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Hague justice through prism of new forms of criminal responsibility

ABSTRACT

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) was established by Resolution 827 of the UN Security Council, on 25th May 1993. Such establishment of the international tribunal led to it being disputed, primarily due to the fact that it was established by the UN body, which does not have judicial authorizations and therefore cannot transfer them to one of its subsidiary organs. However, the ICTY has successfully fought all challenges of such nature out, but it triggered a series of debates in the professional community with promotion of new forms of criminal responsibility - from impugnment to unconditional approval. With critical review of specific interpretation of the concept of command responsibility and construction of joint criminal enterprise through practice of ICTY, the autor points out the tribunal's inconsistency in interpretation of these forms of criminal responsibility, as well as the presence of elements of strict liability, otherwise unallowed in criminal law.

Key words: crime, tribunal, ICTY, command responsibility, JCE, joint criminal enterprise

1. Criminal responsibility of superior for acts of its subordinates

After the end of the World War I, international community started elaborating more seriously the question of superior's responsibility for unlawful acts of its subordinates during armed conflicts. However, only the mass of crimes and system in commiting them during World War II pushed winning forces into seriously focusing on this problem. London agreement of establishing Nuremberg trial rejected the possibility of defense by calling up on superior's orders. However, they were supposed to find a way to bring to the

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face of justice all those who did not order the crimes directly, but knew of them, or should have known that their subordinates were commiting crimes because of nature of their duty, but failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. The idea of such command responsibility developed into a doctrine through international agreements, firstly Protocol I additional (1977) to the Geneva Conventions from 1949, got its full swing on trials of ad hoc courts after the World War II, and as a special form of criminal responsibility, it was shaped by Statute and practice of ICTY. The concept of command responsibility as criminal responsibility of superior for the acts of its subordinates, especially in its wider form that is in the practice of ICTY, opened new questions that worldwide legal experts have opposed opinions about. The most important questions are those about legality, legal nature and boundaries of command responsibility.

1.1. Legality and legal nature of command responsibility

By getting an answer to the question if using the concept of command responsibility in practice of ICTY distorts the principle of legality in criminal law, we get an answer to the question if command responsibility is a new form of criminal responsibility for already existing crimes or if it is a new crime. In his report regarding UN Security Council resolution 808 from 22nd February 1993 that established ICTY, Secretary-General of the UN emphasizes that the use of the principle *nullum crimen sine lege* dictates that ICTY should use norms of international humanitarian law that have undoubtedly become part of customary law.[2] In accordance with jurisdiction *ratione personae*, such opinion was transfused into article 7 of the Statute of ICTY that established individual criminal responsibility as basic standard of the Tribunal for prosecution of those who did or ordered heavy violations of Geneva Conventions from 1949 based on criteria of execution of crime (directly or on order). Planning, preparing or direct execution of those violations is considered commiting, and in accordance with precedent from after the World War II, responsibility for heavy violations of international humanitarian law includes state chiefs and other state officials and persons that act in boundaries of their official positions.[3] Paragraph 3 article 7 of the Statute establishes that responsibility of superiors exists because of failing in preventing crime or deterring its subordinates from illegal acts, and in the explanation of Secretary-General of the UN it is called imputed responsibility or criminal neglect, that could be interpreted as criminal negligence.[4] In article 86 of Additional protocol

[2] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), presented 3 May 1993 (S/25704), §31.

[3] *Ibid*., §53–55.

I command responsibility (responsibility for given orders) already had its normative indirect form, but in the Statute of ICTY it is expanded on responsibility for not punishing executors of crimes. Responsibility for not punishing was applied on trials against Japanese generals Yamashita[5] and Matsui,[6] as well as German field marshal Von Koehler.[7] In case My Lai,[8] responsibility of general Koster was determined because after finding out about the crimes he did not take necessary measures to punish the executor, however, discipline responsibility was established instead of criminal. All cases above are creation of American court-marshal, and the decisive influence of the USA on establishing ICTY, as well as on the norms that it will work by, is undeniable. Thirty years later, legal experts who participated in making the Additional protocol I did not find justified introducing criminal responsibility for not punishing, and that is why the implementation of the same in the Statute of ICTY is even more arguable. The explanation could be found in the fact that trials in the wake of the World War II were organized by winning forces and performed by court-martials, and that ICTY formed under specific influence of NATO pact, hence a military force —it was not established based on law or under the supervision of any of the juridical bodies (commission) but it was established on the order of the Security Council as its subsidiary body. Never before that did it happen that the Security Council formed a subsidiary body with juridical jurisdictions because the Security Council simply does not have juridical authority that could be transferred to any of its subsidiary bodies. And so, on the insistence of American ambassador in the Security Council, Madlen Albright, concept of command responsibility was expanded to responsibility for not punishing. We can make a reproach to such stand for the absence of cause and effect relationship between not punishing and crime that was commited. Such expanded concept got even wider in the verdict of Trial Chamber in case Hadžihasanović — it was expanded on responsibility for not punishing for crimes that happened before coming to command duty. This was rejected by the Appeals Chamber as groundless

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4 *Ibid.*, §56.

5 Japanese General Yamashita was sentenced to death, although objectively did not have effective control over troops that commited crimes in Manila, and in opinion of the Military Commission of the United States he had opportunities but still failed to prevent the crimes or punish the perpetrators.

6 Tribunal for the Far East (Tokyo) sentenced to death Japanese General Matsui Iwane for massacre of civilians that committed the forces under his command during 1931 in Chinese city Nanking.

7 Field Marshal Von Koehler was held responsible for unlawful liquidation of members of Red Army that occurred prior to his taking command, and after that, although informed of the murders, he failed to take the necessary measures to punish the perpetrators. As a matter of fact, the same acts were continued under his command.

8 Vietnamese hamlet in which the U.S. troops massacred civilians 16th May 1968.

because it does not have stronghold in customary law.[9] However, two of five judges of the Appeals Chamber (Mohamed Shahabuddeen and David Hunt) singled out opposed opinion, based on the stand that necessary basis in international customary law lies in already existing principle of that same law if the principle is interpreted correctly,[10] that is, in the attempt to prove the same with a different (more free) interpretation of existing norms of international law, which does not exclude a different verdict in another case. One of the arguments is the possibility of evading responsibility of superior through constant rotation of command duties, which is understandable up to one point but does not decrease the impression that declaration of superior being criminally responsible because he did not punish executors of crimes that were commited when there was no superior-subordinate relationship is based, not even on strict liability, but more on an absurd liability. Not far from that is the equalization of responsibility for not punishing even when there was a superior-subordinate relationship with responsibility for crimes that were commited. On the other hand, having in mind the moral duty of reaction to crime, even by informing about knowing of the same to competent authorities, calling superior on discipline responsibility in such situations could have sense, because it would be a form of fighting against silence about events and collapse of superior's conscience, whether because of him being uninterested or because of the need not to get into conflicts with coworkers, as well as a measure against covering up crimes. In certain amount, if the information about crimes that were done could have been attainable only to that superior by the time of finding out about it, and he still did not take further measures of informing competent organs or punishing executors in boundaries of his own jurisdiction, with an aim to cover them up, it would be covering up the crime, which is incriminated in national criminal legislations and article 7 paragraph 1 of the Statute of ICTY.

1.2. Boundaries of responsibility of superior for crimes of subordinates

Question about boundaries of criminal responsibility of superior for crimes commited by his subordinates is completely justified. Responsibility of superior can be observed as guaranteed duty, which, by functionalism method, has two contents — protective and supervising.[11] In verdicts of panel of judges of ICTY, protective duty of military commandants toward civilians in zones where their

[9] The decision of the Appeals Chamber on the Interlocutory Appeal Challenging Jurisdiction in relation to command responsibility, in the case "Prosecutor v. Enver Hadžihasanović and others, 16th July 2003, § 41–56.

[10] *Ibid.*, §40.

[11] Franjo Bačić, *Zapovjedna odgovornost*, Hrvatski ljetopis za kazneno pravo i praksu, vol. 8, 2/2001, Zagreb, p. 144.

units take action is often emphasized. It undoubtedly exists, it is studied in military schools and it is provided in military manuals, but in case of responsibility of superior for act of his subordinate, supervising guarantee duty is more important. Military regulations are legal basis for the existence of such duty — duty of military elder to have full control and supervision over the area that is in zone under his responsibility, meaning control and supervision over acts of subordinates, especially in very sensitive conditions of armed conflicts. However, there have to be real boundaries of that responsibility. Military elder is a human being, in a physical meaning, as well as any other soldier that is his subordinate, but as for the education, he stands out not only by the level of military expertise but by mental capabilities that allow him to be in control in warfare. Still, there are levels of commanding that have bigger or lesser possibilities of supervision over each soldier depending on the position in the battle formation. It is certain that those possibilities are far wider to department commander than to division commander. In order to know what is happening in every department, division commander has to have excellent information web, and by military regulations that process of informing goes through process of subordination. In that commanding chain, we go from assumption that every link is made of honorable and decent people, so there is *a priori* trust in reports that are given, but on certain level, on certain position in commanding chain there is a possibility of keeping things from others, meaning giving false reports that superior elder cannot foresee up front. Because of that, prosecution should affirm with great certainty that the accused superior was exactly and completely informed of crimes on field. Certainly there are situations when the mass of crimes is such that knowledge of higher-rank commander is not questionable, but even under those circumstances, the very fact that someone is on command position cannot be assumption of his guilt for crimes of his subordinates to the lowest level. Even in determinant "knew or had reasons to know" hints assumption of knowing, which implies the assumption of guilt. Equally, taking "reasonable" measures leaves space for manipulation during estimation what those reasonable measures under specific circumstances really are and whether they could have been carried out by superior.[12] Change in position of onus of proof is in conflict with the principle of presumption of innocence and presents an affirmation of objective responsibility in criminal law. On one side, there is the duty of superior's action and on the other, the execution of crime by subordinate, and what happened in between those two sides, the circumstance whether there is any mutual relationship that there is no responsibility without is marginalized. In order to prove guilt of a superior based on failing to fulfil

[12] Military Tribunal for the Far East in the case Yamashita ignored the fact that American army cut off communications and disabled any contact between general Yamashita and his units that were hundreds of kilometers away committing crimes.

guarantee obligation, causal relationship between his missing out on supervising and crime that was commited by subordinate should be ascertained, in a way that it can be claimed with great possibility that missed measures of supervision could have prevented execution of crime.[13] Panels of judges of ICTY take the stand that it is not necessary to prove causal relationships between superior's no action and subordinates' crime. And so, the Trial Chamber based such conclusion in case Čelebići on the very existence of the principle of responsibility of superior for omission of punishing.[14] The conclusion of this Trial Chamber was gladly accepted by other panels of judges of ICTY. The Trial Chamber in case Halilović deems that existence of causal relationship as a condition would change basis of command responsibility for omission of preventing or punishing in amount that would practically need commander's involvement in crime that his subordinates commited, which would change the very nature of command responsibility established in article 7 paragraph 3.[15] We cannot agree with this, because there is definitely indirect involvement of superior in crimes of his subordinates under circumstances of failing in preventing them. If it were not like that, there would not be his criminal responsibility. The Appeals Chamber in case Blaškić emphasizes that the problem of causality is more a question of facts that should be ascertained in each case individually than a general legal question,[16] but even in case of this chamber the "questions of facts" was brought down to accepting opinion of panels of judges from case Čelebići. Such approach of ICTY is in accordance with some of theoretical opinions that causality is not relevant for crimes of omission, but there are opposed opinions, and they are in our jurisprudence (Lazarević, Srzentić, Stojanović).[17] However, up to what extent is causality "irrelevant"? Ignoring causality questions sense of "reasonable" measures, because they cannot be taken unless even mind projection of causal relationship between wanted acts of superior and possible illegal actions of subordinates is possible. That projection of future is component of negligence, but even that has to have its boundaries. In practice, rejecting necessity of proving causal relationship significantly facilitates the job of Prosecution, and puts accused ones into very ungracious position since with that the boundaries of

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13 Franjo Bačić, *op.cit*. (footnote 11), p. 40.

14 Trial Judgment in the case „Čelebići" – Prosecutor v. Zejnil Delalic et al. No. IT-96-21-T of 16th November 1998, §396, 398 and 400.

15 Trial Judgment in the case Prosecutor v. Sefer Halilović, No. IT-01-48-T of 16th November 2005, §78.

16 Appeal Judgment in the case Prosecutor v. Tihomir Blaškić, No. IT-95-14-A of 29th July 2004, §77.

17 Nedeljko, Jovančević, *Izvršilaštvo i saučesništvo kroz nečinjenje*, Anali Pravnog fakulteta u Beogradu, godina LIX, 1/2011, p. 345–366.

responsibility in commanding chain are lost, there is a complete legal insecurity, because everything is left to free estimation of acting judges. And so, in case Blaškić, the Prosecution ascrribed to the accused responsibility on two bases – for ordering execution of crimes in village Ahmići, as well as for failing to prevent or punish for those crimes. Giving orders to commit a crime produces direct command responsibility that, as a heavier form, consumes indirect form of the same so the purpose of such indictment could be questioned, and the answer could be that the Prosecution only made a retreat by including the failure in preventing or punishing commited crime in lack of firm evidences that the accused ordered execution of crimes. And indeed, Blaškić was declared guilty and was sentenced to a draconian punishment of 45 years in jail, but that same sentence was changed after appeal to even five-times shorter punishment — 9 years of jail. In the appeal, the existence of so called „double line of command" in village Ahmići was affirmed, so it was ascertained that those crimes were commited by forces outside of efective control of general of HVO (Croatian Defence Council), Tihomir Blaškić, and it seems that by the evidences in the appeal, an acquittal could have been made but in that case, more that eight years spent in prison (custody) would become a problem.

Affirmed existence of double line of command in case Blaškić, opened a new page in the approach to command responsibility in front of ICTY. Command responsibility could no longer be observed on automatism, but more attention should have been on proving the existence of effective control, because without it there is no superior-subordinate relationship. It was proven that it is not necessary that the superior is legally authorized to prevent or punish, but not even the fact it is does not make it really possible unless the superior does not have firm mechanisms that can prevent subordinate from commiting crimes or punish him for what he had already done.

1. Critical view of JCE

By introducing the concept of joint criminal enterprise in the practice of the ICTY, outside existing statute, appeared many questions, which there are still not precise answers to that would clear all doubts regarding validity of its applying. Key questions concern the legality of the legal institute, its legal nature and respect of the principle of causality and guilt.

1.1. The principle of legality

In already mentioned report, the Secretary General of the UN pointed that corpus of rights whose application the ICTY has the authority for, "exists in the form of conventions' law and customary law", and that approach is necessary

in order for all states to equally abide the rules of international humanitarian law, which beyond any doubt became part of customary law. In applying such corpus of rights, ICTY applies the principle of legality (*nullum crimen nulla poena sine lege*).[18] *Joint criminal enterprise* (JCE), as a form of committing a crime, was constructed in sentence of the Appeals Chamber in the case Prosecutor v. Tadić and other sentences that ensued. The Appeals Chamber in the case Prosecutor v. Tadić pointed out that they are aware of the fact that JCE does not exist in the Statute as a crime (§2-5) and with an arbitrary interpretation of the article 7(1), they defined it as a form of criminal responsibility, relying on the principle of legality in form of alleged trial practice and conventions as foothold in the international law. The Appeals Chamber in the case Prosecutor v. Milutinović and others asserted that ICTY, according to the Statute, has *ratione personae* to establish a new form of criminal responsibility, among other, under condition that it existed in the international customary law in relevant time in a way that it was reachable for anyone who acted.[19] Analyzing trial sentences that the Appeals Chamber in the case Prosecutor v. Tadić got on, which ones were later accepted and got on by other trial chambers of the ICTY, we get the impression that they selectively extracted from them segments that would, if not legally then at least linguistic associatively, connect those sentences with construction of joint criminal enterprise that was established five decades later. The fact that during that period law theory did not recognize such novelty in criminal law is a serious indicator that such new-developed form of criminal responsibility actually does not exist outside previously known law institutes in international customary law, as a form of criminal responsibility and as a way of connecting participants in a criminal event. Such concept is unknown in most of national legislations, especially in those states that have a very important role in international relations, such as Germany, France and Spain, as well as in the states of region where the crimes happened and whose citizens sit on the dock of the ICTY — Bosnia and Herzegovina, Croatia and Serbia. It must be taken into consideration that the United States did not approach the Rome Statute, they even expressed their opposition against it, which compromises this international contract as a creditable proof of customary law. So, contrary to the taken point of the trial chambers of the ICTY, concept of joint criminal enterprise has not been affirmed neither in this one nor in other international contracts.

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[18] Report of the Secretary-General, *op.cit.* (footnote 2), §33.

[19] The decision of the Appeals Chamber in the case Prosecutor v. Milutinović et al., on objection of Dragoljub Ojdanić, 21 March 2003, §21.

1.2. Legal nature of JCE

Analyzing legal nature of the JCE, we would have to answer the question whether this is a new offense or a new element of the term of crime. Recognizing problems of legality which they would be faced with qualifying the JCE as a new offense, the Appeal Chamber in the case Prosecutor v. Tadić aligned it in a form of criminal responsibility, asserting that the Statute of the ICTY does not limit itself only to forms of criminal responsibility listed in article 7 (1). It found a justification in the fact that the nature of massive crimes is such that they are always commited in association, where the roles are divided, but bearing in mind the final consequence, by opinion of the Chambers, guilt would have to be equally divided on direct perpetrators and other participants that contributed to that criminal act in different ways. The Chamber considers that the majority of international crimes „are not result of the criminal tendencies of individuals, but they are manifestations of collective criminality".[20] It could be argued that this claim is rendered very awkwardly, because it undermines the criminological and psychological postulates of nature of crime, and in the most direct way possible dilutes individual criminal responsibility, affirming at the same time collective responsibility in international criminal law. We have to put the problem in the scopes of individual criminal responsibility, and the modern legal theory has classified the individual criminal responsibility in two basic forms — the responsibility of direct perpetrators of crime (perpetration) and the responsibility of other participants who contribute to its perpetration in different ways (complicity). The Appeals Chamber put an equal sign between the moral weight of perpetration and complicity in crimes with common criminal plan,[21] which calls into question the criteria for the imposition of sanction, since it is determined primarily by the shape and extent of participation in a crime. The fact that it has been pre-planned and done in communion with others must be treated as an aggravating factor, not a need to invent a new form of criminal responsibility. The concept of joint criminal enterprise, the way it is applied in practice of the ICTY, is much closer to being qualified as a criminal offense, or even as *modus operandi* of the same crime. In the dissenting opinion of Judge Per-Johan Lindholm in the Trial Chamber in the case Prosecutor v. Blagoje Simić and others, as well as in the judgment of the Trial Chamber in the case Prosecutor v. Stakić, was expressed the same opinion that there is actually a case of complicity, long known concept in modern criminal law and international

[20] Appeal Judgement in the case Prosecutor v. Tadić Duško aka Dule, No. IT-94-1-A of 15th July 1999, §191.

[21] *Ibid.*

criminal law.[22] The Trial Chamber in the case Stakić noted that *mens rea* cannot be changed introducing new form of responsibility, and that by converging the JCE concept to the term of execution actually avoids creating an impression that a new criminal offense, which is not provided by the Statute, is being introduced in criminal law through small door, and that it could be called „membership in a criminal organization." The Appeals Chamber set aside the judgment of the Trial Chamber in the case Stakić, arguing that complicity, the way that it was defined and applied by the Trial Chamber, is not confirmed of international customary law, as opposed to the JCE that is "firmly rooted" there![23] Previous rendition about the legality of the JCE makes such claim of the Trial Chamber look completely unfounded.

1.3. Causality

The Appeals Chamber in the case Tadić said that in order to prove the joint criminal enterprise, participation of the accused in any criminal act within the enterprise is not necessary, but just the fact that these crimes occurred and that there was a probability of their predictability. Term predictability is already integrated in institute of guilt as an intellectual component of the consciousness which, together with the voluntary element, determines the form of culpability of each participant in a criminal event. Expressing an attitude that each participant is equally responsible for the crime, regardless of personal contribution that can be completely marginal, trial chambers of the ICTY lead intellectual and volitional component into objectification. The existence of a common criminal purpose proves itself *a priori* with the consequences of criminal act and thus evidentiary procedure obtains a reverse order — all other material evidence is introduced into the procedure in function of the one that was previously determined as the key evidence. Establishing criminal responsibility based on a predictability in the final outcome gives the broad mass of the defendants, practically all of which were in any way part of a system, by constructing chains of causality from which is essentially deduced a collective criminal responsibility. For the establishment of criminal responsibility on the basis of participation in systemic form of the JCE (JCE II) it is a sufficient fact that the defendant was on one of the duties in the concentration camp, including administrative, by imputing him awareness of

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[22] Trial Judgement in the case Prosecutor v. Blagoje Simic et al, No. IT-95-9-T of 17th October 2003 – Separate and partly dissenting opinion of Judge Per-Johan Lindholm, §2; Trial Judgement in the case Prosecutor v. Milomir Stakic, No. IT-97-24-T of 31st July 2003, §438.

[23] Appeal Judgement in the case Prosecutor v. Milomir Stakić, No. IT-97-24-A of 22nd March 2006, §62–3.

„crimes being committed in the camp and continuation of participation, which allows the operation of the camp".[24] In that way, the blame can be attributed to cooks or doctors who are in such camp employees for feeding and curing prisoners and did not have personal stake in commission of the crime, nor did they want them. It is a responsibility based on membership in an organization (guilt by association), and in the judgment of the Trial Chamber in the case Stakić, it was rejected as a posibility because that would create a new offense and violate the principle of *nullum crimen sine lege*.[25] Accepting an objectively-based presumption of guilt of the accused, unless the defendant proves otherwise, the court ignores the presumption of innocence, which is guaranteed by Article 21 of the Statute of the ICTY.[26] In the third form of the JCE (JCE III), the establishment of guilt is based on the predictability of possible[27] or probable[28] consequences or possible acts of other participants in the enterprise,[29] outside of the JCE — which is nothing but Pinkerton rule of conspiracy as seen by customary law. The essence of a conspiracy is an agreement, which includes a subjective relationship toward an agreed activity, not an objective circumstance under which anybody could be associated with it. The Trial Chambers are also inconsistent in application of the principle *in dubio pro reo*. The Trial Chamber in the case Orić based its decision to release the accused from criminal responsibility exactly on the same principle,[30] while the Appeals Chamber in decision on the complaint of Ojdanić in the case „Milutinović and others" found that this generally accepted principle of criminal law has no place in that matter. This selective approach is possible thanks to the fact that the establishment and application of the concept of the JCE violates the basic principles of criminal law, in addition to the above, even in terms of the principle of guilt (*nulla poena sine culpa*). Because of this it is not surprising that behind the scenes of the tribunal, more as reality than a joke, acronym JCE is not interpreted as "joint criminal enterprise", but "just convict everyone".

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[24] Trial Judgement in the case Prosecutor v. Miroslav Kvočka et al., No. IT-98-30/1-T of 2nd November 2001, §278.

[25] Trial Judgement in the case Prosecutor v. Milomir Stakić, *op.cit.* (footnote 22), §433.

[26] Study of Croatian Academy of Legal Sciences, where footnote 456 indicates to Haan, „The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia", 5 Intl. Crim. L. Rev. 196 (2005).

[27] Appeal Judgement in the case Prosecutor v. Tadić Duško aka Dule, No. IT-94-1-A of 15 July 1999, §204.

[28] *Ibid*., §220.

[29] *Ibid*., §228.

[30] Trial Judgement in the case Prosecutor v. Naser Orić, No. IT-03-68-T of 30 June 2006, §608, 619, 632, 645, 676 и 707.

6. Conclusion

By determining command responsibility as a form of individual criminal responsibility, and proving its confirmation in international customary law, violation of the principle of legality is avoided, which it would inevitably come to if omission to prevent or punish crimes were qualified as a special criminal offense, because the application of it on armed conflicts in the former Yugoslavia would mark impermissible retroactive application of the law.

The existence of responsibility of superiors for omissions of subordinates cannot be disputed by anyone, because it is an imminent characteristic of that relation shown in two aspects — responsibility for fulfilling duties, his own and those of his subordinates, and responsibility for consequences, of his own acts and those of his subordinates. On that scale of responsibility, the intensity is not the same on all levels. On criteria of appeared damaging consequence, responsibility goes from moral, through discipline to penal, which can be misdemeanor and criminal. International team of legal experts foresaw, according to case, discipline or criminal responsibility of superior for failing to prevent crimes in article 86 paragraph 2 of Additional Protocol I, not mentioning which form such criminal responsibility should be manifested in — perpetration or complicity. Practice of ICTY has practically equalized the weight of crime commited by omission of duty with the one commited by giving order. It could be said that by significance that is given to it, responsibility for careless omission to punish perpetrators is equalized with responsibilty for crimes commited with premeditation, and that one is equalized with responsibility for execution of crime, which practically equalizes responsibility based on negligence with responsibility based on intent. In this place, we can dispute sustainability of indirect form of command responsibility as a general law institute, because the nature of international humanitarian law is such that violations of the same are always with intent, and genocide is even with special intent, which absolutely excludes the possibility of negligence. In that sense, it is more right to qualify indirect form of command responsibility as individual crime of omission, i.e. of not taking appropriate measures in order to prevent execution of crimes against humanity and other rights established by international law, in a way that was done in Criminal code of Republic of Serbia. That way, it could be secured that someone who acted out of negligence could be punished more mildly than the one who did it with direct intent, unlike the situation that we have in the practice of ICTY where negligent omission of duty is equal to act behind which is criminal intent. Not in moral or in any other sense can be considered equally guilty the one who simply did not prevent something and the one who directly caused something.[31]

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[31] Jovan Ćirić, *Objektivna odgovornost u krivičnom pravu*, Institut za uporedno pravo, Beograd, 2008, p. 176.

It seems that the prosecutors of this tribunal are aware of that, so in order to facilitate proving their indictments they constructed a new form of criminal responsibility based on participating in joint criminal enterprise. As we have seen, claims that JCE is affirmed in international customary law are not legally grounded. On the contrary, normative and judicial practice of most of the states shows that existing forms of complicity include all possible ways of giving contribution to execution of crime in a completely satisfying way, which makes extrication of JCE unnecessary outside the process of sentencing. However, complicity cannot be constructed by giving only evidences that someone could have known something. With a thorough analysis of sentences, it can be easily seen that trial chambers of the ICTY apply the concept of JCE every time when it seems difficult or impossible to them to prove command responsibility, because this concept gives the prosecutors wide possibilities to accuse anyone of any illegal action of any other participant of JCE by already objective circumstances that they were on certain directing position, from lowest to the highest rank. That is much easier for the Prosecution than proving the existence of subjective elements of crime and intent that is divided with other direct perpetrators. All above indicates big gaps when applying the principle of guilt in front of the ICTY, ambiguities and inconsistence, and direct violation of the same via objectification of guilt, which is unacceptable in criminal law.

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