
INTERNATIONAL CRIMINAL LAW — ACCESSORY LIABILITY —
SPECIAL COURT FOR SIERRA LEONE REJECTS “SPECIFIC DI-
RECTION” REQUIREMENT FOR AIDING AND ABETTING VIOLA-
TIONS OF INTERNATIONAL LAW. — *Prosecutor v. Taylor*, Case No.
SCSL-03-01-A, Judgment (Spec. Ct. for Sierra Leone Sept. 26, 2013).

Individual criminal liability for aiding and abetting violations of the laws of nations is “firmly established”¹ as “one of the core principles”² of customary international law.³ Less clear is what conduct aiding-and-abetting liability reaches.⁴ Recently, in *Prosecutor v. Taylor*,⁵ the Appeals Chamber of the Special Court for Sierra Leone (SCSL) upheld the conviction of former Liberian President Charles Taylor for aiding and abetting eleven violations of international law perpetrated by armed rebels during the Sierra Leone Civil War.⁶ In affirming Taylor’s conviction, the Appeals Chamber declined to adopt the more exacting actus reus requirement for aiding-and-abetting liability endorsed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Perišić*.⁷ Whereas the *Perišić* Appeals Chamber held that aiding-and-abetting liability is appropriate only where a defendant has “specifically directed” aid toward a particular crime,⁸ the SCSL Appeals Chamber allowed liability to attach upon a showing that Taylor’s provision of assistance to Sierra Leonean rebels had a “substantial effect” on the latter’s commission of violations of international law.⁹ While the *Taylor* chamber properly concluded that “specific direction” is not an actus reus element of aiding and abetting under customary international law,¹⁰ the vague nature of the “substantial effect” test remains a troublesome feature of the *Taylor* formulation.

In March 1991, Foday Sankoh’s Revolutionary United Front (RUF) launched an insurgency in Sierra Leone, seeking to overthrow the government of then-President Joseph Momoh.¹¹ For eleven years, RUF

¹ *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 274 (2d Cir. 2007) (Katzmann, J., concurring).

² *Id.* at 273.

³ See GERHARD WERLE, *VÖLKERSTRAFRECHT* 185 (2d ed. 2007).

⁴ See Christopher Jenks, International Decision, *Prosecutor v. Perišić*, 107 AM. J. INT’L L. 622, 624–25 (2013).

⁵ Case No. SCSL-03-01-A, Judgment (Spec. Ct. for Sierra Leone Sept. 26, 2013), <http://www.sc-sl.org/LinkClick.aspx?fileticket=t14fjFP4jJ8=&tabid=191>.

⁶ See *id.* ¶ 708.

⁷ Case No. IT-04-81-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013), http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf.

⁸ *Id.* ¶ 43.

⁹ See *Taylor*, Case No. SCSL-03-01-A, Judgment, ¶¶ 502, 526–27, 540.

¹⁰ *Id.* ¶ 481.

¹¹ LANSANA GBERIE, *A DIRTY WAR IN WEST AFRICA* 59 (2005).

fighters brutalized the country, using forced labor and child abduction to fuel their military objectives while terrorizing the civilian population with mass amputations, sexual violence, and indiscriminate murder.¹² During the closing years of the Sierra Leone Civil War, the RUF relied “heavily and frequently” on shipments of weapons and ammunition furnished or orchestrated by Taylor,¹³ who had provided the RUF with operational and logistical support throughout the war.¹⁴

The RUF was defeated by a British military intervention in 2000.¹⁵ In response to a request by Sierra Leonean President Ahmed Kabbah,¹⁶ the U.N. Security Council endorsed the establishment of a special court to try those who had perpetrated war crimes during the Sierra Leone Civil War.¹⁷ In March 2003, the resulting SCSL, authorized to prosecute serious violations of international law committed in Sierra Leone after November 1996,¹⁸ approved Taylor’s indictment on a number of war crimes.¹⁹ The indictment helped to destabilize the Taylor regime.²⁰ In August 2003, an embattled Taylor abdicated as President of Liberia and departed for Nigeria,²¹ where he lived in exile until delivered into the custody of the SCSL in March 2006.²²

Taylor’s trial opened in June 2007 in The Hague,²³ where he faced charges of five war crimes,²⁴ five crimes against humanity,²⁵ and one serious violation of international humanitarian law²⁶ pursuant to article 6(1) of the Statute of the Special Court for Sierra Leone.²⁷ Prose-

¹² See MYRIAM DENOV, CHILD SOLDIERS: SIERRA LEONE’S REVOLUTIONARY UNITED FRONT 63–64 (2010); GBERIE, *supra* note 11, at 126–30, 134–35.

¹³ Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement, ¶ 6914 (Spec. Ct. for Sierra Leone May 18, 2012), <http://www.sc-sl.org/LinkClick.aspx?fileticket=k%2bo3KREPCQ%3d&tabid=159>.

¹⁴ See *id.* ¶¶ 6927–45; COLIN M. WAUGH, CHARLES TAYLOR AND LIBERIA 342 (2011).

¹⁵ See GBERIE, *supra* note 11, at 173–75.

¹⁶ *Id.* at 208–09.

¹⁷ See S.C. Res. 1315, ¶ 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

¹⁸ Statute of the Special Court for Sierra Leone, art. 1(1), Jan. 16, 2002, 2178 U.N.T.S. 145.

¹⁹ See Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Indictment (Spec. Ct. for Sierra Leone Mar. 7, 2003), <http://www.sc-sl.org/LinkClick.aspx?fileticket=afhF3nXfc%2bY%3d&tabid=159>.

²⁰ GBERIE, *supra* note 11, at 213.

²¹ JEREMY I. LEVITT, THE EVOLUTION OF DEADLY CONFLICT IN LIBERIA 237 (2005).

²² See WAUGH, *supra* note 14, at 277–86.

²³ *Id.* at 340.

²⁴ Terrorism, murder, outrages upon personal dignity, cruel treatment, and pillage. Prosecutor v. Taylor, Case No. SCSL-03-01-I, Amended Indictment, at 2–5, 8 (Spec. Ct. for Sierra Leone Mar. 17, 2006), <http://www.sc-sl.org/LinkClick.aspx?fileticket=VIfMuLYvYs4=&tabid=159>.

²⁵ Murder, rape, sexual slavery, other inhumane acts, and enslavement. *Id.* at 3–4, 6–7.

²⁶ Conscripting and use of child soldiers. *Id.* at 6.

²⁷ Statute of the Special Court for Sierra Leone, art. 6(1), Jan. 16, 2002, 2178 U.N.T.S. 145. Although “it [was] undisputed that [Taylor’s National Patriotic Front of Liberia] was strongly implicated in the early activities of the RUF,” WAUGH, *supra* note 14, at 342, the SCSL’s limited jurisdiction — over only those abuses committed after November 1996 — forced the prosecution to

cutors argued Taylor's responsibility for the eleven substantive violations on several distinct theories of liability.²⁸

In May 2012, a unanimous three-judge SCSL Trial Chamber convicted Taylor for all eleven violations on an aiding-and-abetting theory.²⁹ Writing jointly, Justices Lussick, Doherty, and Sebutinde found that Taylor supplied the RUF with weapons, ammunition, personnel, and operational and moral support, without which the RUF could not have sustained its military operations.³⁰ Because Taylor was aware of the RUF's "systematic campaign of crimes against civilians,"³¹ the justices concluded that Taylor knew his support would aid the commission of those crimes and found Taylor guilty of aiding and abetting the RUF's widespread violations of international law.³² The Trial Chamber sentenced Taylor to fifty years of imprisonment.³³

The Appeals Chamber affirmed.³⁴ Justices King, Ayoola, Winter, Kamanda, and Fisher unanimously rejected Taylor's contention that the Trial Chamber erred in omitting from its definition of aiding and abetting an actus reus requirement that an accused party direct assistance toward a specific crime.³⁵ After independently reviewing the post-World War II jurisprudence and the decisions of the ad hoc international criminal tribunals,³⁶ as well as state practice and the Inter-

prove a more recent connection between Taylor and the RUF, for which evidence was weaker. *See id.* at 262–63, 343–48.

²⁸ The prosecution urged that Taylor was (1) directly responsible for planning and ordering particular atrocities in Sierra Leone; (2) liable for the RUF's widespread violations on joint-criminal-enterprise and command-responsibility theories of liability; and (3) liable as an accessory, having instigated and aided and abetted the RUF's commission of violations. Prosecution Final Trial Brief ¶¶ 571–661, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T (Spec. Ct. for Sierra Leone Apr. 8, 2011), <http://www.sc-sl.org/LinkClick.aspx?fileticket=1BfEpKZVfW%3d&tabid=107>.

²⁹ *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgment, ¶ 6994 (Spec. Ct. for Sierra Leone May 18, 2012), <http://www.sc-sl.org/LinkClick.aspx?fileticket=k%2bo3KREPCQ%3d&tabid=159>. Additionally, having found that Taylor helped to design an RUF campaign to capture the Sierra Leonean capital in 1999, the Trial Chamber held Taylor responsible on a planning theory of liability for the slaughter and mutilation of thousands of civilians at RUF hands during the offensive. *See id.* ¶¶ 6954–71. The justices determined, however, that Taylor neither shared the RUF's purpose of "terroriz[ing] the civilian population of Sierra Leone," *id.* ¶ 6896 (internal quotation mark omitted), nor exercised control over the rebel group, and acquitted Taylor of the violations on the joint-criminal-enterprise, command, and ordering theories of liability, *see id.* ¶¶ 6887–900, 6973–86. Having convicted Taylor for the RUF's crimes on an aiding-and-abetting theory, the justices declined to find that he instigated those same crimes. *Id.* ¶ 6972.

³⁰ *Id.* ¶¶ 6913, 6915, 6924, 6937; *see also id.* ¶¶ 6907–53.

³¹ *Id.* ¶ 6969.

³² *See id.* ¶¶ 6947–53.

³³ *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Sentencing Judgment, at 40 (Spec. Ct. for Sierra Leone May 30, 2012), <http://www.sc-sl.org/LinkClick.aspx?fileticket=U6xCITNg4tY%3D&tabid=53>.

³⁴ *See Taylor*, Case No. SCSL-03-01-A, Judgment, ¶ 708.

³⁵ *See id.* ¶¶ 357, 362.

³⁶ Formally, the decisions of international tribunals do not bind subsequent tribunals, which independently ascertain and apply customary international law. *See, e.g., Prosecutor v. Brima*,

national Law Commission's Draft Code of Crimes (ILC Draft Code), the Appeals Chamber concluded that "specific direction" is not an *actus reus* requirement for aiding and abetting under customary international law.³⁷ The Appeals Chamber distinguished *Perišić* on the ground that the *Perišić* Appeals Chamber was "applying internally binding [ICTY] precedent," not customary international law.³⁸ The *Taylor* Appeals Chamber concluded that a defendant, if aware of the elements of an underlying offense and the "substantial likelihood" that his actions or omissions would assist the commission of that offense,³⁹ could be responsible for the crime if he did in fact provide "practical assistance, encouragement, or moral support" to the perpetrator that had a "substantial effect" upon the underlying offense.⁴⁰

Case No. SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, ¶¶ 24–25 (Spec. Ct. for Sierra Leone Apr. 1, 2004), <http://www.sc-sl.org/LinkClick.aspx?fileticket=f7SEdl6ocgs=&tabid=157>. However, the infrequency of interstate interaction in international criminal law — which, unlike much customary international law, governs the conduct of individuals — complicates efforts to ascertain customary norms through traditional means. See Larissa van den Herik, *Using Custom to Reconceptualize Crimes Against Humanity*, in JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 80, 100 (Shane Darcy & Joseph Powderly eds., 2010). In this context, international criminal tribunals rely extensively on previous judicial decisions when confronted with ambiguities in the law. See *id.* at 102; cf. Theodor Meron, Comment, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 819–20 (2005) ("[O]ne can discern perhaps the outlines of an informal *stare decisis* principle . . ."). As the few relevant expressions of *opinio juris* have advanced divergent formulations of aiding and abetting, compare, e.g., Rome Statute of the International Criminal Court art. 25(3)(c)–(d), July 17, 1998, 2187 U.N.T.S. 90, with Draft Code of Crimes Against the Peace and Security of Mankind art. 2(3)(d), Rep. of the Int'l Law Comm'n, 48th Sess., May 6–July 26, 1996, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10 (1996), available at http://legal.un.org/ilc/documentation/english/A_51_10.pdf, judicial formulations of accomplice liability in the opinions of post-World War II tribunals, as well as the jurisprudence of the ad hoc tribunals, enjoy particular deference, see, e.g., Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement, ¶¶ 194–220 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjud/en/tad-aj990715e.pdf>.

³⁷ *Taylor*, Case No. SCSL-03-01-A, Judgment, ¶¶ 474–75.

³⁸ *Id.* ¶ 476.

³⁹ *Id.* ¶ 403 (quoting Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 486 (Spec. Ct. for Sierra Leone May 18, 2012), <http://www.sc-sl.org/LinkClick.aspx?fileticket=%2bo3KREPCQ%3d&tabid=159>).

⁴⁰ *Id.* ¶ 353 (quoting *Taylor*, Case No. SCSL-03-01-T, Judgment, ¶ 482). Justice Fisher authored a concurring opinion, joined by Justice Winter, in which she sharply defended the majority's analysis of aiding-and-abetting liability under customary international law. See *id.* ¶¶ 709–21 (Fisher, J., concurring). On appeal, Taylor had argued that without a "specific direction" requirement, aiding-and-abetting liability would attach to activities "carried out by a great many States in relation to their assistance to rebel groups or to governments . . . well known to be engaging in crimes." Transcript of Oral Hearing at 49,896, Prosecutor v. Taylor, Case No. SCSL-03-01-A (Spec. Ct. for Sierra Leone Jan. 22, 2013), <http://www.sc-sl.org/LinkClick.aspx?fileticket=VIAPYoncE04%3d&tabid=160>. Justice Fisher dismissed Taylor's allegation and characterized the argument as conflating "international law-breaking" and "customary law-making," *Taylor*, Case No. SCSL-03-01-A, Judgment, ¶ 716 (Fisher, J., concurring), which "interjected a political and highly inappropriate conceit into [the] proceedings." *Id.* ¶ 717.

The *Perišić* and *Taylor* formulations reflect a desire to define the physical elements of aiding and abetting in a way that constrains the broad reach of recklessness-based complicity liability.⁴¹ While the SCSL correctly declined to adopt the “specific direction” element, which lacks sufficient support in customary international law, the importance of restraining discretion in international aiding-and-abetting law suggests a shortcoming in the SCSL’s reliance on a vague “substantial effect” requirement as the lone physical limitation on complicity liability. Though the *Taylor* disposition was uncontroversial due to the Trial Chamber’s finding that Taylor’s aid was a condition *sine qua non* of the RUF’s crimes,⁴² the opinion leaves undefined the distinction between innocent and culpable aid in cases where the provision of assistance is not essential to the commission of an underlying offense.

The unique challenges of international criminal law enforcement demand clarity of those rules and standards that seek to limit complicity liability. Definite rules of law further the principle of legality by constraining discretion.⁴³ While judicial discretion is often accepted in domestic law,⁴⁴ where the adjudication of criminal-law standards proceeds in the context of “a mature political or legal system that lends legitimacy to [the domestic] criminal process,”⁴⁵ the enforcement of international criminal law through international courts lacks such a strong legitimizing foundation.⁴⁶ The absence of such a foundation is exacerbated by international criminal law’s particular vulnerability to criticism of selective enforcement.⁴⁷ As legitimacy is vital to the realization of the human-rights and transitional-justice objectives of international criminal law, the desirability of avoiding standards that give tribunals wide discretion is heightened in the international context.⁴⁸

Mindful of these challenges, tribunals have long recognized the need to restrict the scope of complicity liability by drawing “a line

⁴¹ The SCSL has explicitly recognized *dolus eventualis* as the requisite mens rea for aiding and abetting. See *Taylor*, Case No. SCSL-03-01-A, Judgment, ¶ 438. Although the International Criminal Tribunal for Rwanda and the ICTY formally require a mens rea of knowledge, see ELIES VAN SLIEDREGT, *INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW* 174 (2012), the case law suggests that both tribunals “have implicitly acknowledged *dolus eventualis* or recklessness as a sufficient mens rea for aiding and abetting.” FLAVIO NOTO, *SECONDARY LIABILITY IN INTERNATIONAL CRIMINAL LAW* 135 (2013); see also *id.* at 126–27.

⁴² See *Taylor*, Case No. SCSL-03-01-T, Judgment, ¶ 6914.

⁴³ See *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966); Fiona de Londras, *Terrorism as an International Crime*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW* 169, 169 (William A. Schabas & Nadia Bernaz eds., 2011).

⁴⁴ See, e.g., *Nash v. United States*, 229 U.S. 373, 377 (1913).

⁴⁵ Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 96 (2005).

⁴⁶ See *id.* at 96–97.

⁴⁷ See ROBERT CRYER, *PROSECUTING INTERNATIONAL CRIMES* 198 (2005).

⁴⁸ See Danner & Martinez, *supra* note 45, at 97.

somewhere at which indictable criminality must stop.”⁴⁹ As the ICTY and SCSL have conclusively rejected “purpose” as the necessary mental state for aiding and abetting,⁵⁰ the physical elements of aiding and abetting provide tribunals with the only means to ensure that the criminal law does not extend to de minimis contributions to an underlying crime.⁵¹ The *Perišić* Appeals Chamber sharply limited liability with “specific direction,” requiring evidence of a strong connection between the provision of assistance and the commission of an underlying offense.⁵² The *Taylor* Appeals Chamber emphasized that “specific direction” was redundant because the “firmly entrenched”⁵³ requirement that aid have a “substantial effect” on the commission of the underlying crime adequately constrained the scope of criminal liability.⁵⁴

As the *Taylor* Appeals Chamber emphasized, the “specific direction” requirement lacks strong foundation in customary international law. The requirement originated as an *obiter dictum* in the 2001 opinion of the ICTY Appeals Chamber in *Prosecutor v. Tadić*,⁵⁵ which mentioned the terminology while distinguishing aiding-and-abetting from joint-criminal-enterprise liability.⁵⁶ No court prior to *Tadić* had held “specific direction” to be a customary element of aiding and abetting;⁵⁷ on the contrary, the post-World War II courts eschewed such a requirement.⁵⁸ In the wake of *Tadić*, every chamber to address aiding-

⁴⁹ United States v. Pohl, 5 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 958, 1004 (1950); see also *Prosecutor v. Perišić*, Case No. IT-04-81-T, Judgment, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011) (Moloto, J., dissenting), http://www.icty.org/x/cases/perisic/tjug/en/110906_judgement.pdf.

⁵⁰ See NOTO, *supra* note 41, at 135.

⁵¹ Cf. WAYNE R. LAFAVE, CRIMINAL LAW 716–18 (5th ed. 2010) (describing U.S. courts' efforts to restrain knowledge-based accomplice liability).

⁵² See *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgment, ¶¶ 38–40, 44 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013), http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf.

⁵³ NOTO, *supra* note 41, at 84; see also *Taylor*, Case No. SCSL-03-01-A, Judgment, ¶ 390 n.1231 (collecting cases).

⁵⁴ See *Taylor*, Case No. SCSL-03-01-A, Judgment, ¶ 480.

⁵⁵ Case No. IT-94-1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>; see also *Perišić*, Case No. IT-04-81-A, Judgment, ¶ 2 n.5 (Liu, J., dissenting in part).

⁵⁶ See *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 229.

⁵⁷ See James Stewart, “Specific Direction” is Unprecedented: Results from Two Empirical Studies, EUR. J. INT'L L.: TALK! (Sept. 4, 2013), <http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies>.

⁵⁸ See United States v. Flick (“The Flick Case”), 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1187, 1216–21 (1952); cf. United States v. von Weizsaecker (“The Ministries Case”), 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 314, 853–54 (1952). But cf. Christoph Burchard, *Ancillary and Neutral Business Contributions to ‘Corporate–Political Core Crime’: Initial Enquiries Concerning the*

and-abetting liability prior to the *Perišić* Appeals Chamber either rejected the requirement as without foundation in customary international law⁵⁹ or did not apply it “with any rigor.”⁶⁰ Likewise, neither the Rome Statute of the International Criminal Court⁶¹ nor the ILC Draft Code justifies the “specific direction” requirement.⁶²

Yet the importance of constraining discretion in international criminal law underscores a shortcoming in the *Taylor* Appeals Chamber’s response to “specific direction.” A “substantial effect” analysis by design vests tribunals with significant discretion to “decide on a case-by-case basis whether in the particular circumstances the assistance should or should not properly be regarded as criminal.”⁶³ While the fact-sensitive inquiry endeavors to ensure “both that the culpable are properly held responsible for their acts and that the innocent are not unjustly held liable for the acts of others,”⁶⁴ judges have no fixed standard by which to measure culpability. Various tribunals have defined “substantial effect” in various ways,⁶⁵ eliciting worry that this discre-

Rome Statute, 8 J. INT’L CRIM. JUST. 919, 936–37 (2010) (“[T]he ‘basis of liability’ [in *Flick*] effectively was membership in or contributing to a criminal organization . . .” *Id.* at 936).

⁵⁹ See, e.g., *Prosecutor v. Lukić*, Case No. IT-98-32/1-A, Judgement, ¶ 424 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012), http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/lacjug/en/121204_judgement.pdf.

⁶⁰ *Perišić*, Case No. IT-04-81-A, Judgement, ¶ 3 (Liu, J., dissenting in part); see also Stewart, *supra* note 57 (finding that “specific direction” was applied substantively in only two percent of post-*Tadić* judgments).

⁶¹ July 17, 1998, 2187 U.N.T.S. 90.

⁶² While some judges and scholars consider the Rome Statute and the ILC Draft Code to be expressions of *opinio juris*, see *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 227 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>, the relevant provisions in the Rome Statute make no mention of “specific direction,” see *Rome Statute of the International Criminal Court* art. 25(3)(c)–(d), July 17, 1998, 2187 U.N.T.S. 90. Likewise, though the ILC Draft Code subjects to punishment anyone who “directly and substantially [aids] in the commission of . . . a crime,” *Draft Code of Crimes Against the Peace and Security of Mankind* art. 2(3)(d), Rep. of the Int’l Law Comm’n, 48th Sess., May 6–July 26, 1996, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10 (1996) (emphasis added), available at http://legal.un.org/ilc/documentation/english/A_51_10.pdf, the commentary restates the relevant provision as a requirement that assistance be “significant,” *id.* art. 2 cmt. 11.

⁶³ *NOTO*, *supra* note 41, at 97; see also *LAFAVE*, *supra* note 51, at 717–18.

⁶⁴ *Taylor*, Case No. SCSL-03-01-A, Judgment, ¶ 391.

⁶⁵ See *NOTO*, *supra* note 41, at 94–96. In some cases, for example, tribunals have required a showing that the defendant’s act or omission enhances the ease with which a violation is committed, see, e.g., *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgement, ¶ 282 (Int’l Crim. Trib. for the Former Yugoslavia June 30, 2006), <http://www.icty.org/x/cases/oric/tjug/en/ori-judo60630e.pdf>, while in others, tribunals have required the prosecution to show that the violation would have been “substantially less likely” had the defendant’s act or omission not occurred, *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgement, ¶ 1019 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010), <http://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>. Many chambers have declined to define the term altogether. See, e.g., *Prosecutor v. Blagojević*, Case No. IT-02-60-T, Judgement, ¶ 738 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005), http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf.

tion may allow “arbitrary application [of the test] *after* the blameworthiness of [a defendant’s] conduct has been decided on.”⁶⁶

While adjudication of the “substantial effect” standard may, through a gradual “case-by-case evolution of doctrine,”⁶⁷ develop guidelines that restrain judicial discretion, the distinctiveness of the facts in *Taylor* prevents the disposition of the case from providing any such instruction. Because the RUF’s violations of international law were “inextricably linked to the strategy of the military operations themselves,”⁶⁸ Taylor’s culpability rested upon the effect his support had on the viability of the RUF as a whole, rather than on the organization’s individual violations.⁶⁹ Moreover, Taylor’s support was found to have been a condition *sine qua non* of the RUF’s atrocities.⁷⁰ The *Taylor* judgment thus fails to provide guidance for cases of more marginal assistance, in which violations are not “inextricably linked” to an organization’s military strategy, or where the provision of support to a criminal organization is not essential for the organization’s survival.

The *Taylor* Appeals Chamber appropriately declined to adopt the more rigorous actus reus requirement for aiding and abetting announced by the ICTY Appeals Chamber in *Perišić*. However, the SCSL’s answer to “specific direction” — a “substantial effect” test that relies on the discretion of a trier of fact to distinguish between culpable and innocent aid — leaves indefinite the line at which inessential assistance becomes criminal. While reliance upon tribunals to exercise broad discretion is neither unique to accomplice liability nor always undesirable,⁷¹ the distinctive importance of clarity in international criminal law suggests that the flexibility of the “substantial effect” standard may not be without cost.

⁶⁶ NOTO, *supra* note 41, at 98. Misgivings about the ambiguity inherent in a subjective standard influenced the drafters of the Model Penal Code to replace a similar “substantial facilitation” requirement with a mens rea of purpose. LAFAVE, *supra* note 51, at 717–18; *see also* Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 239 (2000).

⁶⁷ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 373 (1978).

⁶⁸ *Taylor*, Case No. SCSL-03-01-A, Judgment, ¶ 508.

⁶⁹ *See* Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 6905 (Spec. Ct. for Sierra Leone May 18, 2012), <http://www.sc-sl.org/LinkClick.aspx?fileticket=k%2b03KREPCQ%3d&tabid=159>. The SCSL Trial Chamber found a “substantial effect” where the physical connection between Taylor’s provision of weapons and troops and particular RUF crimes was either not established or may have been comparatively slight. *See* Kai Ambos & Ousman Njikam, *Charles Taylor’s Criminal Responsibility*, 11 J. INT’L CRIM. JUST. 789, 801–02 (2013).

⁷⁰ *Taylor*, Case No. SCSL-03-01-T, Judgment, ¶¶ 6913–14.

⁷¹ *See, e.g.*, Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 388 (1997).