ZOOM IN

The Question:

Is the concept of aiding and abetting international crimes leading to the 'fragmentation' of International Criminal Law?

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In the *Taylor* Appeal Judgment of 26 September 2013, the Special Court for Sierra Leone (SCCL) deconstructed the concept of aiding and abetting liability, as it had been accepted by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Perisic* Appeal Judgment of 28 February 2013. Later on, in the *Sainovic et al.* Judgment of 23 January 2014, a partially differently composed bench of the ICTY Appeals Chamber agreed with the SCSL and reversed the ICTY position adopted in *Perisic*. Do these judicial rulings have any bearing on the 'harmony' of international criminal law (ILC), or on the relationships among international criminal tribunals?

In an attempt to identify the *actus reus* elements of aiding and abetting as a form of individual criminal liability, under Article 6(1) of the Statute and customary international law, the SCSL refused to follow the ICTY Appeals Chamber's finding in *Perisic* that the assistance given by the accused to the perpetrators needs to be *specifically directed* towards the commission of the crimes. Perisic was eventually acquitted since the ICTY Appeals Chamber found that the aid he provided to Bosnian Serbs was instrumental for the war effort as a whole, rather than for the specific crimes against international law that they perpetrated in Sarajevo and Srebrenica. Taylor instead was convicted, since the SCSL Appeals Chamber found that the assistance he gave to Sierra Leonean rebel forces had a *substantial effect* on the commission of war crimes and crimes against humanity that they committed in Sierra Leone. Apparently, such a departure from the ICTY latest case-law pays little attention to Article 20(3) of the SCSL Statute. This requires the judges of the SCSL Appeals Chamber, in applying the

Statute and customary international law, to be guided by the decisions of the ICTY Appeals Chamber. However, the SCSL Appeals Chamber considered itself as the final arbiter of the law for its Court and argued that the decisions of other courts are only persuasive, not binding, authority. When it run again across the problem in *Sainovic et al.*, the ICTY, after having reviewed relevant sources, rejected the approach itself had taken in *Perisic* finding that the *specific direction* was not an *actus reus* essential element of aiding and abetting in customary international law.

Do these legal findings somehow reflect, or contribute to, a sort of 'fragmentation' (or even 'self-fragmentation') of ICL, as a part of the purportedly ongoing 'fragmentation' of international law as a whole? Which, in case, would be the areas where this phenomenon occurs? Or do they simply reflect different interpretations of the same legal concept enshrined in different and independent legal acts? Does the source – customary or statutory – of the legal concept at stake have any role in addressing these legal issues?

Finally, may these judgments be perceived under the perspective of (or affect) the institutional and functional relationships among international criminal tribunals? May we assert the latter actually form part of the same 'family'? Or do they constitute self-contained independent entities, whose activity relies only on their own legal frameworks?