished his article by quoting approvingly another author who pointed out that “[s]ixteen years into its jurisprudence, the ICTY should be more, not less, predictable. Yet in the wake of \textit{Perisic} the elements of aiding and abetting are murkier than ever”.\(^{889}\)

As for Marko Milanovic, expressing himself about the \textit{Taylor}\(^{890}\) decision which refused to follow \textit{Perisic}\(^{891}\) and apply the specific direction requirement, he said that “this is a

\(^{884}\) Supra note 843.
\(^{885}\) Ibid at 890 [emphasis added] [footnotes omitted].
\(^{886}\) Supra note 34.
\(^{888}\) Ibid at 4.
\(^{889}\) Ibid at 5.
\(^{890}\) Supra note 35.
\(^{891}\) Supra note 34.
very welcome development, and the specific direction standard was rightly discarded". He maintained that while “[t]he Appeals Chamber is surely correct that there should be a difference between contributions to the war effort as such and to the commission of specific crimes”, distinguishing these two with the specific direction requirement would be difficult, if not arbitrary. About the holding of the majority in Perisic, he declared that:

This essentially boils down to the conclusion that it will be practically impossible to convict under aiding and abetting any political or military leader external to a conflict who is assisting one of the parties even while knowing that they are engaging in mass atrocities, so long as that leader is remote from the actual operations and is not so thoroughly stupid to leave a smoking gun behind him. (...)

As for James G. Stewart, the specific direction requirement “makes no sense”. Here are the reasons for his assertion: 1) the distinction that specific direction makes is untenable because the accomplices’ acts are “almost always “otherwise innocent” and acts that help crime are frequently commonplace”, 2) “[s]pecific direction” is all the more anomalous when one of the leading criterion for limiting the over-inclusive consequences of causation—the substantial contribution standard—is already applied in international

894 Ibid.
895 Supra note 34.
896 Ibid.
897 Supra note 34.
899 Ibid.
doctrine”, 3) specific direction is “is also exceptionally hard to define”, 4) specific direction creates confusion between the content of the actus reus and mens rea of aiding and abetting, 5) the condition of remoteness to trigger the analysis of specific direction is not appropriate, 6) specific direction is unnecessary because the concerns it tries to address are already taken care of by the mental element of aiding and abetting, and 7) it has “no basis in customary international law or scholarly thought”. The author explained the sixth element in the list above by saying that the ICTY Appeals Chamber probably adopted the specific direction standard to restrain the scope of the mental element of the aiding and abetting liability (knowledge), which, as stated above, includes a notion of probability (recklessness) when the aid is given before the crime is committed. According to him, this concern of over-inclusiveness should have been dealt with through an analysis of what this probability includes or by saying that the knowledge standard only applies when the crime allegedly aided or abetted also has a recklessness-based mens rea. The author also said that, instead of changing the elements of complicity, “the Appeals Chamber could also [have found] that providing the means used to commit atrocities was justified”. Professor Stewart also opined that the specific direction requirement is even higher than the purpose standard of mens rea because it would lead to the acquittal of an aider who purposefully furnished the assistance, but did not

900 Ibid.
901 Ibid.
902 Ibid.
903 Ibid.
906 Ibid.
specifically directed it towards the commission of the crime. According to him, this would lead to the acquittals of the businessmen who supplied the Zyklon B to the SS for want of specific direction (the Zyklon B was provided to gas the Jews and the extermination of insects and germs within the camps). This is contested by the Kevin Jon Heller as will be shown below. He terminated his analysis by saying that “[i]f left unaddressed, this reasoning will leave a black mark on that institution’s important contribution to international criminal law, and erect an unjustifiable impediment to the accountability of those who assist atrocities”.

As for Eric Gordy, the specific direction requirement is too narrow and has no place in the analysis. According to him, this standard makes that “the only way that Perišić’s conviction had been upheld would have been with evidence that showed him telling the VRS [Bosnian Serb Army], “here is some money, weapons and personnel, please use them to commit crimes””.

4.2.1.1.2. For the specific direction requirement

Kevin Jon Heller voiced his support for the specific direction requirement in these terms “I believe that the ICTY Appeals Chamber was absolutely correct to endorse the

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911 Ibid.
“specific direction” requirement in the context of organizational criminality”. He substantiated his claim by saying:

In the absence of the specific-direction requirement, the expansive mens rea of aiding and abetting puts individuals who interact with organizations engaged in both lawful and unlawful acts in an impossible position. If they are aware of the unlawful acts, they cannot provide the organization with any assistance that might end up facilitating them — even if they do not intend to facilitate those acts, and even if they do everything in their power to prevent their facilitation.

He pleaded that the specific direction requirement was the best safeguard against the overbroad mens rea of aiding and abetting which he said was awareness of the probable commission of any kind of crime. For him, this mens rea standard is problematic in all cases, but is particularly so “in the context of neutral assistance to organizations that are not inherently criminal”. To illustrate this principle, he took the example of a well-intentioned military commander who wants to provide neutral assistance to an organization, but cannot because he knows that it will probably commit some crime in the future. Despite his best efforts, he would not be able to do so without putting himself at risk, if it turns out that the assistance had a substantial effect on the crime actually committed. Overall, the importance of the specific direction condition comes from the fact that Mr. Heller does not believe “that providing assistance to an organization — whether a rebel group or a state’s military — should be off limits simply because the

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913 Ibid [emphasis added].

914 Kevin Jon Heller, “Everything You Ever Wanted To Know About Specific Direction But Were Afraid To Ask” (Lecture presented at a conference on the ICTY’s recent high-profile acquittals in Perisic, Gotovina, and others, delivered at the Chamber’s Symposium Chatham House/Doughty St., October 26, 2013) only the outline of the lecture was published by the author on the web at <http://opiniojuris.org/2013/10/26/talk-london-defending-specific-direction-requirement/> [Heller, “Everything You Ever Wanted To Know About Specific Direction”].

915 Ibid.

assistor knows that the organization does not have completely clean hands". According to the author, this standard is required because, without it, the United Kingdom and the United States of America could be held liable under the aiding and abetting liability for the help provided to the Syrian rebels. Lastly, Professor Heller maintained that James G. Stewart was wrong in saying that specific direction would have lead to acquittals had it been applied in the Zyklon B case. This was incorrect according to him because all the SS’s activities were unlawful and that in such cases (assistance provided to organizations which have solely criminal activities), the majority’s holding in Perisic directs a conviction. Professor Heller added that, with the specific direction requirement, it will even be possible to have conviction of aiders and abettors of organizations which are not inherently criminal. This will be possible when the accused’s intent will provide proof of specific direction or when the specific direction can be inferred “from the nature and manner of the defendant’s assistance”.

4.2.1.1.1.3. The general opinions

Most ICL books simply lay out what their authors think to be the requisite elements of the actus reus of complicity without discussing in-depth specific direction. However, their observations still represent the understanding of academics on the matter and, for

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918 Ibid.
919 Supra note 19.
921 Supra note 34.
923 Ibid.
that reason, it is appropriate to note their views. To that end, Andrea Reggio, Joseph Rikhof, Jeffrey J. Smith, Elies Van Sliedregt, Mohamed Elewa Badar, Kai Ambos, Gideon Boas, James L. Bischoff, and Natalie L. Reid, Antonio Cassese, Ilias Bantekas, and Olivier de Frouville all gave a definition of the material element of aiding and abetting that did not include specific direction whereas Robert Cryer et al. and Cherif M. Bassiouni expressed the contrary view. As for the international material, the International Commission of Jurists in its 2008 report on corporate complicity and international crimes adopted the directed standard. The International Criminal Law Services adopted the definition without the specific direction requirement. The executive director of Human Rights Watch, Kenneth Roth, said that the specific direction requirement made “little practical sense” and might have been contributed to by the “fear of creating a precedent that could lead to unfair accomplice

924 Supra note 23 at 637-639.
926 Jeffrey J. Smith, “The plundering of the Sahara: Corporate criminal and civil liability for the taking of natural resources from Western Sahara” Editorial Comment, (2011) at 29.
927 Supra note 708 at 122.
928 Supra note 689.
929 Supra note 697.
930 Supra note 715.
931 Cassese, Cassese's international criminal law, supra note 720.
932 Supra note 727.
933 Supra note 730.
934 Supra note 25.
935 Supra note 725.
liability for anyone who supports a party to a conflict that then commits human rights crimes”. 939

4.2.1.1.2. My position

4.2.1.1.2.1. Preliminary remark

I will divide this section in three subsections: the first will give my position on the debate and the reasons for it, the second will deal with the question of the aid given to organizations with lawful and unlawful activities, and the third one will discuss some arguments that could be brought up to contradict my view.

4.2.1.1.2.2. The adopted approach

As stated above, the specific direction requirement should not be part of the accomplice liability.

Firstly, I think that the reasoning and the arguments provided by James G. Stewart in this debate are the more compelling. More specifically, I find that the argument about the fact that the substantial effect requirement already limits the over-inclusiveness of the aiding and abetting liability particularly accurate. 940 I also agree with his argument that specific direction is hard to define, for the guidance provided by the majority in Perisic 941 is unclear. In that judgment, the court gave two examples to help in this assessment: 1) “whether the VRS [perpetrator] was an organisation whose sole and exclusive purpose

939 Supra note 938.
940 In the context of my definition of complicity, this concern is addressed by the substantial effect requirement and through the mental element I designed. These elements are strong-enough safeguards against over-inclusiveness and make sure that innocent behaviours will not be punished.
941 Supra note 34.
was the commission of crimes”, 942 2) “whether the SDC [the aider] endorsed a policy of assisting VRS crimes”. 943 To apply this in the future, “organization”, “sole and exclusive purpose”, and “endorse” should have been defined. For example, does the aider endorse the criminal policy of the aided organization if he knows about it and provides aid that he knows will further it? I am also in accord with Professor Stewart when he says that, instead of bringing the specific direction requirement in the analysis, the court could have said that, in certain circumstances, providing the means used to commit atrocities is justified. 944 I see nothing in the international tribunals statutes that could forestall such a finding. Plus, the international tribunals must apply the guilt principle included in the notion of justice and not convict innocents when a person’s behaviour can be qualified as such. This could be a very interesting solution where the circumstances warrant that assistance be provided even though there is knowledge that it will serve to commit international crimes. Strictures could be put on that defence such as the humanitarian benefits of the aid substantially outweigh its downsides, no other reasonable solution was possible to reach the humanitarian goal for which the aid was provided, everything was done to reduce the damage caused by the aid, etc. This would be useful in circumstances where the number of lives to save with the aid is much more significant than the lives that might be lost as a result of it. This idea is also interesting because it would ensure that an enough capacious definition of complicity prevails while preventing that reasonable behaviours be punished when it is not warranted by the particular circumstances of the cases. Also, it seems particularly workable in practice. For example, the United Kingdom would have been justified in aiding the Soviet Union in the Second World War even

942 Supra note 34 at para 52.
943 Ibid.
though it knew that international crimes were committed because it was necessary to save the Jews and the Slavs from destruction and slavery. The same would apply for the aid provided to the Rwandan Patriotic Front in the Rwandan genocide. However, it would not be applicable to Germany’s allies in the Second World War because their motives were mostly grounded on national interests.

Secondly, this interpretation is the one most in accord with the values of ICL which are: 1) retribution, 2) deterrence, 3) incapacitation, 4) rehabilitation, 5) denunciation/education, 6) justice for the victims, 7) recording history, and 8) post-conflict reconciliation. Given the particularities of ICL, deterrence should be given a certain weight in the analysis because of its forward-looking nature and the notion of prevention embedded within it. Even though it is a commonplace in that field of law, I believe that the rules must always be interpreted keeping in mind the ultimate goal of international justice which is to reduce of prevalence of international crimes. The specific direction requirement, by putting the bar higher up for the prosecution, undercuts the important aim of deterrence. However, this does not mean that deterrence should have priority over the basic tenets of fundamental justice such as the presumption of innocence, the right of the defence to fully argue its case before an impartial tribunal, and the guilt principle. Deterrence cannot justify any measure to curb criminality and the latter principle must be respected at all times. It would be so without the specific direction requirement because the accused would not be convicted unless the prosecution proved beyond reasonable doubt that 1) the accused provided assistance to the commission of the crime, 2) which assistance had a substantial effect on the commission of the crime, 3)

945 Cryer et al., supra note 25 at 23-35.
knowing that the crime was being committed or that the perpetrator wanted to commit the crime and that it was almost inevitable that the crime was going to be committed. The foregoing is sufficient to ensure that only the guilty will be convicted (guilt principle). Corollary, I do not think that one can reasonably argue that he is morally innocent when it is proven beyond reasonable doubt that his conduct fulfills all these criteria.

Thirdly, not requiring specific direction is a reasonable approach that puts the threshold for fulfilling the *actus reus* of the accomplice liability at an acceptable level for a fair debate between the prosecutor and the accused. Here is why. The system must be balanced and avoid putting an inappropriate burden on either of the parties. Demanding that the aid be specifically directed probably creates an imbalance in favour of the defence. Specific direction burdens the prosecution with a complicated element to prove with circumstantial evidence or with the mental state of the accused. In these circumstances, if the accused does not make clear his intentions, it will be very difficult to obtain a conviction. It will be so because, as per the main articulation of the law on the specific direction requirement, the *Perisic* judgment, the circumstantial evidence pointing towards specific direction “must be the sole reasonable inference after a review of the evidentiary record as a whole”. Therefore, every accused who provided a general assistance at a remote distance will be able to plead that it was not specifically directed towards the commission of the crime, despite the fact that he was well aware of the crime committed and that his assistance would help its commission. In fact, the specific direction requirement will provide a good defence to all military commanders or

946 *Supra* note 34.
947 *Ibid* at para 56.
politicians who want to help any insurgency or rebel movement or intervene in any kind of war from abroad, even if they know that their assistance will probably help to commit international crimes. As the majority said in *Perisic*,[948] “[a]s demonstrated above, the Appeals Chamber considers 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”.[949] To use a concrete example, assuming that the remoniteness requirement is satisfied, the Rwandan politicians who supplied the *Interahamwe* militias with weapons during the Rwandan genocide knowing that they would be used for genocidal purposes would not be subject to prosecution because they could always say that that was to fight the insurgency of the Rwandan Patriotic Front. The above shows the imbalance. Specific direction will make it very difficult to obtain a conviction for aiders when general aid is provided.

Fourthly, the specific direction requirement brings confusion in the analysis of complicity in three different ways. Firstly, logically, this requirement, if it must be, should go into the analysis pertaining to the *mens rea* of complicity and not into the *actus reus*. Indeed, it is impossible to assess if the aid provided is specifically directed towards something without inquiring about the intent of the person supplying it. Secondly, as pointed out by Judge Lui (dissenter in *Perisic*[950]) the specific direction requirement has not been applied with any rigor prior to *Perisic*.[951] In fact, this issue has never been isolated in any

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[948] Supra note 34.
[949] Ibid at para 72.
[950] Supra note 34.
[951] Ibid.
previous judgment regardless of the statement of the law used. In most *ad hoc* tribunals cases, the judgments simply repeated *Tadic*\(^{952}\) and put the emphasis on whether the assistance supplied met the substantial effect threshold. Insisting on this new ill-defined criterion instil uncertainty into the law. In sum, as the jurisprudence on complicity develops, it should get clearer and more principled, not murkier. Thirdly, insisting on specific direction might conflict with the oft-cited jurisprudential *dictum* that “the *actus reus* of aiding and abetting may be satisfied by a commander permitting the use of resources under his or her control, including personnel, to facilitate the perpetration of a crime”\(^{953}\).

Fifthly, as specified above, the specific direction element arises out of *Tadic*\(^{954}\) which furnished a very cursory statement of the law. More specifically, paragraph 229, which contained the definition of the *actus reus* of aiding and abetting, was simply made in comparison to the joint criminal enterprise liability\(^{955}\). While the statement of the law on the JCE liability was very well developed and supported, the statement about aiding and abetting fitted in one subparagraph unsupported by any argument whatsoever, whether they be textual or jurisprudential. Owing to that fact, it is not logical to take each word of the *Tadic*\(^{956}\) definition as the governing principle on the matter.

\(^{952}\) *Supra* note 16.
\(^{953}\) *Blagovic*, *supra* note 245 at para 127.
\(^{954}\) *Supra* note 16.
\(^{955}\) For information on this mode of liability, see *supra* note 181.
\(^{956}\) *Supra* note 16.
Sixthly, the majority in *Perisic* \(^{957}\) said that “the existence of specific direction (...) demonstrates the culpable link between the accused aider and abettor’s assistance and the crimes of principal perpetrators (...).” \(^{958}\) This function is already fulfilled by the substantial effect on the commission of the crime requirement and the *mens rea* I propose\(^{959}\). This is so because someone who provides assistance that has a substantial effect on the commission of the crime knowing that the crime is being committed or knowing of the perpetrator’s criminal intent and that it is almost inevitable that the crime will occur cannot logically claim the absence of a culpable link between the crime committed and his acts as an aider. This reality undercuts the utility and the necessity of the specific direction requirement.

Seventhly, the application of this requirement, which according to the majority in *Perisic* \(^{960}\) is to be conditioned by the aider/abettor’s proximity \(^{961}\) to the perpetrator’s crime, harbours the danger of inconsistency and of violating the presumption of innocence. Indeed, by applying two different legal standards based on temporal and geographical proximity would possibly lead to incoherent results and would be potentially unfair for the accuseds. For instance, a military commander/aider could, from a remote camp a few days before the attack, knowingly lend his troops to the principal, a squad commander, who is about to go conquer a village and massacre its citizens and not

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\(^{957}\) *Supra* note 34.

\(^{958}\) *Ibid* at para 38.

\(^{959}\) Which is that the aider knew that the crime was being committed when he supplied the aid or that the perpetrator wanted to commit the crime and that, given the circumstances known to him notably that intent, the commission of the crime was almost inevitable.

\(^{960}\) *Supra* note 34.

\(^{961}\) The majority in *Perisic, ibid*, said that when there is proximity between the acts of the aider and abettor and the principal’s crime, specific direction may be demonstrated through the other elements of the aiding and abetting liability such as the substantial contribution criterion. If that proximity is absent, explicit consideration of the specific direction requirement is needed.
be subject to criminal charges (specific direction required) whereas the contrary would be
ture with regards to the same conduct done the day of the attack into a camp closer to the
village (specific direction not required). This would not make sense. Furthermore, as per
the majority in Perisic\(^962\), when the the aider/abettor is proximate enough to the crime
scene, there is no need for the court to analyze the specific direction requirement.\(^963\) In
other words, when the aider/abettor is proximate to where the crime is being committed,
the court assumes the specific direction element of the actus reus, which is an element
that, otherwise, has to be proven beyond reasonable doubt by the prosecutor. Therefore,
when the proximity issue is satisfied, the court assumes an element of the offence against
the accused which is arguably violating the presumption of innocence. These difficulties
show the misbegotten nature of specific direction.

Eighthly, insisting on the specific direction requirement would have a significant impact
on the mens rea of the accomplice liability since there is little difference between
requiring that the acts of the accomplice be specifically directed towards the commission
of the crime and having the intent to assist the crime. In other words, how can one
perform acts specifically directed towards the commission of a crime without having the
intent of assisting it? As I argue in this paper, intent is not an appropriate standard for the
accomplice liability in ICL and I do not think that inserting it through the backdoor with
specific direction is an adequate way to proceed.

\(^962\) Supra note 34.
\(^963\) Ibid at para 38.
Ninthly, putting the emphasis on the specific direction requirement in the analysis jeopardizes the important general principle of law outlined by Judge Hunt in *Aleksovski*\(^\text{964}\). This principle is that of the stability of the law:

> The need for certainty in the criminal law means that the Appeals Chamber should never disregard a previous decision simply because the members of the Appeals Chamber at that particular time do not personally agree with it. The Appeals Chamber should depart from its previous decisions only with caution. It is unwise to attempt an exhaustive tabulation of specific instances when it would be appropriate to do so. The appropriate test, in my view, is that a departure from a previous decision is justified only when the interests of justice require it.\(^\text{965}\)

The usage of the word “departure” is here justified because the specific direction requirement had never been isolated or used in a significant manner in the jurisprudence prior to *Perisic*\(^\text{966}\). I do not dispute that the said requirement was *mentioned* in judgements of the ICTY and of the ICTR; my point is that it was not given *any significant role* in the analysis of any tribunal. On that point, I make mine Judge Ramaroson’s opinion in *Perisic*\(^\text{967}\):

> [T]he specific direction requirement has never been isolated as such, either from a legal or factual point of view. On a legal point of view, most of the judgments just simply restated verbatim of the definition elaborated in *Tadic*, some of them using synonyms. I moreover note that the Appeals Chamber, in raising the specific direction requirement in a substantial form, shows that it uses a new criterion. On a factual point of view, the jurisprudence has never applied this criterion to the facts of any case. Most of the cases do not mention it whereas others implicitly include it in the substantial effect element.\(^\text{968}\)

In this context, it is difficult to say that the court precedents, which had never thoroughly scrutinized the specific direction element, were departed from with caution. This caution would have required that meaningful reasons be provided to explain why this requirement

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\(^{964}\) *Supra* note 239.  
\(^{965}\) *Ibid* at para 8 of Judge Hunt’s opinion [emphasis added].  
\(^{966}\) *Supra* note 34.  
\(^{967}\) *Ibid*.  
\(^{968}\) *Ibid* at paras 3-4 of Judge Ramaroson’s opinion [footnotes omitted] [emphasis added] [translated by author]; See also Stewart, “Two Empirical Studies”, supra note 904.
is now important and necessary in the analysis while it was not before 2013. Instead, the court simply said that it was part of the analysis because it was mentioned many times in the jurisprudence. A more thorough reasoning would also have been important since most prior-to-Perisic judgments did not analyze the specific direction requirement, but simply provided a restatement of the law given in Tadic. In the same vein, no meaningful reasons were provided as to why the jurisprudence without specific direction should be disregarded. Also, referring back to the quoted passage from Aleksovski, the argument to the effect that the guilt principle included in the notion of justice requires a departure from the jurisprudence free of the specific requirement cannot stand according to me. This is so because the guilt principle is already taken into account in the other elements of my definition of complicity: one who, knowing the current commission of the crime or that the perpetrator wanted to commit it and that it was almost inevitable that it would be committed, provides assistance which has a substantial effect on its commission can hardly assert his or her innocence.

4.2.1.2.3. The organizations with both lawful and unlawful activities

The question of the legality of the aid provided to organizations engaged in lawful and unlawful activities is important because most organizations who commit international crimes are likely to fit in this category. The answers given on that issue will have direct implications for western powers notably with regards to the aid furnished to Lybian and

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969 See Lukic, supra note 348 where the ICTY Appeals Chamber said that it was in accord with anterior jurisprudence negating the presence of specific direction in the actus reus of the accomplice liability without any more details.
970 Supra note 34.
971 Supra note 16.
972 Supra note 239.
Syrian rebels, for it is possible that some organizations within them were committing international crimes, which were possibly known to the western assistance providers. Regarding that issue, the majority in *Perisic* 973 held 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”. 974 This means that with specific direction in the test, neutral assistance given to organizations with unlawful and lawful activities will not be criminalized, except special circumstances. Professor Heller argues that, in such a context (aid provided to an organization with both lawful and unlawful activities), specific direction is required to avoid the aiding and abetting liability of the neutral assistance providers. For him, providing assistance to an organization should not be off limits simply because the assistor knows that the organization is committing international crimes. I respectfully disagree. I believe that if the aider knows about the commission of the crime or that the perpetrator has the intent to commit the crime and that, in the normal course of events, it is almost inevitable that it will be committed and provides assistance that has a substantial effect on the commission of the crime, the aider should be indicted as such notwithstanding that the principal is also doing lawful things. In other words, the aid should not have to be specifically directed towards the commission of the principal’s crime for the aider to be indicted. Below is my reasoning.

Firstly, adopting a test without specific direction will be a great incentive to organizations who will want assistance. They will have to show that they abide by the ICL provisions

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973 *Supra* note 34.
in their activities or else they will not receive any aid. This standard will give an advantage to organizations within the various rebel movements who do not commit international crimes, for they will be able to get help from abroad. This will therefore create a sound competition among the organizations forming these entities we call rebel groups in the West. Should a situation arise where it would be very important to assist an organization even though it is known that it commits international crimes, a justification defence would be available. As stated above, this defence would be available under restricted circumstances the gist of which would be to show that the assistance’s humanitarian benefits substantially outweigh its deleterious consequences. I recognize that the content of this justification defence is not the most detailed, but it has to remain flexible to be able to adapt to all international situations that might arise.

Secondly, keeping the specific direction out will make the aiders more vigilant and careful about whom they support. They will have to examine the organization purposes and the way it behaves in the particular conflict in which it is involved. They will resort only to aid organizations that they know commit international crimes along with their lawful activities only in the most appropriate circumstances such as if aiding this organization is the only option to avoid a genocide. This framework will ensure that organizations who commit international crimes, in most cases, will not have any help and thus are less likely to survive and continue making victims, but without completely paralyzing the international system with rigid rules.
Thirdly, I also disagree with Professor Heller because adopting the specific direction requirement in the context of organizations that have both lawful and unlawful activities belittles the crimes that they commit. We are not talking of small crimes here, but major crimes which, in many instances, are to cost their lives to many people. Aiding and abetting when there is knowledge of international crimes being committed should be deterred and discouraged, except when it is justified by very serious circumstances.

Fourthly, keeping specific direction out of the equation does not mean that no assistance could be given to organization with mixed activities. It will still be possible to provide aid that has no substantial effect on the commission of their international crimes or when the aider has no knowledge of international crimes being committed by the aid recipient or if the aider has no knowledge of the perpetrator’s intent to commit the crime or if it cannot be said that it was almost inevitable that the crime would be committed. These possibilities, along with the defences regarding the happening of a pure accident and that applying to the aid furnished for humanitarian purposes, provide ample opportunities for the aider to provide his aid without incurring criminal liability and thus preserve the necessary flexibility of international relations.

Fifthly, leaving out the specific direction requirement would make sure that should a case similar to the Zyklon B case arise, the defendants could not argue that, although they cannot deny knowledge of the crime, the aid was not specifically directed towards the commission of the crime, that their mens rea does not provide proof of that, and that a

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975 When the aid provided has a substantial effect on the commission of the crime, but this is a pure and complete accident given the nature of the aid and the circumstances in which it was provided.
976 Supra note 19.
specific direction finding is not the sole appropriate inference that can be made from the facts of the case and avoid conviction. On that point, even though Professor Heller is adamant, it is less than evident that a defence along these lines would have no chance of success.

Finally, I fail to see any persuasive force in the argument that the substantial and knowing aid given to an entity committing international crimes should receive a different treatment from criminal law because the entity has some lawful activities too. The lawful activities do not render the group less criminal. The *Interahamwe* is not less criminal because it buys weapons legally. The aid given to this kind of organizations should not receive a softer treatment from the law. I find it even difficult to see the relevance of these other activities as far as criminal law is concerned. Criminal law focuses on prohibited activities and cares little that the crime doers otherwise follow the law. This logic should prevail when it comes to deal with aid transferred to mixed-purpose organizations in ICL.

4.2.1.2.4. The counterarguments

It will surely be opposed to my theory that not requiring specific direction in the context of an organization with mixed activities renders some western powers complicit with international crimes committed by the Lybian and Syrian rebels because of the aid provided by the former to the latter. Here is my response. First, this reasoning arguably shows that there is still a favourable prejudice concerning what the western powers do on the international scene. It also implies that they are not able to commit crimes because they promote democracy, the rule of law, and human rights. These ideas should be
abandoned and the rule of law, applied to everyone, including the western powers. This would be a good thing since they have the power and thus can ensure a change in the course of international affairs. They must show the example. Second, it is speculative at this point to suggest that the western powers would be aiders of international crimes without the specific direction requirement given the small amount of information available to the public on these interventions. Third, even if it turns out that they provided illegal help, depending on the circumstances of the case, it might be open to them to say that this intervention was justified for very serious humanitarian reasons. Fourth, since they promote the rule of law and human rights, they should be able to accept the application of the same to themselves and face the consequences of their actions. To sum up, any aid given that has a substantial effect on the commission of the crime given knowing that the crime was being committed or that the perpetrator wanted to commit the crime and that it was almost inevitable that the crime was going to be committed should be criminalized even though the recipient is an organization that also has lawful activities. We should ensure that those who commit crimes are not aided, not find ways to provide aid to these people without incurring criminal responsibility. The world would probably be a safer place if this rule were applied with uniformity. The lawful activities of the aid recipient should not be an impediment to one of the main aims of ICL: prevention of criminality.

I will now deal with the counterargument to the effect that, in the context of mixed-activity organizations, there should be a difference between aiding and abetting a war effort and aiding and abetting international crimes. According to me, there is no
difference between these two because if one aids the war effort knowing that the assistance furnished will aid the commission of international crimes, this is aiding and abetting international crimes. To me, saying that this aid was only for the war effort while one knew that it was not the case is simply to comfort one’s conscience that he or she did nothing wrong. Applying this reasoning would mean that Italy could pretend to have only aided the Germany’s war effort in the Second World War while she was well aware of the international crimes committed and avoid responsibility for its acts. Similarly, the government officials in Rwanda could claim that the aid provided to the Interahamwe was only to aid Interahamwe’s war effort against the Rwandan Patriotic Front and avoid responsibility. My humble opinion is that such a reasoning should not be permitted. This refusal is even more compelling when we realize that many of the potentially aided organizations are and are likely going to be rebel movements and insurgencies fighting in civil wars to gain power in their respective state. The aid provided to these organizations might make the balance tip in their favour, make them prevail in the conflict in which they are involved, and, eventually, form the government. As history shows, the past is never a stranger to the future so much so that these movements now in power could resume or continue the abuses wrought during the conflict they waged without any outside oversight due to the still-strong doctrine of sovereignty of the states. These excesses might in turn provoke another rebellious movement in the country and the whole process would be started all over again and no one would benefit from such a situation. The above demonstrates the weakness of the argument to the effect that there should be a difference between aiding crimes and aiding the war effort when an organization is involved in both of these matters.
I now turn to the argument to the effect that the arms dealer who simply wants to sell his merchandise only to make profits without supporting the purchaser’s aims should not be subject to criminal prosecution. If the vendor sold his weapons while being unaware of the commission of the crime or of the buyer’s intent to commit the crime or that it was almost inevitable that an international crime would occur, this proposition is right. However, if the vendor knew that the crimes were being committed or of the perpetrator’s criminal intent and that it was almost inevitable that the commission of the crime would ensue given this intent and other circumstances and it turned out that the arms had a substantial effect on the commission of the crime, I fail to see an injustice in holding him accountable.\footnote{This is what happened in the Van Anraat case where a Dutch businessman was convicted of complicity with war crimes after having provided chemicals used to make poison gas to a state which later used them to commit killings \cite{VanAnraatAppealJudgment}: Public Prosecutor v Frans Cornelis Adrianus van Anraat, Court of Appeal of The Hague, The Netherlands, Case number 2200050906-2, Appeal Judgment of 9 May 2007, online: International Crimes Database <http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Netherlands/vanAnraat_Appeal_Judgment_09-05-2007_EN.pdf>, aff’d Supreme Court of The Netherlands, Case number 07/10742, Judgment of 30 June 2009, online: International Crimes Database <http://www.asser.nl/upload/documents/2012129T050720-Van%20Anraat%20Supreme%20Court%20Judgment_30-06-09_NL.pdf>.) To me, this is the only reasonable outcome if we are serious in trying to prevent international criminality. It would be a small impediment put on his business activities in comparison to the harm to avoid. Indeed, the harm caused to him is the profit lost on deals that might cost the lives of hundreds, if not thousands, of people and money cannot outweigh life. In short, the right to prosper of one person cannot be stronger than the right to live in security of many. Plus, international crimes are most likely to be committed by militias, rebel movements, and other organizations involved in internal conflicts in unstable countries. Selling to these organizations, provided that the elements of complicity are satisfied, would be criminal. Logically, since these
organizations are usually not as large as and as well-funded as the different national armies, the profit lost by the arms dealers is likely to be low. The arms dealers can still sell to states with large armed forces and with formidable funds to equip them which deals are likely to produce bigger profits for the dealer. It would even be possible for these dealers to knowingly sell to countries or armies planning wars, provided that these wars are waged and started legally, without incurring any criminal liability. In view of the above, the profits that the arms dealers would lose, as well as the number of deals lost, because of the absence of specific direction in the aiding and abetting liability would be very low.

4.2.2. The subjective element

An ideal subjective element should be the following. If aid is given as the crime is being committed: actual knowledge or wilful blindness that the crime is being committed. If the aid is given before the crime is committed: actual knowledge or wilful blindness that the aided entity wanted to commit the crime (or, if it is not a crime requiring intent as mens rea, had the requisite mental element required by the definition of the aided crime) and it was almost inevitable that, in the normal course of events given notably the known intent of the perpetrator and other known relevant circumstances, the crime was going to be committed. For the purposes of this test, the commencement of the crime would be when any step is taken by the perpetrator which is known or cannot be ignored given the circumstances by the aider which indicates that the actus reus of an international crime is being committed by the perpetrator. This mental element is meant to be accurate, precise, and fair for the accused. It aims at preserving the guilt and legality principles while
making sure that deterrence and retribution are not forgotten. It is supposed to be pragmatic and workable in every circumstance regardless of the recipient of the aid. I explain each element further below.

First, a knowledge-based test appears to me to strike the right balance between fairness to the accused and values of deterrence and prevention dear to ICL. Of course, as I will discuss more thoroughly below, it cannot be said to be without flaws and shortcomings, but it is the least objectionable and the most workable standard that can be selected. This is clear when the other possible solutions are examined. To that effect, simple negligence or recklessness alone are not high enough standards: 1) they do not ensure that the guilt principle is abided by because they only ask for an absence of care about the potential foreseeable consequences of one’s conduct which is too much focused on the risk and not enough on the accused’s mindset, 2) it would be difficult with these mental states to condemn aiders of the same crime as the perpetrator if it is one that requires intent or specific intent, and 3) compounded with the randomness element found in causation (substantial effect requirement), they would not offer a degree of certitude high enough about the moral guilt of the aider. As for intent, it is too low a standard because it allows knowing aid to perpetrator of crimes which cannot be tolerated if the international community is serious in wanting to eradicate international criminality. Besides, knowledge upholds the guilt principle as it is hardly open for an aider who provided a contribution knowing that the crime was being committed or that the perpetrator wanted to commit the crime and that it was almost inevitable that, in the normal course of events, it would be committed to plead that he is morally innocent. I therefore conclude that,
from a theoretical and practical vantage point, the knowledge standard is the least objectionable and is the one which contains the most benefits compared to its downsides.

Second, the foregoing does not mean that knowledge alone is the answer to all problems or that recklessness should be left on the sidelines altogether. In fact, knowledge and recklessness can go hand-in-hand to ensure fairness and efficiency when the aid is given prior to the commencement of the commission of the crime. In such a case, the proposed mens rea overtly blends knowledge and recklessness because, as argued before, knowledge cannot be actual knowledge when the aided crime is committed at a time ulterior to the providing of the aid. In this situation, I cannot imagine how some element of recklessness could be avoided because it is impossible to know things in the future at 100% certainty. What is known of the future is what we expect will happen, but this is only a probability according to known circumstances; hence, the need for recklessness. But to be reasonable and fair, the recklessness side has to be grounded in what the aider knows when he provides his contribution and has to contain a heightened threshold of negligence. Otherwise, the accomplice liability would fall into arbitrariness and would likely violate the guilt principle. Thus, where the commission of the crime by the perpetrator has not yet started, the suggested mens rea uses enhanced recklessness grounded in knowledge: the aider has to know that the perpetrator wanted to commit the crime (the knowledge part) and that the crime would, in the normal course of events given notably the known intent of the perpetrator and other known relevant circumstances, almost inevitably be committed (the enhanced recklessness part). This notion of enhanced recklessness comes from the fact that what is required to satisfy it is more than simple
recklessness, which is that the aider knows about the risk and persists in the risk-generating conduct without caring whether the risk will materialize or not. In contrast, the enhanced recklessness requires knowledge of the risk (the perpetrator wants to commit the crime), persistence in the conduct generating it while knowing that it is *almost inevitable* that the risk will materialize (the commission of the crime). Also, this heightened recklessness is not evaluated generally given all the circumstances of the case, but in keeping with what the aider knew at the time he provided the aid. This mixed standard is meant to be compatible with general principles of law applicable in ICL. All in all, when the aid is provided before the commencement of the crime, the standard is still grounded in knowledge, but applied with enhanced recklessness in the only way that could make sense when the aid is prospective if we are to keep a knowledge-based *mens rea*.

Third, I suggest that the *mens rea* be adapted according to the time at which the contribution is given to the perpetrator by the aider. I agree that, ideally, the standard should be the same for all accomplices. This would instil predictability and certainty in the accomplice liability and would make sure that all aiders are treated alike. But this is impossible in the current circumstances since we have determined that knowledge is the most appropriate standard and that knowledge has to be allied with an element of recklessness when the aid is given before the commencement of the commission of the crime. Moreover, the appeal of a unified test should not override the necessary flexibility that any ICL mode of liability must enjoy and, in the particular case of complicity, the need for clarifications using elements that are applied taking into account the
The only way to reconcile these competing interests is to make sure that the test is essentially composed of constant elements that are fitted to the circumstances in which they are applied. This is towards what I aim by setting out a knowledge-based mental element applied according to the time at which the contribution is given. Such a way to proceed would clarify the situation and spell out how to apply the test depending on the circumstances of the case. To explain more clearly this point, I take the example of the mens rea developed by ICTY and the ICTR for the accomplice liability which is, generally speaking, the aider’s knowledge that the contribution assists in the commission of the crime. This element is constant and is applied in a way that, informally at least, pay due respect for the circumstances which influence the way it works. Sometimes, it is applied as actual knowledge of the crime being committed whereas, when the aid is given before the perpetrator’s crime is committed, it is applied as a form of recklessness, i.e. the aider should have known that the aid provided would contribute to the commission of the crime. These observations depict a mens rea test that is the same in every case, but is informally applied according to the circumstances in which the aid is provided. Rendering this modus operandi official is one of the goals of the test I propose. This is the only way to use the knowledge standard in a meaningful way in every case.

\[978\] This criterion is contained in the ad hoc tribunals’ statement to the effect that it is not necessary that the aider knows the specific crime committed by the perpetrator; rather, if he is aware that a number of crimes might be committed with the aid and one of them is in fact committed, he is guilty of having aided and abetted that crime.
Currently, the only divide ever proposed in the accomplice liability is the one found in the *Rome Statute*\(^979\) which operates through the *actus reus* by changing the elements of the said mode of liability depending on the nature of the recipient of the aid. The apparent logic of that divide is that usually group crimes tend to be of a larger-scale and easier to discover by the aider while crimes committed by non-group entity or a few individuals tend to be of a less extensive nature and easier to conceal; thus, the standard to obtain conviction is lower in the former case (any assistance provided knowing the criminal intent of the group as opposed to a substantial assistance provided to facilitate the commission of the crime). This reasoning omits to consider various factors. First, the nature of the aid is sometimes a more significant factor than to whom it is handed. For example, poisonous gas in the hands of a single individual might cause more damages than fuel put at the disposition of a group. Second, who received the aid is a distraction from the criminal conduct reproached to the aider. The only thing that should have an effect on the aider’s culpability should be what he did which is that he, with the relevant state of mind, aided the perpetrator to commit the crime. That the crime is ultimately committed by a group or a non-group perpetrator does not seem to justify a different standard to obtain conviction. For example, this division would make the same aid provided with the same intent criminal if transferred to a group, but innocent if transmitted to a non-group perpetrator. This is hardly justifiable. Third, this division does not take into account the often complex factual circumstances surrounding the commission of an international crime. Sometimes, because of the intricate web of individuals and intermediaries involved, the aider does not even know with certainty who will perpetrate the crime with his contribution. Fourth, the notion of group further

\(^{979}\) *Supra* note 29.
complicates the test and this problem is even more acute in the *Rome Statute*\textsuperscript{980} because the group has to have a common purpose to be qualified as such. For all these reasons, the standard should not vary according to the recipient of the aid.

Fourth, the knowledge requirement in the suggested *mens rea* should be interpreted as including wilful blindness. However, that should be done with great care to ensure that it is not perceived as an unreasonable expansion of the knowledge-based *mens rea* standard. I wish to explain how this compromise should be worked out with the guidance provided by the Supreme Court of Canada in *R v Briscoe*\textsuperscript{981}. In that judgment, the SCC emphasized:

> Wilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries.\textsuperscript{982}

As I understand this standard, the accused knew of certain facts which should have prompted him to inquire, but decides not to with a view to avoid gaining actual knowledge of the fact towards which what he knew pointed. The court argues that there is a clear-cut difference between that standard and recklessness, but the distinction might not be that definite. Generally speaking, the difference appears to be that wilful blindness involves a deliberate choice made in order to secure a specific consequence, which is to not know about something. But knowing certain things which point in a certain direction while avoiding to inquire can also be said to be recklessness: the person disregards obvious risks by deliberately doing something else than obviating to these risks. Inserting

\textsuperscript{980} *Supra* note 29.

\textsuperscript{981} *R v Briscoe*, 2010 SCC 13, [2010] 1 SCR 411, Charron J [*Briscoe*].

\textsuperscript{982} *Ibid* at para 21 [emphasis added].
that the choice not to inquire is deliberate does not negate that assertion because deliberate choices are involved in all situations denoting recklessness, for example, deliberately not refraining from or stopping the risk-generating conduct (which, in the case of wilful blindness, is in fact done when the person does not inquire). One is reckless because one knows about the risk of his conduct and deliberately chooses to persist in it therefore being wilfully blind to the risk. That the risk be hurting someone with a car or knowing something that the person knows he should not know changes little in the equation. In short, both recklessness and wilful blindness consist of disregarding obvious risk through a deliberate choice, whether this choice be omitting to inquire or persisting in the risky demeanor. The counterargument to this point of view would be to contend that although both notions implicate disregarding the known risk, wilful blindness is different because the risk is more obvious and certain and, in not inquiring about it, the person shows greater and more blamable recklessness than the regular recklessness of the accused who just knows about the risk and simply does something else than stopping its risky conduct. It could also be opposed that wilful blindness is different from recklessness in that it involves a choice (not inquiring) with a view to obtaining the occurrence of a discrete and defined consequence (not having actual knowledge) with an ultimate aim (being able to deny knowledge of a certain fact). One could reply that these elements can also be present in recklessness: the person makes a choice (not stopping its risky conduct) to obtain a result (continuing in the risky activity) with an end goal (obtaining the pleasure or benefits of the said activity). Nevertheless, I believe that there is merit to these counterarguments even though I remain dubious that they render wilful blindness entirely different from recklessness. Therefore, it is arguable that wilful
blindness is simply a particular instance of recklessness. This determination causes problem because we have already asserted that simple recklessness would be too low a standard. Therefore, the definition adopted by the SCC cannot be said to be entirely adequate for the purposes of the accomplice liability in ICL. In any event, even if it could be conclusively demonstrated that the SCC’s definition of wilful blindness is completely different than recklessness, I would not adopt it anyway because it does not comport with the enhanced recklessness standard argued for when the aid is given before the commencement of the commission of the crime. The threshold it puts in order to impute knowledge is too low and would unreasonably expand the scope of the suggested mens rea, undermine its knowledge foundation, and would impose upon aiders a cumbersome obligation to inquire on the basis of mere suspicions which would be excessive and unworkable and might paralyze international dealings.

In spite of these difficulties, I believe that my proposition is correct that the aider should not be able to claim absence of knowledge when all the circumstances that he knew pointed towards a fact so as to make him almost actually aware of that fact which he was not because of his failure to inquire. The best solution to make sure that wilful blindness does not become a too-easy exit for the accuseds while ensuring that negligence is not inserted in complicity through the backdoor is to use a modified version of the standard set out in Briscoe. To that effect, I unreservedly agree with and adopt the remarks made by the author Glanville Williams cited in Briscoe which imply a higher standard than simply having suspicions and not inquiring:

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983 Supra note 981.
984 Ibid.
The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. 985

This standard is higher because it calls for 1) the accused to be aware of circumstances so compelling that it can be almost be said that he actually knew of the fact about which he should have inquired (as opposed to mere suspicions) and 2) the accused had simply to obtain a final confirmation to get the fact straight and did not secure it to be able to deny knowledge later. Such a standard is definitely a move away from recklessness because the risk the accused disregarded was higher and the step to avoid it, easy and the mindset in doing so is more blameworthy than simply doing something else than inquiring. I am unsure that even with this higher threshold wilful blindness is totally exempt of recklessness, but I believe that this form of recklessness is more in line with the enhanced recklessness the features of which were outlined above. In effect, the modified version of wilful blindness blends knowledge and recklessness, the latter being of a higher degree than usual. The similarity between the modified version of wilful blindness and enhanced recklessness is noticeable in the language used which is respectively the following: “almost be said that the defendant actually knew” and “almost inevitable that the crime was going to be committed”. This modified standard for wilful blindness should not be interpreted as imposing a duty to inquire on all aiders so much so that they should proceed to a probe when the first suspicious circumstance comes to their knowledge. This would be very onerous to stakeholders in the field and would be unreasonable as it would

generate findings of knowledge too easily. To that end, the proposed wilful blindness framework should only come into play when all the circumstances known by the accused made it very probable (to the point that it is possible to say the accused almost actually knew) that the fact for which he should have inquired was a reality and that he deliberately omitted to conduct the inquiry, which was possible in the circumstances and would have easily confirmed the fact deliberately ignored. In any event, this new element cannot be said to be revolutionary or that it would bring massive changes in ICL. In fact, this is nothing more than reasonableness and common sense at work to prevent the problem of the accused using its own turpitude to escape conviction.

This discussion pertaining to the concept of wilful blindness should not overshadow that knowledge can still be imputed to the accused when all the circumstances of the case makes it logically impossible beyond reasonable doubt for the accused not to know about the specific fact for which knowledge is to be imputed. This notion is not a novelty either and is applied in the daily work of national and international courts.

The foregoing ways to ascribe knowledge to an accused should only be used in clear cases where there is no reasonable doubt about the adequacy of their application. These concepts are important as they make sure that it is not too easy for an accused to deny knowledge and get away with his deeds when he is morally blameable. What’s more, the wilful blindness concept is a positive addition to the accomplice liability because it clarifies the standard and thus bolsters the legality principle.
Fifth, I want to explain why, in situations where the aid is supplied before the commencement of the commission of the crime, the aider has to know the criminal intent of the perpetrator. First, I included this requirement so that the proposed *mens rea* remains knowledge-based in all circumstances. True, as stated above, when the crime has yet to be committed, the standard is a blend between knowledge and recklessness, but still knowledge is a mandatory part of the test so much so that its absence negates its fulfillment. Therefore, the test continues to put the necessary focus on the blamable mental state of the accused at the time of the aid. Second, recklessness only would create a significant discrepancy with the test usable when the commission of the crime has started. Third, without the knowledge part, the standard would be strongly criticized for permitting conviction for intent and specific-intent crimes with a recklessness-based *mens rea*. Fourth, the knowledge part makes sure that the standard respects the guilt principle while remaining aimed at prevention and deterrence. Finally, it has to be kept in mind that both the elements of the *mens rea* when the commission of the crime has not yet started mesh well in the sense that if the aider knows about the perpetrator’s intent to commit the crime it will be likely that the commission of the crime is almost inevitable and, conversely, if the commission of the crime is almost inevitable according to the circumstances known by the aider it will be likely because the latter knew about the perpetrator’s intent to commit the crime.

Sixth, values of predictability, certainty, and accuracy are at the core of the proposed *mens rea*. As stated above, the idea is to make it as easy as possible for the ICL stakeholders to deal with this mode of liability without having to speculate as to its
elements. This attempt at rationalizing and streamlining complicity will be said to be thwarted by the considerable amount of details found in the suggested mental element and by the fact that it can vary according to the time at which the help is awarded. This criticism is not without merit, but some complexity is the price to pay for accuracy of the chosen standard. Details have to be present to deal with complicated situations in an efficient and reasonable fashion. Further, the complexity of the definition is one thing, but the real damaging thing would be incoherence and uncertainty. The proposed mental element addresses these concerns by spelling out clearly what are the elements that the prosecution would have to prove beyond reasonable doubts in any given situation. The elements can be read and acted upon by the potential aiders which situation will make sure that they are not able to claim *ex post facto* that the legality principle is not adhered to because of all the intricacies and subtleties present in the concept of complicity do not appear in its legal definition.

4.2.2.1. Mixed-purpose organizations, counterarguments, and final observations

First, as announced above, the argument made by the defence team in *Taylor*\(^986\) to the effect that, before any conviction can be entered, the aider has to be aware that his contribution will have a substantial effect on the commission of the crime needs to be entertained. I considered adding this element in the proposed *mens rea* to reinforce the culpable link between the aid given and the crime perpetrated. I did not do so because it would almost be the same as requiring that the aid be specifically directed to the commission of the crime which solution I rejected for the reasons outlined above. Indeed, the difference is very tenuous between demanding that the aid be specifically directed

\(^{986}\) *Supra* note 35.
towards the commission of the crime and asking that the aider knows that his aid will have a substantial effect on the commission of the crime. Arguably, specific direction is stricter than knowing of the substantial effect, but in the end the difference is too small to avoid the downsides explained above for specific direction. Also, this new criterion would also bring back the concerns about the randomness of causation and about the recklessness included in the notion of knowledge when applied to things occurring in the future. These could probably be dealt with with the mechanisms discussed above, but it is better to avoid using these concepts in a too extensive fashion. Finally, the mens rea might become too complicated with this element to such a point that it would be difficult for stakeholders in the field to apply it.

Second, it is important to fully acknowledge the oft-made criticism to the effect that the knowledge standard is, for some crimes, lower than the mental element needed to obtain conviction of the perpetrator; yet, both the aider and the perpetrator are convicted of the same crime. This is of course an issue that should be tackled, but that my approach does not touch. As made clear above, it would be a herculean task to come up with an approach that could solve all the quandaries involved in complicity and that is not the aim of the present thesis. Rather, I tried to concentrate on the most pressing issues that warranted immediate attention. With that in mind, two comments must be made. First, although it is probably not the most suitable outcome that the aider is convicted of the same crime as the perpetrator, the link between the crime and the aider as defined by the suggested mens rea (the latter knowingly aided the commission of the former) partially vindicates such a state of affairs to the extent that it cannot be contended to be completely
inappropriate to convict the aider of the aided crime in these circumstances. Second, it is noteworthy that the convicted aider will receive a punishment commensurate to his involvement in the crime and that takes into account all his personal circumstances including the fact that he aided the crime as opposed to committing it. In that sense, it is firmly established in the jurisprudence of the ad hoc tribunals that the aider/abettor will be meted out a lighter punishment than the perpetrator himself. Otherwise, this problem could be eradicated by amending the statutes of the international tribunals so that modes of liability be inserted within the disposition part of the judgments and that punishments be formally tailored as per the modes of liability through which the crime was committed.

Third, as for the argument under which it is said that a knowledge-based mens rea is overly prohibitive and inadequate when it comes to aid provided to a group with lawful and unlawful purposes, at the risk of repeating myself, I must dismiss it, for I fail to see how it would be unfair to punish knowing assistance to crimes even though the perpetrator might otherwise be acting lawfully. Some will buttress the contrary view taking the example of group crimes in the national setting suggesting that knowing that the group is committing a crime does not make neutral contribution to it criminal as well. Such an argument overlooks the nature of ICL and of international crimes. In an internal setting, it might be defendable that the banker who lends money to the mafia knowing its criminal activities, but with no intent to further or facilitate them, should not be prosecuted for aiding the importation of drugs by the same group. However, that thinking scheme cannot be transferred to aid provided to groups conducting large-scale international core crimes when the same are known by the aider. All knowing or very
recklessly provided aid that has a substantial effect on the commission of the crimes by these groups should be prohibited simply because their deeds make them what Andrea Reggio calls “the enemy of mankind”.987 Obviously, blanket rules are not always applicable in reality and that is why I notably proposed the exception when humanitarian purposes justify the aid to criminal groups even though their crimes are known by the aider. However, I reiterate that the lawful activities of the group should not prevent the application of the law to punish the unlawful ones.

Fourth, some will argue that the recklessness element contained in the second application of my mens rea standard (knowledge and enhanced recklessness) and in the wilful blindness concept unreasonably lowers the threshold and is not appropriate in ICL. I disagree. On the one hand, the recklessness I propose is grounded in the knowledge of certain specific circumstances by the accused, notably the perpetrator’s intent to commit the crime, which makes it fair for the accused. On the other hand, what I propose, whether it pertains to the suggested mental element or to wilful blindness, is not simple recklessness, but an enhanced version of recklessness. To that end, the crime must have been almost inevitable according to what the aider knew when he provided the aid and, in the case of wilful blindness, the accused must have refrained from getting the final confirmation of what he practically knew in order to be able to use the absence of knowledge as a defence and thus must have intended to cheat the administration of justice. These elements demonstrate that simple recklessness is not what I argue for although it is undeniable that it is a component of the proposed approach. Even if I am wrong as to the foregoing, the requirement that the aider knows about the perpetrator’s criminal intent

987 Supra note 23.
would strongly mitigate the concerns about the recklessness element present in the suggested \textit{mens rea}. In any event, as I argued above, knowledge is the only apposite \textit{mens rea} for complicity in ICL and, when it is applied to crimes committed after the aid is provided, recklessness cannot be obviated.

Fifth, consideration has to be given to the argument made by the defence team in \textit{Taylor}\textsuperscript{988} to the effect that a recklessness standard would criminalize almost any substantial aid provided to any party involved in any war as it is generally recognized that such a circumstance makes it very likely that crimes will be committed. Such a criticism would be valid if only recklessness was the standard. However, that is not the case of the proposed \textit{mens rea}. Rather, with the suggested mental element, the aider has to have actual knowledge or be wilfully blind to the commission of the crime or, if the aid is provided prior to the commission of the crime, have knowledge or be wilfully blind that the aided entity wanted to commit the crime while it was almost inevitable that the crime would be committed according to the circumstances known by the aider. Therefore, with the suggested \textit{mens rea}, the aider can support parties involved in war in many ways without being at risk of being prosecuted for it: 1) by providing insubstantial aid, 2) if he has not actual knowledge and is not wilfully blind to the crime being committed by the perpetrator, 3) if he does not know and is not wilfully blind to the perpetrator’s desire to commit the crime, 4) even if he knows about this desire, if it is not almost inevitable that the crime will be committed given the other circumstances of the case known by him. In this context, the fulfillment of the mental element would not be automatic and would require the adducing of proof by the prosecution.

\textsuperscript{988} \textit{Supra} note 35.
Sixth, some will say that enhanced recklessness alone would be a high enough standard, would the best for deterrence and prevention purposes, and would respect the guilt principle. I disagree. It might be the best for deterrence and prevention, but these values cannot infringe on the interests protected by the guilt principle. More specifically, adopting such a standard would allow the conviction of aiders that did not intend to help the perpetrator, did not know about his criminal intent, and who supplied aid that turned out to have a substantial effect on the commission of the crime. Providing the aid when the commission of the crime is almost inevitable is surely a condemnable practice, but I remain convinced that knowledge of the perpetrator’s criminal intent should be found on the part of the aider before convicting him. Also, I reiterate the concerns expressed above that if knowledge is chosen as the basis of the mens rea then the second application of the proposed mental element (when the aid is provided before the commencement of the commission of the crime) must contain the element about the knowledge of the intent of the perpetrator. Otherwise, two bases (knowledge and recklessness) would coexist in the same mental element which would damage its coherence. Moreover, formally requesting only recklessness in a test for complicity would be contrary to the main position in ICL which requires knowledge and, thus, would run afoul of the concerns for stability of the law to which I have professed my allegiance at the outset of the current chapter.

Seventh, some will argue that requiring that the aider knows the criminal intent of the perpetrator sets the bar too high because it allows an easy defence to aiders who provided the aid when the commission of the crime was almost inevitable. This is one reason why I formally introduced the notion of wilful blindness in the test so that the aider cannot
abusively deny knowledge of the perpetrator’s criminal intent and get away with his deleterious behaviour. Therefore, if it is quite obvious that the perpetrator has aims to commit the crime, but the aider does not inquire to be able to deny knowledge of the intent to commit the crime, wilful blindness will come and impute knowledge to the aider and satisfy the requirement. This knowledge will also be imputed to the aider if all the circumstances of the case point towards him knowing about the perpetrator’s intent so much so that it was not possible, beyond reasonable doubts, for him not to know about it.

To conclude, the suggested mental element is not meant to be revolutionary. Rather, it is designed to systematize and streamline one of the major mens rea standards currently used in ICL, knowledge, which I adopted for the above mentioned reasons. The proposed mens rea is not presented as and is not intended to be a magical formula that will solve all and any problems and difficulties inherent when it comes to blame people other than the perpetrator of the crime himself. Rather, I tried to determine the less objectionable approach that could ensure deterrence and prevention, be workable and respect the founding principles of criminal law, and be fair to the accuseds. In this complicated and by no means painless quest, I wanted to overhaul and clarify a solution that has, generally speaking, worked well in the past.
5. CHAPTER 5: CONCLUSION

To sum up the content of this thesis, in the second chapter, I retraced chronologically the evolution of the concept of complicity. To do so, I evaluated the interpretation of the concept of complicity by the post-WW2-era tribunals, the ad hoc tribunals, and the ICC. As for the post-WW2-era jurisprudence, complicity was mainly interpreted as a knowingly provided aid. That jurisprudence is a major source in order to decipher the content of customary international law on complicity and was interpreted by modern-day ICL tribunals as containing additional elements apparently to suit the interpretative needs of these tribunals, but none of these custom assessments were compelling in credibly showing elements other than an aid knowingly provided. I therefore concluded that the custom gives scant guidance to contemporary tribunals when it comes to finding an acceptable definition of the concept of complicity workable in today’s circumstances.

Concerning the jurisprudence issued by the ad hoc tribunals, the concept of complicity was generally interpreted as an aid having a substantial effect on the commission of the crime provided with knowledge that the aid assists in the commission thereof. Underneath this apparent uniformity, every tribunal struggled with one issue that undermined the apparent solidity of the concept. For the ICTY and ICTR, the issue was whether the aid provided had to be specifically directed towards the commission of the crime by the perpetrator. For the SCSL, it was the presence of an unprecedented element in its mens rea, the aider’s awareness of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator, which was placed there without any explicit justification. Similarly, for the STL, the mens rea of complicity was replete with incertitudes, contradictions, and uncertainties that rendered its interpretation troublesome.
With respect to the ICC, the concept of complicity has been adapted to two scenarios each one of them having its own legal standard: 1) the aid given to a non-group perpetrator, 2) the contribution given to a group acting with a common purpose. The jurisprudence about the former is, as of January 2015, not very elaborated whereas the latter was examined by only one decision following a full-length trial. Nonetheless, as for the first form of complicity, the plain reading of the relevant article informed that an aid or abetment given with the intent to facilitate the commission of the crime will probably be part of the forthcoming definition. On the actus reus side, a divide might be on the horizon as two obiter dicta suggested that the substantial effect on the commission of the crime requirement might have to be considered in the analysis while two judgments hinted that a mere effect on the commission of the crime fulfills the standard. As for the second form, the same exercise and the analysis of the available jurisprudence showed that a significant contribution to the commission of a crime committed by a group acting with a common purpose while being aware of the group’s intent to commit the crime might be the least demanding of the available standards to obtain a conviction under this mode of liability. Two issues arose out of the ICC jurisprudence: 1) the nature of the aid and of the contribution provided to the perpetrator and 2) the mental element needed when the aided perpetrator is a group acting with a common purpose. In the third chapter, I first reviewed what the major books in the field of ICL have said about the concept of complicity and then explained the theory of some authors who put forward innovative and thought-provoking new ideas about the same concept. I carefully considered their propositions, but rejected the integral importation in ICL of each and every one of them while recognizing the propriety of certain criticisms made and of some parts of their
analyses. In the fourth chapter, I set out my own definition of what could be an ideal concept of complicity for ICL. In doing so, I dealt with the objective and subjective elements separately. As to the objective element, I worded it as an assistance that had a substantial effect on the commission of the crime and rejected the need for that assistance to be specifically directed towards the commission of the crime. As to the subjective element, I explained that it should vary depending on when the aid is given to the perpetrator. If the aid is given while the crime is being committed, the mens rea should be actual knowledge or wilful blindness that the crime is being committed. If the aid is given before the crime is committed, the standard should be actual knowledge or wilful blindness that the aided entity wanted to commit the crime and that it was almost inevitable that the crime was going to be committed. I concluded my argumentation by saying that, while assuredly not perfect, the proposed test was submitted in order to systematize and clarify the accomplice liability while respecting fundamental values of ICL and be fair to the accuseds.

It is unquestionable that the currently fragmented ICL notion of complicity needs to be streamlined so that well-deserved comments like that of Manuel J. Ventura cannot be made in the future:

Having said all of this, what are the accused supposed to make of the situation? What does Taylor make of this in his cell in the United Kingdom and Perišić in his freedom in Serbia? In my view, a divergence such as this one gives the distinct impression that liberty at international criminal law is akin to a game of Russian roulette. If one strips away the law, expensive lawyers, robes and Latinisms and reduce the split between Perišić and Taylor to its core you end up with the following conclusion: find yourself at the ICTY you will be found not guilty, but find yourself at the SCSL and you will be found guilty on essentially the same facts under exactly the same mode of liability. It is really not that much different from Perišić and Taylor flipping a coin. International criminal law should not be reduced to a mere game of chance. It is hard to conclude that justice has been done in these
circumstances: either the victims have been shortchanged in Perišić or Taylor is spending far more time in jail than he should.989

The fundamental value of individual freedom requires nothing more than the most serious measures to ensure that like cases receive like treatment. It is in that spirit that I proposed a reform in the law of complicity applicable all throughout ICL which would preclude the situation alluded to by Mr. Ventura from happening. My idea is clear: no aid that has a substantial effect on the commission of the crime transferred knowingly or very recklessly to the perpetrator can be tolerated. Some will argue that it is too large, but, given the interests at stake and the current state of international affairs, I do not think that the world can afford to do otherwise. After all, what ICL protects is the values most dear to humankind such as the right to life, to live in security, and to be free from persecution. This reality requires appropriate measures that are strong and clear. In these circumstances, my approach dictates without ambiguity what is the conduct prohibited so that reading the provision would immediately put on notice any stakeholder in the field which promotes fairness and predictability.

All things considered, complicity is a difficult problem which posits many challenges. It is illusory to think that it is possible to find one perfect solution that will solve all the problems plaguing it. All solutions have problematic downsides and are not satisfactory in some respect simply because analyzing complicity is a complicated and delicate task. The goal is to try to think outside of the box to find the less imperfect solution that


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addresses a maximum of concerns. What I tried in my text is to pinpoint certain problems about complicity and give an acceptable solution, but I do not pretend that my proposition settles all issues. In all propositions about complicity, there will be obscurity and grey zones which might prompt detractors to say that a new proposition is not suitable. However, one of the strengths of my approach is that, through its pragmatic side, it harbours a strong concern for people in the field who have to work with ICL in their daily job like military commanders, politicians, and business leaders. But, as mentioned above, no approach will be exempt of ambiguities and its contours will always need to some extent to be delineated by the courts. The goal of the proposed approach is to make sure that the uncertainty is reduced to a reasonable degree.

Our world is in a transition period between the international setting arising out of the Second World War and the next phase which will probably be a multipolar world with more than one superpower. These big players will compete over the globe for influence in the geopolitical battles characterising these kinds of world context which we have seen many examples in the past (notably from 1870 to 1914). This will surely involve aiding diverse groups in various parts of the world whose aims will suit those of the said superpowers. We are now in the beginning of this phase\textsuperscript{990} which will ramp up in the coming years so much so that it is the ideal time for the world community to agree on common rules for the race to come. In these circumstances, the present call for legal reform should come as no surprise and is the simple application of the well-known

\textsuperscript{990} See notably the situation in Libya, Syria, Egypt, Yemen, Iraq, Ukraine.
dictum issued almost 70 years ago by IMT in Nuremberg “[t]his law [international law] is not static, but by continual adaptation follows the needs of a changing world”. 991

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