

## Commentary

### 1. Introduction

Rule 72 of the ICTY's Rules of Procedure and Evidence specifies the reasons the accused can invoke to challenge, in a preliminary motion, the jurisdiction of the tribunal. In one of the decisions considered in this commentary, Mr. Ojdanić challenged the *spatial* jurisdiction of the ICTY (Rule 72(D), sub (ii)), arguing that the Security Council – and hence the tribunal – lacked power over states that are not a member of the United Nations (UN).

The other two decisions concerned the jurisdiction *ratione personae* (Rule 72(D), sub (i)) and attacked two respectable concepts of criminal responsibility: superior responsibility and the doctrine of joint criminal enterprise. In defiance of the clear-cut judgement of the Appeals Chamber in the Tadić case, Mr Ojdanić boldly argued that joint criminal enterprise liability did not come within the tribunal's jurisdiction and that its application in the case of the accused would infringe the *nullum crimen sine lege*-principle. The Appeals Chamber instead confirmed its previous judgement.

For obvious reasons, the challenge to the concept of superior responsibility was more modest and limited in nature. The Appellants argued that

- a) international customary law did not unquestionably sustain the application of the doctrine in internal armed conflicts;
- b) the superior could not incur criminal responsibility for acts of his subordinates committed prior to his appointment as their commander.

The Appeals Chamber rejected the first part of the appeal but, interestingly, endorsed the second part.

### 2. Decision of 6 May 2003

The Trial Chamber's decision of 6 May 2003 considered the limits of the tribunal's spatial jurisdiction.<sup>1</sup> One of the accused, Mr. Ojdanić, argued that, as the Federal Republic of Yugoslavia (FRY) was not a member of the UN at the time the statute was adopted, nor at the time the crimes had allegedly been committed, the Security Council lacked the power to impose measures on the FRY under Chapter VII of the Charter. As Ojdanić had been charged with crimes committed in Kosovo – part of the FRY – and he himself was a national of the FRY, he argued that he was beyond the reach of the tribunal's jurisdiction. Were the Chamber to accept this contention, then the tribunal could not resort to universal jurisdiction, as international criminal courts do not enjoy such wide competence.<sup>2</sup>

The motion raises difficult issues of state succession. The author, being an international criminal lawyer, feels inhibited to give his informed comment. Suffice to say that, in the opinion of the Trial Chamber, the FRY did not completely forfeit its UN membership. A 'rudimentary' membership was preserved, entailing rights and obligations that could only be assessed on a 'function by function' basis.<sup>3</sup> The Trial Chamber considered decisive the fact that the Security Council was authorized under Article 41 of the Charter to establish the tribunal. In view of the primordial goal to maintain peace and security, the need for this measure had not waned in the following years. The break-up of the former Socialist Federal Republic of Yugoslavia into different states and any subsequent loss of UN membership did not affect their being subject to the initial Chapter VII resolution establishing the tribunal.<sup>4</sup>

Although the reasoning may not be entirely satisfactory, it is inconceivable that the Trial Chamber could have reached a different decision. After all, the implications of the motion are not limited to Kosovo, as part of the FRY, but strike at the heart of the tribunal. Slightly disguised, the arguments raised in the motion re-

<sup>1</sup> ICTY, Decision on Motion Challenging Jurisdiction, *Prosecutor v. Milutinović, Ojdanić and Šainović*, Case No. IT-99-37-PT, T. Ch., 6 May 2003, Klip/Sluiter, ALC-XIV-13.

<sup>2</sup> ICTY, Decision on Motion Challenging Jurisdiction, *Prosecutor v. Milutinović, Ojdanić and Šainović*, Case No. IT-99-37-PT, T. Ch., 6 May 2003, Klip/Sluiter, ALC-XIV-13, par. 2.

<sup>3</sup> ICTY, Decision on Motion Challenging Jurisdiction, *Prosecutor v. Milutinović, Ojdanić and Šainović*, Case No. IT-99-37-PT, T. Ch., 6 May 2003, Klip/Sluiter, ALC-XIV-13, par. 38 and 44.

<sup>4</sup> ICTY, Decision on Motion Challenging Jurisdiction, *Prosecutor v. Milutinović, Ojdanić and Šainović*, Case No. IT-99-37-PT, T. Ch., 6 May 2003, Klip/Sluiter, ALC-XIV-13, par. 62.

vive the constitutional issues that had been settled in the Tadić case on the *Kompetenz-Kompetenz*.<sup>5</sup> Endorsement of the motion would invalidate, retroactively, a large part of the work of the tribunal and would cripple the tribunal for the remaining years of its existence. A more embarrassing situation would be that hard to imagine!

As the Trial Chamber had corroborated the tribunal's jurisdiction over events that had taken place in the entire territory of the former Yugoslavia, there was no need to decide the second prong of the motion, which challenged the tribunal's universal jurisdiction.<sup>6</sup> It is, however, interesting to determine how these issues, in the mind of the defence, were related. This question was addressed by Judge Patrick Robinson in his separate opinion. For a proper understanding of the intricate relationship between the two elements of the motion, it should be stressed that the second one – regarding universal jurisdiction – only serves to plug the legal loopholes if the first one is accepted.

Let us assume, for the sake of argument, that the Trial Chamber had agreed with the defence's view that the tribunal lacked jurisdiction over crimes that had allegedly been committed in states that were no (longer) a member of the UN. The tribunal might try to evade this quandary, so the defence's argument supposedly runs, by claiming universal jurisdiction over all states, irrespective of whether the state was a member of the UN or not. However this claim would fail, as international courts are not vested with universal jurisdiction. As Judge Robinson correctly observed, the defence obviously raised the question of universal jurisdiction, just in order to dismiss it.<sup>7</sup>

After an extensive account of the proper scope of universal jurisdiction and the crimes that would be eligible for universal jurisdiction, Judge Robinson correctly refuted the sweeping statement of the defence that international criminal courts would never be allowed to exercise universal jurisdiction. After all, the International Criminal Court has universal jurisdiction, insofar as the system of state consent is circumvented by a resolution of the Security Council referring a situation to the Court.<sup>8</sup> International law by no means seems to exclude the possibility that international criminal courts are vested with universal jurisdiction, either as a derivative of a consensual decision of states, pooling their own rights and transferring them to the international court, or as a consequence of a resolution of the Security Council.

The jurisdiction of the ICTY, however, is not determined by international customary law, but by its own statute, which unambiguously delimits the jurisdiction to the territorial space of the former Yugoslavia.<sup>9</sup> In this respect, the defence was certainly correct in contending that the ICTY lacks universal jurisdiction.

Would this have decided the case in its favour, if the Trial Chamber had endorsed the view that the jurisdiction of the tribunal was restricted to states that are members of the UN in the first place? Not at all, because the second part of the motion is completely redundant. The author essentially agrees with Judge Robinson's observation that the defence confused the powers of the Security Council to establish an international tribunal with the issue of universal jurisdiction.<sup>10</sup> However, this sharp perception may benefit from a short elucidation. The defence seems to suggest that remnant universal jurisdiction would pertain to the tribunal's competence, were it not for an explicit denial that international criminal courts ever enjoyed such a wide basis of jurisdiction. What the defence fails to grasp, however, is that the resolution of the Security Council is the only and exclusive source of the tribunal's jurisdiction. If the Trial Chamber would have endorsed the defence's view that the Security Council had only the power to equip the ICTY with jurisdiction in respect of states that were members of the UN, it would *eo ipso facto* have denied its universal jurisdiction.

<sup>5</sup> ICTY, Decision on the Defence Motion on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-04-1-T, T. Ch. II, 10 August 1995, Klip/Sluiters ALC-I-13, Commentary Theo van Boven; ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, A. Ch. , 2 October 1995, Klip/Sluiters, ALC-I-33, Commentary Horst Fischer.

<sup>6</sup> ICTY, Decision on Motion Challenging Jurisdiction, *Prosecutor v. Milutinović, Ojdanić and Šainović*, Case No. IT-99-37-PT, T. Ch., 6 May 2003, Klip/Sluiters, ALC-XIV-13, par. 64.

<sup>7</sup> ICTY, Decision on Motion Challenging Jurisdiction, Separate Opinion of Judge Robinson, *Prosecutor v. Milutinović, Ojdanić and Šainović*, Case No. IT-99-37-PT, T. Ch., 6 May 2003, Klip/Sluiters, ALC-XIV-13, par. 1.

<sup>8</sup> ICTY, Decision on Motion Challenging Jurisdiction, Separate Opinion of Judge Robinson, *Prosecutor v. Milutinović, Ojdanić and Šainović*, Case No. IT-99-37-PT, T. Ch., 6 May 2003, Klip/Sluiters, ALC-XIV-13, par. 24-30.

<sup>9</sup> ICTY, Decision on Motion Challenging Jurisdiction, Separate Opinion of Judge Robinson, *Prosecutor v. Milutinović, Ojdanić and Šainović*, Case No. IT-99-37-PT, T. Ch., 6 May 2003, Klip/Sluiters, ALC-XIV-13, par. 43.

<sup>10</sup> ICTY, Decision on Motion Challenging Jurisdiction, Separate Opinion of Judge Robinson, *Prosecutor v. Milutinović, Ojdanić and Šainović*, Case No. IT-99-37-PT, T. Ch., 6 May 2003, Klip/Sluiters, ALC-XIV-13, par. 48.

The point is, of course, that a concession on the first issue would have defeated the very purpose of the Security Council in establishing an international criminal court with jurisdiction over the whole region, in order that it might contribute to the restoration of peace and security.

### 3. Appeals Chamber's Decision of 21 May 2003: joint criminal enterprise

One of the accused in this case, Mr. Ojdanić, had been charged with a number of crimes against humanity and war crimes, which he allegedly had committed as a participant in a joint criminal enterprise.<sup>11</sup> Ojdanić had submitted a motion seeking a reversal of the Appeals Chamber's judgement in the Tadić case, in which the Chamber had concluded that joint criminal enterprise liability was firmly established in international customary law and, although implicitly, incorporated in the ICTY Statute as well.<sup>12</sup>

One of the preliminary issues that divided two learned judges of the Bench, was whether the opinion of the Appeals Chamber in the Tadić case that the joint criminal enterprise's was within its jurisdiction was part of the *ratio decidendi* or merely *obiter*. After all, in the former case, the decision would bind all later Chambers, while in the latter case, Chambers would be allowed to deviate and take a different position.<sup>13</sup> Judge Shahabuddeen argued that any holding that was the fruit of careful and exhaustive examination and (hence) 'essential' to the decision, would be part of the *ratio decidendi*, even if the proposition was conceded by the party concerned.<sup>14</sup> Judge Hunt, however, disagreed. According to him, the fact that Tadić had not challenged the premise that participation in a joint criminal enterprise amounted to individual criminal responsibility, was the relevant bench-mark to render the previous finding an *obiter dictum*. This prompted the Judge to inquire into the correctness of this ruling.<sup>15</sup>

The Appeals Chamber itself did not use much ink on the issue. It rejected the defence's submission that the Appeals Chamber's statement in Tadić was *obiter*, by simply assuming each Chamber's duty to inquire *ex officio* into its jurisdiction *ratione materiae* and *ratione personae*.<sup>16</sup> The Appeals Chamber argued that the defence should indicate why the tribunal should change its course, thus shifting the burden of persuasion to the Appellant. Before discussing in more detail the arguments advanced by the defence to reverse the Tadić dictum, it is interesting to dwell upon the way the Appeals Chamber construed the separate legal requirements with which the doctrine should comply.

It is self-evident that Article 7, section 1 of the statute should cover participation in a joint criminal enterprise. By referring to the Tadić judgement in concluding that this provision was not meant to be exhaustive, the Appeals Chamber did not break new ground. Unlike the substantive crimes, however, the provisions in the statute on criminal responsibility need not necessarily be reflected in international customary law. Rather, this requirement rather emerged from the *nullum crimen sine lege* principle.<sup>17</sup> Apart from being within the parameters of Article 7 of the statute, the joint criminal enterprise liability had to meet a threefold test: it had to be part and parcel of international customary law and the application had to be both accessible by and foreseeable for the accused.

What specific arguments did Ojdanić advance in order to challenge the application of the joint criminal enterprise in his case? First, he suggested that the doctrine had emerged from the concept of 'conspiracy'. By explicitly limiting conspiracy as a mode of criminal responsibility in relation to the crime of genocide, the drafters of the statute had shown their determination to abolish the general applicability of the concept.

<sup>11</sup> ICTY, *Prosecutor v. Milutinović, Šainović & Ojdanić*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72, A. Ch., 21 May 2003, Klip/Sluiter, ALC-XIV-41, par. 1.

<sup>12</sup> ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A.Ch., 15 July 1999, Klip/Sluiter ALC-III-761, Commentary Terry Gill, par. 220.

<sup>13</sup> ICTY, Judgement, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, A. Ch., 24 March 2000, Klip/Sluiter ALC-IV-361, Commentary André Nollkaemper and Liesbeth Zegveld, par.113.

<sup>14</sup> ICTY, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise, *Prosecutor v. Milutinović, Šainović & Ojdanić*, Separate Opinion of Judge Shahabuddeen, Case No. IT-99-37-AR72, A. Ch., A. Ch., 21 May 2003, Klip/Sluiter, ALC-XIV-41, par. 22 and 24.

<sup>15</sup> ICTY, Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction - Joint Criminal Enterprise, *Prosecutor v. Milutinović, Šainović & Ojdanić*, Case No. IT-99-37-AR72, A. Ch., A. Ch., 21 May 2003, Klip/Sluiter, ALC-XIV-41, par. 15.

<sup>16</sup> ICTY, *Prosecutor v. Milutinović, Šainović & Ojdanić*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72, A. Ch., 21 May 2003, Klip/Sluiter, ALC-XIV-41, par. 16.

<sup>17</sup> ICTY, *Prosecutor v. Milutinović, Šainović & Ojdanić*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72, A. Ch., 21 May 2003, Klip/Sluiter, ALC-XIV-41, par. 10.

Moreover, the doctrine was reminiscent of the generally rejected idea of ‘organizational liability’ which had polluted the judgement of the Nuremberg Tribunal and had manifested in individual responsibility for mere membership of a criminal organisation.

These arguments were easy prey for the Appeals Chamber. Joint criminal enterprise does not equate to ‘conspiracy’, nor is it similar to mere membership of a criminal organisation. Whereas ‘conspiracy’ is a separate crime of an inchoate nature that is completed as soon as the conspirators have reached an agreement, joint criminal enterprise liability requires concrete crimes to be committed and a material contribution of the accused.<sup>18</sup> This final condition already shows that mere membership of a criminal group would never suffice for imputing crimes, committed by a group, to all of its members.

Although the points raised by the defence were rather disingenuous and Judge Hunt was certainly correct in emphasizing the distinctions between joint criminal enterprise and conspiracy as an inchoate crime, the judgment tends to slightly obscure the problematic nature of the doctrine. The point is that ‘conspiracy’ is an intricate and somewhat ambiguous legal concept that has expanded over time, covering not only single agreements, but also sustaining the individual criminal responsibility of scores of individuals who are only loosely connected *inter se* or indirectly implicated in (the commission of) crimes.<sup>19</sup>

The joint criminal enterprise doctrine has a mixed pedigree, combining complicity law with conspiracy law.<sup>20</sup> The danger looms that in this ‘mixture’, the basic elements of both ancestors – substantial contribution for accomplices, mutual agreement for conspirators – may evaporate. In the case law of the ICTY and – to a lesser extent – the ICTR, the joint criminal enterprise has served as a vehicle to aggregate persons who are somehow related to mass crimes, without much heed being paid to the question of how exactly they contributed to the crimes or whether they had at least a silent understanding.<sup>21</sup>

In recent case law, some Trial Chambers of the ICTY have acknowledged this potential inflation of the doctrine and have made some necessary corrections, by requiring a specific agreement or ‘concerted action’ between the participants.<sup>22</sup>

At the end of the day, the Appeals Chamber was satisfied that the joint criminal enterprise doctrine met the conditions mentioned above. It confirmed the holding in Tadić that this mode of criminal responsibility was beyond doubt recognised in international customary law. Although admitting that this feature did not in itself suffice to make criminal responsibility foreseeable and accessible, the Appeals Chamber reasoned that both the existence of the doctrine in the domestic law of the former Yugoslavia and the egregious nature of the crimes charged contributed in providing the accused with sufficient notice that he would engage criminal responsibility on the basis of participation in a joint criminal enterprise.<sup>23</sup>

#### 4. Appeals Chamber’s Decision of 16 July 2003: command responsibility

The gist of Appellants’ challenge to jurisdiction in this decision, implying that the concept of command responsibility only applies in international armed conflicts, is that the concept is predicated on reciprocal ob-

<sup>18</sup> ICTY, *Prosecutor v. Milutinović, Šainović & Ojdanić*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72, 21 May 2003, par. 23-26 and, in particular, Separate Opinion of Judge Hunt, Klip/Sluiters, ALC-XIV-59, par. 23.

<sup>19</sup> E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press: The Hague, 2003, has coined the term complicity-conspiracy (p. 354).

<sup>20</sup> On the latter, see the excellent article of A.M. Danner and J.S. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, in: 93 *California Law Review* (January, 2005), 75, where they assert, contrary to the Appeals Chamber’s view, that “joint criminal enterprise is historically and conceptually related both to conspiracy and to the prosecution of criminal organisations”, p. 110.

<sup>21</sup> Compare, for instance, Judgement, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, 2 November 2001, Klip/Sluiters, ALC-VIII-581, par. 405/406.

<sup>22</sup> ICTY, Judgement, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Tr. Ch. I, 1 September 2004, par. 351; Judgement, *Prosecutor v. Krajišnik*, Case No. IT-00-39/40-T, Tr. Ch., 27 September 2006, par. 884. For a critical assessment of the Brđanin-judgement, compare K. Gustafson, ‘The Requirement of an Express Agreement for Joint Criminal Enterprise Liability: A Critique of Brđanin’, in: 5 *Journal of International Criminal Justice* (March 2007), pp. 134-158. The Appeals Chamber has rejected the requirement of an express agreement for JCE-liability, *Prosecutor v. Brđanin*, Judgement of the Appeals Chamber, Case No. IT-99-36-A, A.Ch., 3 April 2007, par. 418/419.

<sup>23</sup> ICTY, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, *Prosecutor v. Milutinović, Šainović & Ojdanić*, Case No. IT-99-37-AR72, A. Ch., 21 May 2003, Klip/Sluiters, ALC-XIV-41, par. 43.

ligations between States to regulate warfare and that internal armed conflicts lack this nature of reciprocity.<sup>24</sup> A dangerous flaw pervades this opinion, as it potentially subverts the whole fragile structure of humanitarian law in internal armed conflicts. After all, it is by no means clear why the ‘reciprocity argument’ should stop at the gates of command responsibility. If one were to consider common soldiers as the assets of warring states, the argument would be equally compelling. This obviously would make a travesty of humanitarian law in internal conflicts.

Expressing its dissent in the strongest way, the Appeals Chamber held that “internal armed conflict is now the concern of international law without any question of reciprocity”.<sup>25</sup> The Appeals Chamber appeared to found command responsibility on the kindred concept of ‘responsible command’. This is obviously the correct way to proceed. The ICRC Commentaries to the Geneva Conventions and the provisions of the Additional Protocols themselves elucidate that ‘responsible command’ was a *conditio sine qua non* for recognition as a lawful combatant. The absence of responsible command would offer a licence to commit atrocities, while the counterpart would not know whom to address.<sup>26</sup>

In this perspective, command responsibility is the logical complement to ‘responsible command’.<sup>27</sup> The latter yields command responsibility, whenever the commander fails to discharge his supervisory and disciplinary powers and things go astray. There is no reason why this would work out differently in internal armed conflicts as apposed to international armed conflicts. The nature of the conflict is immaterial to the validity of the principle.

Besides, as the Appeals Chamber correctly observes, the statutes of those tribunals that exclusively deal with international crimes in internal armed conflicts, take the applicability of the doctrine of command responsibility in those conflicts for granted. This codification reflects the current state of international customary law in this respect.<sup>28</sup> The fact that Additional Protocol II, contrary to Articles 86 and 87 of Protocol I, is silent on command responsibility, does not corroborate the point of view of Appellants, as the Protocols were only declaratory of the existing position of international law and did not constitute it.<sup>29</sup>

The issue of whether command responsibility in internal armed conflicts is recognized in international customary law being settled, the contention that its application would infringe the principle of legality (*nullum crimen sine lege*) had also been rejected, as the Appellants had predicated this second objection on a negative answer to the first one.<sup>30</sup>

This part of the decision deserves our admiration for having shed light on a legal issue that has bedevilled legal commentators, but the outcome of which is self-evident and satisfactory for all persons of common sense and goodwill.

### 5. Command responsibility and the newcomer

The majority of the Appeals Chamber agreed with Appellants’ position that international customary law did not provide for criminal responsibility in respect of those commanders who came into office after the international crimes had been committed by their subordinates. It was a close call indeed, as two judges – Hunt

<sup>24</sup> ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadzihasanović, Alagić & Kubura*, Case No. IT-01-47-AR72, A. Ch., 16 July 2003, Klip/Sluiters, ALC-XIV-73, par. 3.

<sup>25</sup> ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadzihasanović, Alagić & Kubura*, Case No. IT-01-47-AR72, A. Ch., 16 July 2003, Klip/Sluiters, ALC-XIV-73, par. 19.

<sup>26</sup> Geoffrey Best, *War and Law* since 1945, Clarendon Press, Oxford 1994, p. 355: “No armed force can be trusted to comply with the relevant IHL principles and rules and to enter into the implied relationship of reciprocity towards its opponent(s) unless it is cohesive and disciplined; opponents and third parties (...) need to know who is in command, and to be assured that he or she really is in command. (...) This requirement has ever been basic to this part of IHL precisely because bandits, freebooters, and criminals inevitably make hay in times of disorder and anarchy, sometimes trying to pass themselves as respectable guerrillas or forging ad hoc alliances with the same.”

<sup>27</sup> In the words of the Appeals Chamber: “The latter (i.e. ‘command responsibility’) flows from the former (‘responsible command’), par. 23.

<sup>28</sup> ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadzihasanović, Alagić & Kubura*, Case No. IT-01-47-AR72, A. Ch., 16 July 2003, Klip/Sluiters, ALC-XIV-73, par. 26.

<sup>29</sup> ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadzihasanović, Alagić & Kubura*, Case No. IT-01-47-AR72, A. Ch., 16 July 2003, Klip/Sluiters, ALC-XIV-73, par. 29.

<sup>30</sup> ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadzihasanović, Alagić & Kubura*, Case No. IT-01-47-AR72, A. Ch., 16 July 2003, Klip/Sluiters, ALC-XIV-73, par. 33.

and Shahabuddeen – had professed a different opinion, arguing that no authority sustained the restricted position that superior responsibility only engaged those persons who were in command at the time the crimes had been committed. The majority reasoned the other way round: “absence of authority suggesting that command responsibility does not apply to crimes committed before the assumption of command does not establish the conclusion that such criminal responsibility does exist.”<sup>31</sup>

The Appeals Chamber admitted that different opinions on the contested issue were possible, but professed its determination to put the question of whether a solid and positive rule confirmed superior responsibility for those commanders who had been appointed after the crimes had been committed to the strictest standard. In the absence of such a clear cut rule, the Chamber could only endorse Appellants’ position. To bolster its point of view, the Appeals Chamber referred to Article 86(2) of the First Protocol to the Geneva Conventions and Article 28 of the Rome Statute, which indeed suggest that both ‘knowledge’ and a superior-subordinate relationship should exist simultaneously with or before the moment the crimes were committed.<sup>32</sup>

Some Trial Chambers have expressed their concern over this outcome, arguing that “a superior’s duty to punish is not derived from a failure to prevent the crime, but rather is a subsidiary duty of its own”<sup>33</sup>, or by pointing out that, in view of the frequent turnover of command in war time, it may be conducive to an interruption in the chain of responsibility, thus creating a legal void.<sup>34</sup>

The issue at hand is closely related to an interesting debate on the proper legal foundation of the doctrine of superior responsibility.<sup>35</sup> In the earlier case law of the ICTY, the superior responsibility has usually been qualified as a responsibility *for* the crimes of subordinates.<sup>36</sup> This construction suggests participation through omission: by the dereliction of his duty to exercise proper control over his subordinates, the superior has furthered the commission of crimes.<sup>37</sup> The approach has been harshly criticised by the eminent scholar Mirjan Damaška who has pointed to the huge discrepancy between the commander’s liability and his actual guilt, if he, while ignorant of and certainly not intending the crimes of his subordinates, would still be held responsible for them.<sup>38</sup> Damaška’s reaction was triggered by the Trial Chamber’s judgment in the Blaškić case, which stretched the ‘reason to know’ standard so as to include inadvertent negligence.<sup>39</sup>

There are, however, other elements in the participation construction which equally militate against the conceptual soundness of considering superior responsibility as a form of participation.<sup>40</sup> For one thing, participation law requires a causal relationship between the participant’s contribution and the actual crime. There is, however, no common ground that, in case of command responsibility, the crimes of the subordinates

<sup>31</sup> ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadzihasanović, Alagić & Kubura*, Case No. IT-01-47-AR72, A. Ch., 16 July 2003, Klip/Sluiters, ALC-XIV-73, par. 54.

<sup>32</sup> ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v. Hadzihasanović, Alagić & Kubura*, Case No. IT-01-47-AR72, A. Ch., 16 July 2003, Klip/Sluiters, ALC-XIV-73, par. 46 and 47.

<sup>33</sup> ICTY, Judgement, *Prosecutor v. Orić*, Case No. IT-03-68-T, 30 June 2006, par. 335.

<sup>34</sup> ICTY, Judgement, *Prosecutor v. Hadzihasanović & Kubura*, Case No. IT-01-47-T, 15 March 2006, par. 199.

<sup>35</sup> Cf. A.H.J. Swart, ‘De strafrechtelijke aansprakelijkheid van meerderen in het internationale humanitaire recht’, (‘Superior criminal responsibility in international humanitarian law’) in: M.M. Dolman, P.D. Duyx, H.G. van der Wilt, Geleerde lessen (‘Learned Lectures’) Liber Amicorum Simon Stolwijk, Wolf Legal Publishers: Nijmegen 2007, pp. 213-235.

<sup>36</sup> Compare for instance Judgement, *Prosecutor v. Delalić and others*, Case No. IT-96-21-T, 16 November 1998, par. 333: “That military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law.” See also G. Werle, *Principles of International Criminal Law*, T.M.C. Asser Press: The Hague 2005, p. 128: “Superiors must answer for the crimes of subordinates”.

<sup>37</sup> Werle, op. cit. (2005), p. 129: “Doctrinally, the concept of superior responsibility can be located between omission and complicity.”

<sup>38</sup> M. Damaška, ‘The Shadow Side of Command Responsibility’, 49 *The American Journal of Comparative Law* 2001, p. 455, 464: ‘a commander’s liability is divorced from his culpability to such a degree that his conviction no longer mirrors his underlying conduct and his actual *mens rea*’.

<sup>39</sup> ICTY, Judgement, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, 3 March 2000, par. 332, Klip/Sluiters, ALC-IV-477, Commentary Nico Keijzer and Elies van Sliedregt. The Appeals Chamber, however, has rejected this broad interpretation, contending that the ‘reason to know’ standard did not cover negligence, ICTY, Judgement, *Prosecutor v. Blaškić*, IT-95-14-A, 29 July 2004, par. 62-64.

<sup>40</sup> Compare Swart, op. cit. (2007), p. 216.

should be the consequence of the superior's failure to exercise control properly.<sup>41</sup> Secondly – and for our topic highly relevant – one wonders how a superior can participate in a crime (for instance by failing to punish the perpetrators) after this crime has been completed. The issue is, of course, reminiscent of the problem of complicity *ex post facto*.

In recent case law another approach has surfaced. Rather than holding the superior responsible for the crimes of his subordinates, the Trial Chambers reproach him with 'dereliction of public duties', which amounts to a separate crime of omission. A move in this direction was made by the Trial Chamber in the Bagilishema case, which the Appeals Chamber reversed.<sup>42</sup> Other Trial Chambers, however, have persisted in this 'separate offence' approach, which has gradually emerged as the prevailing view.<sup>43</sup> It bears emphasis that this view is also shared by the dissenting Judges – Shahabuddeen and Hunt – in the case at hand.<sup>44</sup>

The dissociation between the responsibility of the superior and the actual crimes of his subordinates is likely to circumvent a number of problems identified above. The disparity between the *mentes reae* of a superior and subordinates does not trouble our legal minds, as they attach to different crimes. There need not be a causal relationship between the dereliction of duty and the very crimes. Finally, the omission to take adequate measures after the events is a separate offence which emerges from, but is no longer inextricably entwined with the core crimes themselves.

It is obvious that, in this context, the criminal conviction of a superior who has assumed office after his subordinates have committed war crimes is more suitable and acceptable than in the 'command responsibility as participation' construction. After all, he has not to answer for the crimes of his subordinates, which he could not have prevented anyway, but is criminally responsible for the lingering impunity that may provoke recidivism.

The real question is whether the 'separate offence' solution, commendable though it may be, stands a chance of survival in the long run. One may be inclined to doubt this. The adversaries of this approach have a point when they argue that neither the statutes of the ad hoc tribunals, nor the Rome Statute, provide for a separate crime of omission for superiors. Squeezing this option into the existing concept of superior responsibility inevitably implies the expansion of the doctrine in the direction of 'negligence'. Besides, Article 28 of the Rome Statute is crystal clear in requiring that the crimes, committed by the subordinates of a military commander, are "the result of his or her failure to exercise control properly over such forces", thus reinforcing the causal link between the omission and the crimes themselves. This rather points in the direction of the conventional construction of "superior responsibility as participation."

On the other hand, some counter-arguments may serve to sustain the 'separate offence' approach. The relaxation of the *mens rea* is compensated by the charge of a lesser offence and, consequently, a lighter degree of liability. Furthermore, the requirement of a causal link between the superior's omission and his subordinates' crimes does not necessarily rule out the proposition of two separate offences. In other words: one is

<sup>41</sup> The general opinion appears to be that proof of a causal link between the superior's omission and the ensuing crimes is not a legal requirement, ICTY, Judgement, *Proesutor. v. Delalić and others*, Case No. IT-96-21-T, 16 November 1998, par. 398; ICTY, Judgement, *Prosecutor v. Blaškić*, IT-95-14-A, 29 July 2004, par. 77 and Werle, *op. cit.* (2005), p. 136. Compare, however, G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford University Press: Oxford 2005, pp. 309-310, who argues in favour of such-- a causal link.

<sup>42</sup> ICTR, Judgement, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, T. Ch. I, 7 June 2001, par. 897, Klip/Sluiter ALC-X-617 and Judgement (Reasons), *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, A. Ch., 13 December 2002, par. 32-34, Klip/Sluiter, ALC-X-979. Compare also the short but highly perceptive commentary to the latter case by Paola Gaeta, ALC-X-1021-1025, who deplores the reversal and points to the German Code of Crimes against International Law, which has incorporated the negligent violation of the duty of supervision as a separate offence.

<sup>43</sup> Compare especially ICTY, Judgement, *Prosecutor v. Halilović*, Case No. IT-01-48-T, 16 November 2005, par. 54 and 78; Judgement, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, 15 March 2006, par. 191 and *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006, par. 782. In the same vein: Kai Ambos, 'Superior Responsibility', in: A. Cassese, P. Gaeta, J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Volume I, Oxford University Press: Oxford 2002, pp. 851/852.

<sup>44</sup> Interestingly, Cassese follows a bifurcated approach, contending that only those superiors who positively know of the crimes and willingly fail to prevent them would qualify as accomplices or co-perpetrators, while those who neglect their supervisory powers should only be held responsible for the separate offence of omission, A. Cassese, *International Criminal Law*, Oxford University Press, Oxford 2003, p. 206/207.

not allowed to reverse the equation by contending that, *because* a causal link exists between the offences, it is a matter of participation.<sup>45</sup>

It remains to be seen whether the International Criminal Court will follow the ad hoc Tribunals in their creative explorations of international criminal law. The present judgement of the Appeals Chamber, however, will probably stand, as it defies logic that previously committed crimes can ever be the result of the failure to exercise proper control by a newly appointed commander over his subordinates. Article 28 of the Rome Statute at least suggests that he will only incur criminal responsibility if the subordinates relapse in their callous behaviour.

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<sup>45</sup> For a similar point of view, Ambos, *op. cit.* (2002), p. 851, who correctly points out that “[...] they [the underlying crimes] constitute the point of reference of the superior’s failure of supervision; therefore, a specific causal relationship between the failure and the occurrence of the crimes must exist.”