

Online Appendix

A.1: Experiment materials

A.1.1.: Invitation letter

Dear Judge:

I look forward to welcoming you to the session on “Behavioral Research on Judicial Decision-Making” at the Harvard/FJC Law & Society program on April 13 at 8:35am.

In agreement with the FJC, I will use the first 55 minutes of my session for an experimental study of judicial decision-making. I hope you will participate in the study, but participation is entirely voluntary. In particular, you can attend the remainder of the session (from 9:30am to 10am) regardless of your participation in the study, and you can withdraw from the study at any time without penalty.

If you do participate, you will be asked to judge a fictitious yet highly realistic international law case. I expect and indeed hope that you are completely unfamiliar with the applicable law. Relevant legal materials will be provided to you on a tablet or other computer that will log all of your activity, i.e., which materials you consult when. At the end, you will also be asked to sketch the reasons for your judgment in a paragraph, either on the computer or on a piece of paper. The goal of the study is to learn about the process of legal reasoning and the role of various legal materials therein. I am not testing your knowledge of, or opinions about, particular legal issues. In the future, I plan to run the same study in other jurisdictions and compare the results.

There is no remuneration for participation in the study. But I hope that the case will teach you something interesting about a hot topic in a controversial area of international law. I also hope that participation in the study will bring to life the methods of the research I will review in the remainder of the session, and that my colleague Jim Greiner will discuss later in the day. I will provide you more details of the research plan and initial results right after completion of the study.

No more than minimal risk is expected from participation in this study. To keep your answers confidential, I will not record your name, and I will immediately transcribe and then destroy any handwritten answers. You need not provide identifiable information such as age-group, and if you do, I will store it separately on a password-protected computer and not share with anyone except with other researchers who want to replicate the results and undertake to keep the data confidential in the same way. In the very unlikely event of a breach of confidentiality, it is possible that someone with outlier demographic information might be able to be identified. If that were to happen, the risk of harm could include embarrassment or reputational harm.

If you have any questions about the study, please do not hesitate to contact me. I look forward to meeting you on April 13.

Sincerely, [s/ Holger Spamann]

A.1.2.: Experimenter welcoming remarks

Good morning, your honors.

I am not Larry Tribe.²⁷ My name is Holger Spamann, and I am an assistant professor here.

It is truly a great pleasure and a privilege to be able to talk to you today.

As you know from my letter, I have prepared an exercise for you, and I suggest we get started on that right away so that we have enough time for discussion later.

You will find in front of you an iPad. When we begin in just a moment, all you will have to do is swipe, and the experiment site should show up immediately. Then you just follow the instructions on the screen.

If you have any problems operating the iPad or navigating the experiment site, my lovely assistants Priyanka, Caleb, and Hannah are here to help you. They are all law students here and can't wait to tell a judge what to do, so they'd be happy if you have questions. But they do not know anything about the legal question you are about to confront.

Everything else will be explained on the screen. Please begin. I hope you will find this interesting and educational.

²⁷ This was a reference to last minute rescheduling within the program. Larry Tribe was originally scheduled to speak during the time slot of the experiment, which was originally supposed to run a day earlier.

A.1.3.: Instructions

Please imagine you are an appeals judge in the case Prosecutor v. [NAME] pending at the International Criminal Tribunal for the Former Yugoslavia (ICTY). This case is fictitious but very closely resembles an actual case recently decided by the ICTY. The ICTY is an international tribunal with the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the ICTY Statute. [As an international tribunal, the procedure of the ICTY combines elements from common law and from civil law systems, some of which may seem unfamiliar to you. – VISIBLE TO ONLY HALF THE SUBJECTS]

You have already presided over several hearings. The prosecution and the defence have now submitted their final appeals briefs and agreed on a list of agreed facts.

Your task is to judge whether the defendant is or is not guilty of aiding and abetting various war crimes by the [RELEVANT MILITARY GROUP] on the territory of Bosnia-Herzegovina in the years 1992-1994.

In reaching your judgment, you will be able to peruse the aforementioned briefs and the list of agreed facts. I recommend you read these in full. The briefs link to other documents, namely the decision of the trial court below, a recent decision by the Appeals Chamber in another case, and the statute establishing the ICTY. These other documents are very long. You will not have time to read them in full, but you may pursue a handful of further passages that you deem particularly relevant.

Please do NOT access any information on another device such as your smart phone, and please do NOT talk to your neighbors until the study is completed.

You have 50 minutes to reach a decision and submit a brief summary of your reasoning, either on this computer or on a separate piece of paper marked with your participant number, which will be randomly generated at the end of the study. To help you keep track of time, a clock on the screen will count down the 50 minutes.

By clicking on the button below, you will proceed to an index page with all the documents provided. You can at any time return to this introduction or to the index page by clicking the relevant link at the top of the page.

A.1.4.: Statement of Agreed Facts (differences between defendants [Vuković/Horvat] in square brackets; substantive differences in bold)

The parties have agreed that the following key facts are not in dispute.

THE ACCUSED [BORISLAV VUKOVIĆ / ANTE HORVAT]

*[Borislav Vuković / Ante Horvat] was born on 22 May 1944 in [Koštunići, Serbia, in the Socialist Federal Republic of Yugoslavia / Skradin, Croatia]. After joining the Yugoslav People’s Army, he graduated from the Ground Forces Military Academy in 1966 and became an officer. Shortly after the conflict in the former Yugoslavia began, [Vuković / Horvat] became the Chief of Staff and then Commander of the 3rd Army within the [Yugoslav / newly formed Croatian] Army (“[VJ/HV]”) based in [Niš, Serbia / Knin, Croatia]. On 26 August 1993, the President of [the Federal Republic of Yugoslavia (“FRY”) / Croatia] appointed [Vuković / Horvat] as Chief of the [VJ / HV] General Staff, a position which made him the most senior officer in the [VJ / HV]. He held this position until his mandatory retirement from the [VJ / HV] in 2004, when he became **[advisor to the FRY government for “the rehabilitation of Serb victims of Albanian persecution” and chairman of the United Serbia Party / Croatian vice-chairman of the Croatian-Bosnian Reconciliation Commission]**.*

THE INDICTMENT

[Vuković / Horvat] was charged on the basis of individual criminal responsibility (Article 7(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia, hereinafter “the Statute”) with aiding and abetting crimes in the Bosnian towns of [Sarajevo / Mostar] and [Vlasenica / Ahmići] by facilitating the provision of military and logistical assistance from the [VJ / HV] to the [Army of the Republika Srpska (“VRS”) / Defence Council of the Hrvatska Republika Herceg-Bosna (“HVO”)]. The [VRS / HVO] was an armed group of ethnic [Serbs / Croats] in the Bosnian civil war. [Vuković / Horvat] was also charged with superior responsibility (Article 7(3) of the Statute); since he was acquitted of these charges and this part of the decision is not on appeal, however, no further mention will be made of the facts underlying this part of the indictment.

THE UNDERLYING CRIMES COMMITTED BY [VRS / HVO]

The underlying events took place in the territory of Bosnia and Herzegovina in the period between August 1993 and November 1995.

[SARAJEVO / MOSTAR] From September 1992 to November 1995, the [VRS / HVO] conducted a lengthy campaign of shelling and sniping in [Sarajevo / Mostar] which resulted in the deaths of hundreds of civilians and the wounding of thousands of others.

[VLASENICA / AHMIĆI] In the summer of 1995, the [VRS / HVO] invaded the town of [Vlasenica / Ahmići], which the United Nations Security Council had previously established as a safe area for civilians. After taking over [Vlasenica / Ahmići], the [VRS / HVO] proceeded to forcibly remove and massacre hundreds of Muslim civilians and persons not taking an active part in hostilities.

THE ASSISTANCE PROVIDED BY [VUKOVIĆ / HORVAT]

Since August 1993, [Vuković / Horvat] oversaw the [VJ / HV]'s provision of extensive logistic assistance to the [VRS / HVO] as the [VJ / HV]'s Chief of General Staff.

Logistic assistance notably included vast quantities of infantry and artillery ammunition, fuel, spare parts, training and technical assistance. The Supreme Defence Council of [the Federal Republic of Yugoslavia / Croatia] granted [Vuković / Horvat] and the [Yugoslav / Croatian] Army the authority to provide logistic assistance to the [VRS / HVO]. Even though [Vuković / Horvat] was not officially a member of the Supreme Defence Council, he participated in the Council's meetings, along with its members, notably [Slobodan Milošević and Zoran Lilić / Franjo Tudjman], who at the time held the title[s] of President of [Serbia and President of the Federal Republic of Yugoslavia, respectively / Croatia]. [Vuković / Horvat] regularly urged the Council to continue providing logistic assistance to the [VRS / HVO], insisting that they could not wage war without significant military support.

A large number of [VRS / HVO] officers were drawn from the ranks of the [Yugoslav / Croatian] Army. They officially remained members of the [Yugoslav / Croatian] Army even as they were fighting in Bosnia under the banners of the [VRS / HVO]. [Vuković / Horvat] proposed and carefully implemented the idea of creating "Personnel Centres" to regularise the status of these officers and allow them to lawfully remain part of the [Yugoslav / Croatian] Army. [VRS / HVO] officers retained their salaries and benefits as [Yugoslav / Croatian] Army members through what was known as the 30th Personnel Centre. [Vuković / Horvat] was well aware that the payment of salaries was, in his own words, of "great help" to the [VRS / HVO].

[VUKOVIĆ / HORVAT]'S STATE OF MIND

[Vuković / Horvat] knew that the [VRS / HVO]'s operations encompassed grave crimes against civilians. [Vuković / Horvat] received information from a variety of sources concerning the [VRS / HVO]'s criminal behaviour and discriminatory intent against Muslims. Under [Vuković / Horvat]'s direction, the [Yugoslav / Croatian] Army's intelligence and security organs monitored the views of the international community and international media concerning the conflict in Bosnia and Herzegovina. **[The Yugoslav Army General Staff also received diplomatic reports about proceedings at the United Nations Security Council / During meetings with NATO to coordinate enforcement of the UN's no-fly zone against Serbian violations, Horvat also received briefings on NATO intelligence]** concerning grave abuses against civilians by [VRS / HVO] forces in [Sarajevo / Mostar] and other parts of Bosnia and Herzegovina. In particular, [Vuković / Horvat] was alerted to the fact that the [VRS / HVO] was conducting a campaign of sniping and shelling against civilians during its siege of [Sarajevo / Mostar]. These regular attacks were well documented and widely reported for a period of three years.

THE TRIAL JUDGMENT

On 7 January 2014, the Trial Chamber found defendant-appellant [Vuković / Horvat] guilty of aiding and abetting the following crimes committed by members of the [VRS / HVO] in [Sarajevo / Mostar] and [Vlasenica / Ahmići]: murder, inhumane acts (injuring and wounding civilians, inflicting serious injuries, wounding, forcible transfer), and persecutions as crimes against humanity; and murder and attacks on civilians as violations of the laws or customs of war. The

Trial Chamber sentenced [Vuković / Horvat] to a single term of 27 years of imprisonment under Articles 3, 5, and 7(1) of the Statute.

A.1.5: Brief for the Accused (cover page omitted; differences between defendants [Vuković/Horvat] in square brackets, with substantive differences in bold; differences between precedents [paragraph 4] separately marked)

I. Introduction

1. This appeal concerns a single point of law: whether or not aiding and abetting under Article 7(1) of the Statute governing this Tribunal requires that the assistance be specifically directed to the commission of a crime.

2. The prosecution agrees that the defendant must be acquitted if specific direction was required, as the defendant merely provided unspecific support to the forces committing the crimes on the ground.

3. The Trial Chamber, however, convicted the defendant because it did not consider specific direction an essential element of aiding and abetting. We urge the Appeals Chamber to overturn this decision because it is inconsistent with prior decisions of the Appeals Chamber, the most fundamental principles of the Statute, and sound policy.

II. "Specific direction" is a component of the actus reus of aiding and abetting.

[Precedent: Šainović]

4. The Trial Chamber failed to take into account that aiding and abetting must be specifically directed to assist the commission of crimes. Neutral acts providing general logistic and military assistance to an army engaged in legitimate military operations do not qualify as aiding and abetting.

[Precedent: Vasiljević]

4. If there was ever any doubt about the requirement of "specific direction," it was laid to rest by the Appeals Chamber's Vasiljević decision handed down two weeks after the Trial judgment in the present case. The Vasiljević decision expressly required "specific direction" as part of the actus reus of aiding and abetting. Distinguishing aiding and abetting from joint criminal enterprise (JCE), the Appeals Chamber stated in Vasiljević:

"The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design."²⁸ (emphasis added)

²⁸ Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgement 23 January 2014, at para. 102.

5. The Appeals Chamber thus explicitly acknowledged that criminal liability does not attach to the mere assistance to a military group, even if that assistance had a substantial effect on the commission of the crime. Rather, the *actus reus* of aiding and abetting is assistance specifically directed at the commission of a crime.

5./6. It is true that not all prior decisions of the Appeals Chamber concerning aiding and abetting explicitly mention the element of specific direction. We submit, however, that specific direction has always been implicit in the finding that the accused provided practical assistance to the principal perpetrator that had a substantial effect on the commission of the crime. Specific direction was never in doubt in previous cases because the accused was at or proximate to the crime scene.

6./7. In contrast, in cases where the conduct of the accused is remote in relation to the commission of the crimes, the requirement of specific direction as an explicit element of aiding and abetting is manifest. This is especially important in this case, as [Vuković / Horvat] is not accused of providing assistance to the commission of crimes committed by the [VJ / HV]. Rather, he is accused of facilitating the commission of crimes committed by the [VRS / HVO], a separate military organization not under his personal command and not even part of the same command hierarchy.

ŠAINOVIĆ ONLY: 7. The prosecution relies on the recent Appeals Chamber's decision in *Sainović*²⁹ to argue that specific direction is not a component of the *actus reus* of aiding and abetting. However, as Judge Tuzmukhamedov stated in his dissent, this issue was not actually relevant for deciding the case in *Sainović*.³⁰ Furthermore the facts in *Sainović* are completely different from the facts at hand. In *Sainović* the accused aider and abettor Vladimir Lazarević was convicted for providing assistance to members of the [VJ / HV] while he was a commander in the [VJ / HV]. [Vuković / Horvat], however, is charged with aiding and abetting the war crimes of a distinct army, i.e. the [VRS / HVO]. Finally, [Vuković's / Horvat's] conduct was remote from the place of the crimes, whereas Lazarević was physically present at the crime scene.³¹

8. The additional element of aiding and abetting follows from the general principles governing the ICTY Statute. One of those principles is, as is generally accepted, that the Statute does not criminalise the waging of war *per se*. States provide military and technical assistance to one another with varying strategic objectives in a number of regions around the world. However, this aid in itself does not render the leaders of the assisting states individually criminally responsible

²⁹ Prosecutor v. Sainović, Case No. IT-05-87-A, Judgement 23.1.2014.

³⁰ Prosecutor v. Sainović, Case No. IT-05-87-A, Judgement 23.1.2014, Dissenting Opinion of Judge Tuzmukhamedov, at para. 40.

³¹ Prosecutor v. Sainović, Case No. IT-05-87-A, Judgement 23.1.2014, Dissenting Opinion of Judge Tuzmukhamedov, at para. 43.

for aiding and abetting crimes committed during such wars. To be held individually criminally responsible, the leaders must be shown to have committed or aided and abetted the commission of some crimes during the war, an act which is distinct, and apart, from the mere provision of military assistance. To conclude otherwise, as the Trial Chamber has done, is to criminalise the waging of war, which is not a crime according to the Statute of the Tribunal. Any provision of weapons would result in the individual criminal responsibility of the provider, approaching a form of strict liability.

9. Moreover, dispensing with the requirement of specific direction, as the Trial Chamber did, leads to absurd consequences. It would potentially ensnare all military and political leaders who approve logistical assistance to a foreign army without the power to control every decision of that foreign army, in particular the intensity of its efforts to curb human rights violations. This would have a substantial chilling effect on all legitimate international military operations.

III. Conclusion

[HORVAT ONLY: 10. From the very beginning of this case, the defendant has expressed his deep regret at all bloodshed in this tragic war, and in particular at the inexcusable crimes of certain soldiers and officers in the field. He categorically denies, however, that he is personally responsible for those crimes. We urge the Appeals Chamber to affirm that the law is on the side of the defendant and others forced by history to make difficult decisions in times of war, and to overturn the conviction by the Trial Chamber.]

[10 / 11]. For these reasons, [Vuković /Horvat] respectfully requests that the Appeals Chamber: (i) hold that the actus reus of aiding and abetting in international law requires specific direction; (ii) apply that standard; and (iii) reverse the Trial Chamber's judgment and enter an acquittal.

A.1.6. Brief for the Prosecution (cover page omitted; differences between defendants [Vuković/Horvat] in square brackets, with substantive differences in bold; differences between precedents [paragraph 4] separately marked)

I. Introduction

1. The defense requests that the Appeals Chamber reverse the Trial Chamber's judgment on the grounds that the assistance provided by [Vuković / Horvat] was not specifically directed at the war crimes committed by the VRS.

2. The defense's argument is without merit. The Trial Chamber correctly found [Vuković / Horvat] guilty of aiding and abetting under Article 7 of the Statute governing this Tribunal because [Vuković / Horvat] provided logistical and personnel assistance to the VRS in full knowledge that the [VRS / HVO] committed atrocious war crimes, as [Vuković / Horvat] knew fully well.

3. It is irrelevant that none of [Vuković's / Horvat's] acts were specifically directed toward the commission of the war crimes by the [VRS / HVO]. Specific direction is not an element of aiding and abetting. The defense's argument to the contrary is a transparent attempt to introduce a novel, restrictive element to the actus reus of aiding and abetting that has no basis in previous cases and that would make it more difficult to convict those who knowingly facilitate the most grievous crimes. We urge the Appeals Chamber to reject this attempt to undermine the very purpose of this Tribunal to hold to account those responsible for the horrors of the Yugoslav wars.

II. "Specific Direction" is not a requirement of aiding and abetting liability

[Precedent: Šainović]

4. If there was ever any doubt about the requirement of "specific direction," it was laid to rest by the Appeals Chamber's Sainović decision handed down two weeks after the Trial Chamber's judgment in the present case. The Sainović decision expressly required³² "specific direction" as part of the actus reus of aiding and abetting. After an exhaustive discussion of the national and international case law, including all relevant decisions by the Appeals Chamber, the majority, Judge Tuzmukhamedov dissenting, came to the conclusion: "[t]hat 'specific direction' is not an element of aiding and abetting liability under customary international law."³³

[Precedent: Vasiljević]

4. The defense's only legal argument is a quotation taken out of context from the Appeals Chamber's recent decision in the Vasiljević case.³⁴ The discussion in Vasiljević, however, was not concerned with systematically defining aiding and abetting liability. Vasiljević merely mentioned aiding and abetting in the context of defining a different basis for criminal liability, namely joint criminal enterprise. To better define the latter, the Vasiljević decision drew comparisons to the former. Nothing in that discussion suggests that specific direction is a stand-alone element of aiding and abetting. Indeed, the defense implicitly concedes that no prior decision of this Tribunal has ever

³² ["required" here was an error; it should have read "rejected." Judging by their written reasons, however, none of the judges were misled by this.]

³³ Prosecutor v. Sainović, Case No. IT-05-87-A, Judgement 23.1.2014, at para. 1649.

denied aiding and abetting liability merely because the assistance was not specifically directed at the crime.

5. The prosecution agrees that the defendant's physical distance from the crime scene may be relevant for aiding and abetting liability. However, this follows from the simple fact that in these situations the assistance is less likely to have a substantial effect on the main act. The prosecution submits that the proximity of an alleged aider and abettor to crimes committed by the principal perpetrators is one factor that a trial chamber may consider in determining whether substantial contribution is established. If such effect is established, however, there can be no doubt that the assistance qualifies as aiding and abetting if the accused knows that it facilitates the commission of war crimes.

6. Moreover, requiring specific direction would make it almost impossible to prosecute aiding and abetting in practice. The only assistance that is clearly specifically directed at a crime is assistance that cannot be used for anything but criminal activity. It is doubtful whether, in real life, such assistance exists; surely it is rare. There is, however, much conduct that significantly contributes to crime even though it may seem harmless on its face (e.g. transferring money or seconding personnel). Such conduct should not be shielded from criminal liability merely because these acts might further both lawful and unlawful activities. The critical question is whether the assistance was provided with knowledge of the crimes and had an actual, substantial effect on the perpetration of the crime by its beneficiaries. In particular, the provision of weapons as a peculiar kind of assistance is never "neutral."

7. The defense submits that under the approach favoured by the Trial Chamber, any provision of weapons would result in individual criminal responsibility of the provider, approaching a form of strict liability. However, this fear is unfounded. In order for aiding and abetting liability to arise, a number of additional elements need to be present: one or more crimes must have been actually perpetrated; the weapons provided must have substantially contributed to the perpetration; and the weapons-provider must have been aware of their likely use. The fact that they could have theoretically been used in lawful activities would not be decisive in this assessment.

III. Conclusion

[VUKOVIĆ ONLY: 8. For too long, the defendant has been able to walk free. He has publicly mocked this tribunal and repeatedly inflamed lingering tensions with inflammatory public statements showing absolutely no regrets about the horrors of the war in general, and the war crimes he supported in particular.³⁵ The Appeals Chamber should make a strong statement that generals in the headquarters can be as guilty as, or more guilty than, the soldiers on the ground when heinous crimes are committed, and that this Tribunal will prosecute both.]

³⁴ Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgement 23 January 2014.

³⁵ The prosecution recalls, for example, the defendant's opening statement before the Trial Chamber, where he stated, among other things, that his "only regret about the war is that too few of Serbia's enemies died." Defence Opening Statement, 22 February 2010, Trial Hearing Transcript 9904.

[9 / 8]. For the reasons stated above, the Prosecution respectfully requests that the Appeals Chamber: (i) hold that the actus reus of aiding and abetting in international law does not require specific direction; (ii) and uphold the Trial Chamber's judgment.

A.2: Professor survey

Text of the invitation email (difference between 4-school and 6-school groups in square brackets [4/6]):

[Subject: "3-minute survey on judicial decision-making"]

Dear [Colleague/Colleagues/Professor X³⁶]:

I am conducting an experiment on judicial decision-making with real judges. [To help me plan / To put the results into perspective], it would be extremely helpful to know what you would expect the judges to do in the experimental setting described below. It will take you less than three minutes to read and then register your answers. The answers will be completely anonymous. I would really appreciate your help.

Description of the experiment: *The judges are asked to decide a case on appeal at the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the court below, the accused was convicted of aiding and abetting war crimes committed by an armed group during the Bosnian war. The accused was not directly affiliated with this group or even physically present in Bosnia. He was the most senior officer in the army of an allied neighboring nation state. In this position, he organized extensive logistic assistance to the armed group, including weapons. As the accused knew fully well at the time, the armed group was committing atrocious war crimes. It is undisputed that the accused's assistance substantially contributed to the war crimes. The only question on appeal is whether this is sufficient for a conviction, or whether aiding and abetting requires in addition that the support be "specifically directed" at the war crime (which it was not). The ICTY statute explicitly criminalizes aiding and abetting but does not define it. There is no strong precedent on point.*

I vary two dimensions of the case:

(A) the accused is either a likeable Croat or an unsympathetic Serb; and

(B) a precedent by the same appeals chamber has either explicitly required or explicitly rejected "specific direction," although those precedents are dicta or distinguishable (because the precedent involved primary perpetrators in the same formal organization as the accused).

How much, if at all, [do you think / would you expect] variations (A) and (B) [/ to] affect the probability that a [judge / US federal judge participating in the experiment] will affirm the conviction?

To preserve the anonymity of your answer, please register them by clicking [HERE](#) [link] (IP addresses will not be recorded).

[6 schools only: Please do not participate in this survey if you have already heard about preliminary results from me or somebody else.]

[Harvard only: Please do not participate in this survey if you have already heard about preliminary results from me or somebody else.]

³⁶ This differed by university.

Thank you very much!

Holger Spamann

Online survey text (one choice per line permitted; ascending/descending and the order of precedent vs. defendant were randomized):

You are being asked to take part in a research study by Holger Spamann from Harvard Law School. There is only the one question below, which, if you remember the text of the invitation email, will take you a couple seconds to answer. The survey is anonymous, and no one will be able to link your answers back to you. You can, of course, abort this poll simply by closing this browser tab. If you have questions, please contact hspamann@law.harvard.edu.

*How much would you expect the experimental variations to affect the judges' decisions, if at all?
(see email for details)*

	<i>No effect</i>	<i>Modest effect</i>	<i>Strong effect</i>
<i>Croat v. Serb</i>	<i>[]</i>	<i>[]</i>	<i>[]</i>
<i>Precedent</i>	<i>[]</i>	<i>[]</i>	<i>[]</i>

[Submit button]

A.3: Judges' written reasons

This table reproduces the judge-participants' reasons verbatim, sorted by defendant (Horvat/Vuković), precedent (Vasiljević/Šainović), and affirmance. The table also indicates whether the reasons mention the precedent, and if so, whether they followed it. An X next to the affirmance decision indicates that the decision seems to have been entered in error, as the reasons support the opposite decision. An asterisk indicates other issues with the reasons, including that they are lacking altogether.

Defendant	Precedent	Prec. mentioned?	Prec. followed?	Affirmed?	Reasons
H	V	1	1	0	<i>Both the prosecution and defense agree that this appeal turns on whether the the law requires that, to be guilty of aiding and abetting, defendant's conduct must have been "specifically directed" to the commission of the underlying crime. The Vasiljevic decision directs that the answer be yes. Not only did the Court define the standard as such, it applied it in Paragraph 135. The application of the aiding and abetting law by the Trial Court greatly expands the criminal responsibility of military leaders who participate from afar. Mere knowledge that another organization to whom support is provided is committing crimes is not specific direction as contemplated by the Court in Vasiljevic. The contrast between the facts of this case and that could not be more striking. The evidence against Horvat did not come close to satisfying the standard announced in Vasiljevic.</i>
H	V	0		0 X	<i>Defendant arranged for salaries, logistical support, etc. for 3 years after being appointed commander of the Croatian forces. He knew that this support was essential to the continued operations of the "squads" executing the "safe area" occupants. He knew through his confidential advisers that there were no official constraints on these murder squads. Compliance with a superior's orders is not a defense to aiding and abetting under the statute. Facilitating the ability of death squads to accomplish their known mission is not a defense under the statute either.</i>
H	V			0*	<i>Not sufficient time to form a judgment.</i>
H	V	0		1	<i>While insufficient time has been allowed to analyze all aspects of this case, I have given great weight to the findings of fact of the trial court. The short review time has made as detailed study of the law impossible so I have relied heavily on the propriety of the the trial court's conclusions re the state of the law. It is apparent that Muslim citizens were targeted by military groups under the control of the defendant. The defendant holds ultimate responsibility for this. Given the constraints of time pressure by this review, deference must be given to the trial courts findings. The outcome could have been completely different if allowed the typical review time such a critical decision deserves.</i>
H	V	1	0	1	<i>This is a question of statutory interpretation. The statute makes it criminal for an individual to have "planned, instigated, ordered, committed, or otherwise aided and abetted," the</i>

commission of a war crime. By introducing the phrase "aided and abetted" with the word "otherwise" the drafters suggested something apart from the more active means of committing the crime such as planning, instigating, or ordering the crime. Therefore providing indirect but critical logistical support for activities which you know involves the commission of war crimes by irregular forces would constitute "aiding and abetting" the commission of a war crime. The acts need not be "specifically directed" at the war crime. While our earlier decision may have used that term in distinguishing between "aiding and abetting" and a criminal enterprise, that language was dicta and is not binding here.

H V 1 0 1 *I would affirm the verdict finding Horvat guilty because I agree with the arguments set forth in the response brief concerning the correct interpretation of the V_____ case. That case does not appear to impose a requirement of "specific direction" on the actus reus element of an aiding and abetting offense. Rather, it discusses aiding and abetting for the sole purpose of contrasting it from the offense at issue: joint enterprise. Thus, I believe the V_____ case's mention of "specific direction" is merely dicta and not controlling. As the defense admits, the V_____ case is the only authority that can be read as imposing a specific direction requirement. In light of my conclusion that V_____ 's discussion of specific direction is dicta, it appears that the defense's reliance on V_____ dooms its case on the merits.*

I also agree with the response brief's argument that imposing a requirement of specific direction on the offense of aiding and abetting would substantially gut the offense, by removing from its those who might attempt to excuse their conduct by cloaking it with some so-called "official" purpose, such as the need to provision the forces actually carrying out the atrocities. This would insulate from prosecution higher-up's such as the Appellant, who clearly knew that the war crimes at issue could not and would not have occurred without his assistance from afar. Criminal actors such as the Appellant should not be permitted to hide from the consequences of the actions behind their official positions.

H S 0 0* *While "soecific direction" is not an essential element of aiding and abetting, the evidence adduced at trial does not support a finding that Horvat rendered practical assistance, encouragement or moral support that had a substantial effect on the perpetration of the crime committed by HOV. Horvat was denied the right to confront witnesses to the alleged crime. He may have been aware of alleged atrocities by HOV, but the weight of credible evidence does not support conviction for aiding and abetting. Tut*

H S 1 0 0 *It appears there is sufficient disagreement over the question of specific direction to conclude the question is an open one. This court concludes that to eliminate the requirement would be to open the door to strict liability for waging war and thus impose liability in a manner inconsistent with the concept of "legitimate" war. Without evidence of a party's specific direction over acts that amount to crimes against humanity, there would be no distinction between the type of grievous behavior sought to be singled out and that which is accepted as a part of the "civilized" conduct of war. Therefore, without compelling evidence of the defendant's specific direction regarding crimes against humanity, his conviction must be reversed.*

H S 0*

H S 0 0 *It's a close call because Horvat was aware of the atrocities that were committed but while he provided material and supplies that were most likely used in the atrocities, there was no conclusive evidence that he willfully made the civilian population the object of the attacks.*

H S 1 0 0 *The court finds that specific direction is an element of the offense of aiding and abetting. In the majority of the cited cases, while the term is not explicitly use, it is evident that the defendant's conduct was specifically directed at the commission of the crime.*

H S 1 0 0 *The defendant is not guilty of the crime of aiding and abetting because, in order to be found guilty of that crime, one must have substantially contributed to the criminal conduct under applicable law and the agreed-to facts do not establish the requisite contribution. Although the Sanovic decision rejected the proposition that "specific direction" is required, it confirmed that a substantial contribution is necessary for aid no and abetting liability, and it did so under circumstances in which a defendant actively commanded the criminal unit and was present at the scene of the crime. Defendant here did not command the unit that engaged in the conduct, nor did he participate directly in the unlawful activity (he was not even present at the scene). Rather, he merely provided "general logistic and military support to an army engaged in legitimate military operations," albeit with knowledge that the unit was ALSO engaged in illicit activities. The law of aiding and abetting should not be read so broadly as to criminalize general logistical support. Although the prosecution need not establish a defendant's active participation was specifically directed at aiding the criminal activity in particular, it must show that there was the kind of acute reas with respect to the offensive army unit and its activities that would support a finding of substantial contribution. The facts here are insufficient to make such showing.*

H S 1 1 0 X *This appeal challenges the judgment of conviction on a single legal ground: the accused did not specifically direct the army's war crimes, and the absence of this mens rea precluded his conviction under the statute as a matter of law. I am unconvinced by the argument. Its legal premise was expressly rejected by the Šainović panel, and the accused has not offered me a persuasive basis to countermand that opinion. Even if the Šainović panel's conclusion that specific direction "is not an essential ingredient of the acts reus" for an Article 7(1) violation, Šainović, para. 1650, were mere dicta, that conclusion was heavily researched, well-reasoned, and deeply analyzed, and I find no reason to depart from it.*

H S 1 1 1 *Recent caseload established that "specific direction" not an element of aiding and abetting as appellant argues. If specific direction were required, the rime of aiding and abetting would collapse into the underlying crime. While that case is factually different in that the defendant there had closer physical proximity to crime, in the current era of instant communication over long distances and concurrent ability to impact and control events far away, that is not a necessary factor in aiding and abetting. Rather, defendant had proven knowledge of repeated and extensive war crimes being committed by the HVO against civilians, including children, and including murder and assault, and deliberatiely and actively provided assistance in the form of not only materiel but also soldiers from the army under his direct control, effectively succounding them to the HVO with full knowledge that they would be committing such crimes. Further, his proposal and implementation of this provision for paying soldiers under him to fight with the HVO was done with secrecy, indicating a guilty state of knowledge. In addition, he did not implement measures to minimize killings of innocent civilians such as disciplining officers, suspending support or*

condemning the war criminal mess at the time, whatever remorse he expresses after it was over. Under the facts here, defendant had more than just knowledge of the likelihood the assistance he directed and provided would aid war crimes but continued to do so because he had actual knowledge it was doing so.

H S 0 1	<i>Following a superior's orders is not a defense under this statute and neither is ignoring responsibility for a subordinate's known and predictable actions. Defendant was commander for 3 years over the second massacre. He knew what the murder squads would do if allowed into a safe area. His actions facilitated these squads with results he knew were inevitable. Conviction for aiding and abetting the second massacre.</i>
H S 1 1 1	<i>I found the defendant guilty and based my decision largely on the precedent set, holding that specific activity or direct activity was not an element of aiding and abetting. I also found very compelling that the defendant had knowledge of the acts being committed when he provided assistance.</i>
H S 0 1	<i>Proof beyond reasonable doubt on all charges. Prosecution made thorough evidence presentation. Court opinion well reasoned and addressed evidentiary issues relevant to charges in sufficient detail.</i>
V V 1 1 0	<i>Not guilty. Based upon the decision in Vasiljević. No showing of specific direction by defendant here. He had some knowledge but nothing else.</i>
V V 1 0 0 X	<i>I would affirm the finding that the Defendant was guilty of aiding and abetting. He knew war crimes were being committed by the VRS.. Specific direction is not required under the statute and is not an essential element of aiding and abetting. The Vasiljevic case was defining joint criminal enterprise and was not a full discussion of aiding and abetting liability.</i>
V V 1 0 1	<i>The language quoted from the subsequent appellate decision defining aiding and abetting is taken out of context. In context, the language defining aiding and abetting does not limit the mens rea requirement as the appellant suggests. There is sufficient evidence that the appellant knowingly provided support for actions of others that constitute war crimes, and that he knew the nature of those actions. The conviction should be affirmed.</i>
V V 1 0 1	<i>The applicable statute does not require specific direction as an element of the crime of conviction. The decision in VASILJEVIC does not establish a contrary precedent.</i>
V V 1 0 1	<i>Art 7(1) prohibits aiding and abetting. The relevant mens rea is knowledge of crimes being committed. The relevant actus reus is an act that has an actual, substantial, and foreseeable effect in furthering the applicable crimes. A specific direction is not required. Any statement to the contrary in Vasiljević is dicta, not necessary to the decision, and is not supported by any other precedent. A contrary holding would make the offense of aiding and abetting essentially the same as co-commission. A and A is a lesser crime.</i>
V V 0 1	<i>The statute provides that aiding and abetting rejoices carrying out acts specifically directed to assist, encourage or lend moral support to the perpetrators of a specific crime and this has a substantial effect on the perpetration of a crime. The facts as given are that Vuković received field and diplomatic reports that VRS forces were sniping and shelling civilians in Sarajevo, which is a crime against humanity. His logistical support therefor assisted the</i>

perpetration of that crime and any support given after he had knowledge of the sniping can be deemed to have been done with the specific intent to commit the crime.

V V 0 1 *Appellants knowledge of the extensive and systematic criminal nature of how the military operation was being carried out makes him guilty under the ICTY. It is impossible for such an endeavor to not result in terrible individual crimes which the appellant well knew. This was not conducting a war with isolated and unsanctioned criminal acts being perpetrated, but an illegal enterprise from the outset. This the appellant well knew and then aided and abetted.*

V V 1 0 1 *Statute does not require specific direction as appellant urges. Case law does not support a contrary conclusion.*

V S 1 1 1 *The Šainović decision holds that "specific direction" is not an element of aiding and abetting under customary international law. To hold otherwise, as argued by the government, would be a far too narrow interpretation of established principal versus aider and abetter law. Moreover, the facts and appellate standards here support Vucokik's longstanding role, proximity, and knowledge of his subordinates. This includes the possible outcomes of his subordinates. Accordingly, I would affirm the judgment of the lower court.*

V S 1 1 1 *I find the Šainović formula for the elements of the offense of aiding and abetting persuasive and authoritative. These are: knowledge by the defendant of the crimes; and a substantial effect upon these crimes by his own conduct. The record contains substantial evidence that he knew of the crimes of the SRJ (?) forces. His position as a military leader alone would be strong evidence of his access to this knowledge. The evidence is also strong that the material assistance he authorized had a substantial effect on the ability of the SRJ to carry out the crimes at the direct level. The defendants responsibility falls well within the mainstream of theories of accomplice liability.*

V S 1 1 1 *Although the time constraints of this exercise limited my ability to master the facts, my review of the decision below and the stipulated facts indicated there were a number of broad and specific steps that the defendant took knowing that they would facilitate the war crimes in question. These included covering up the reasons why VJ soldiers were refusing to go to the VRS and the SU and his decisive role in the creation of the PCS. The systematic nature of the persecution and killing of civilians, unconnected to legitimate war aims, made it impossible for the defendant not to know that he had facilitated mass murder of muslims. On the legal issue the defendant presents, it appears to be wrong, based on the Šainović decision, that specific involvement in a particular criminal act is needed; general support by a superior, with knowledge that it is facilitating a war crime, appears to suffice as a matter of law.*

V S 1 1 1 *Defendant provided practical assistance to the perpetration of war crimes as required by the actus reus element of the aiding and abetting charge. The mens era requirement is an awareness that crimes will probably be committed. Tacit approval is sufficient. These have been established. There is no articulated requirement of specific direction, and I do not believe this should be inferred. It is the responsibility of higher authority to prevent war crimes, because without the substantial assistance of men and materiel up the ladder, there will be no means for widespread atrocities such as these and what we saw in WW2.*

Also, the appeals council has stated, albeit in dicta, that specific direction is not required, and I believe this dicta should be transformed into decisional law.

V S 1 1 1*

V S 1 1 1 *Based solely on what I remember of the evidentiary rulings, it appears that the tribunal carefully and methodically made appropriate evidentiary rulings.*

The biggest legal issue to me is whether the defendant had specific intent to cause, or permit, to occur the atrocities of which he was convicted. Based solely on what I read, it appears that the tribunal reviewed the relevant precedents, and concluded that specific intent was not required.

It also appears that the tribunal appropriately applied the facts to the law, and properly convicted the defendant of the remaining crimes.

The sentence also seems to be supported by precedent.

V S 0 1 *Clear evidence that defendant had to know nature of criminal activities of recipients of VJS assistance for which he was responsible. Those activities further strategic objectives of VJS. This decision does not push liability for indirect aid too far. It fail to punish it vitiates the most dangerous form of aiding and abetting in modern warfare.*