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Srebrenica: On Joint Criminal Enterprise, Aiding and Abetting and Command Responsibility

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Abstract The objective of this article is to find out how the atrocities in Srebrenica have been reconstructed by the ICTY by the choice of concepts of criminal responsibility that reflect the positions, contributions and relative guilt of the participants. The concepts of joint criminal enterprise, aiding and abetting and command responsibility are therefore the guiding notions in the separate sections. These concepts serve distinct purposes. The joint criminal enterprise doctrine is applied if several persons share a common plan and make some contribution to implement that plan. ‘Aiding and abetting’ refers to persons ‘on the fringes’ who ‘merely’ assist in the commission of crimes, without necessarily sharing the intent of the principals. And superior responsibility reflects the reality that international crimes proliferate when military commanders fail to exercise the effective control that fits their position. However, these are ‘ideal types’ of concepts of criminal responsibility, the application whereof is inevitably conducive to some distortion of reality. The fact that criminal law follows its own logic should be taken into account, when one assesses the case law of the Tribunal in order to obtain an impression of what ‘really’ happened.

Keywords Srebrenica · International Criminal Tribunal for the former Yugoslavia · War crimes · Genocide · Norm expression · Joint criminal enterprise · Aiding and abetting · Superior responsibility

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1 Introduction

The massacre in Srebrenica, which has officially been recognized as genocide, entailed the commission of countless crimes and the participation of numerous perpetrators. A small number of them have stood trial before the International Criminal Tribunal for the Former Yugoslavia (hereafter: ICTY). The company of accused in respect of Srebrenica comprised the whole hierarchical gamut, from the physical perpetrators,¹ to the political and military leaders of Serbia and the Bosnian Serbian republic.² Obviously, the contributions of the several perpetrators have been quite diverse and their intentions will have differed as well. The ICTY has for instance convicted the accused on the basis of persecutions on political, racial and religious grounds as a crime against humanity,³ murder as a violation of the laws and customs of war⁴ and forcible transfer.⁵ Concerning the different modes of criminal liability, the ICTY has upheld charges of joint criminal enterprise (hereafter: JCE),⁶ aiding and abetting⁷ and command responsibility.⁸

The aim of this article is to obtain an impression of the way in which the dynamics and interactions between key players are reflected in the case law of the ICTY. It does not seek a normative assessment of the different modes of criminal responsibility in light of basic principles of criminal law.⁹ The objective is rather to find out how a dramatic and terrible event is reconstructed in the courtroom by the choice of concepts of criminal responsibility that reflect the positions, contributions and relative guilt of the participants. The concepts of JCE, aiding and abetting and command responsibility are therefore the guiding notions in the separate sections. In Sect. 2 I will demonstrate that the JCE doctrine has been applied in order to address the criminal responsibility of those who meticulously plan and organize large operations, such as the attack in Srebrenica, sometimes long in advance. It serves to link the political leaders with the military who pass their instructions and orders down the chain of command which ultimately results in the commission of the crimes. A problem presents itself here right from the start. While both Karadžić and

¹ *Prosecutor v. Erdemović*, Sentencing Judgment, Case No. IT-96-22-T, T. Ch. I, 29 November 1996; Judgment of the Appeals Chamber, Case No. IT-96-22-A, 7 October 1997.

² As is well known, the trial of Milošević ended with the death of the accused, *Prosecutor v. Slobodan Milošević*, Order Terminating the Proceedings, Case No. IT-02-54-T, 14 March 2006. The criminal proceedings against Radovan Karadžić and Ratko Mladić are still in progress.

³ *Prosecutor v. Nikolić*, Judgment, Case No. IT-02-60/1, 2 December 2003 and Judgment of the Appeals Chamber, 8 March 2006.

⁴ *Prosecutor v. Blagojević & Jokić*, Judgment, Case No. IT-02-60, 17 January 2005 and Judgment of the Appeals Chamber, 9 May 2007.

⁵ In the case against Borovčanin, *Prosecutor v. Popović et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010.

⁶ Against Popović, Beara, Nikolić and Miletić, see *Prosecutor v. Popović et al.* (*supra* n. 5).

⁷ Against Blagojević and Jokić (*supra* n. 4) and in *Prosecutor v. Krstić*, Judgment of the Appeals Chamber, Case No. IT-98-33-A, 19 April 2004, paras. 135–144.

⁸ Against Pandurević, *Prosecutor v. Popović et al.*, Judgment of the Appeals Chamber, Case No. IT-05-88-A, 30 January 2015 and *Prosecutor v. Obrenović*, Judgment, Case No. IT-02-60/2, 10 December 2003.

⁹ In previous articles I have been critical of an expansive application of the JCE doctrine, compare Van der Wilt (2007), pp. 91–108 and Van der Wilt (2009), pp. 158–182.

Mladić have been charged with membership of (several) JCEs, they have not been convicted. As long as the case is *sub judice*, scholars should be cautious. I will therefore take the charges of the Prosecutor as the point of departure, insofar as they have been provisionally corroborated or at least not denied by the Trial Chamber or Appeals Chamber.¹⁰ Moreover, I will mainly focus on the application of the doctrine in the case of *Popović et al.* Sect. 3 explores the assumption that aiding and abetting, at least in the context of Srebrenica, did not necessarily connote a secondary and subservient contribution by the accomplice, but also served to compensate the lesser *mens rea*. In Sect. 4 I intend to investigate why command responsibility, while not totally absent, was of slight importance to sustain the criminal responsibility of the accused. And Sect. 5 ends with some reflections on the general picture or narrative of Srebrenica that the ICTY has bequeathed to us. That final section will also briefly indicate whether the ICTY has served as an example for other international criminal tribunals and the International Criminal Court (hereafter: ICC).

2 Srebrenica: A Dismal Crossroads of Multiple Joint Criminal Enterprises

According to the famous *Tadić dictum*, a JCE entails a plurality of persons that unite for a common purpose which amounts to or involves the commission of one or more (international) crimes. Participation need not involve the commission of a specific crime; a significant contribution to the execution of the common purpose suffices. A member of the JCE incurs criminal responsibility when he either intended to perpetrate a certain crime (JCE I), or when the crime, while initially outside the scope of the common purpose, was foreseeable and the member nevertheless willingly took that risk (JCE III).¹¹

The prelude to the Srebrenica massacre can probably traced back as far as May 1992 when members of the Bosnian-Serb leadership, including Karadžić and Mladić, the Serbian President Milosević and generals of the Yugoslavian National Army agreed to permanently remove the Bosnian Muslims and Bosnian Croats from Bosnian-Serb claimed territories. As this ‘ethnic cleansing’ involved large-scale expulsions, the setting up of detention camps and widespread killing in and around these detention camps, both Karadžić and Mladić are charged with membership of a JCE that employed the mentioned crimes as a tool to reach their goal. However, this general policy of forced removal was not directly conducive to the attack on Srebrenica. After all, General Halilović of the Bosnian Muslim Army and General

¹⁰ Defence counsel for Mladić started a ‘no case to answer’ procedure, under Rule 98bis of the ICTY Rules of Procedure and Evidence, seeking the acquittal of his client. However, the Appeals Chamber has rejected this request, *Prosecutor v. Mladić*, Rule 98bis Judgment of the Appeals Chamber, Case No. IT-09-92, 15 April 2014. In respect of Karadžić, the Appeals Chamber reversed his acquittal of genocide in the ‘Municipalities’ under Rule 98bis, *Prosecutor v. Karadžić*, Judgment, Case No. IT-95-5/18-AR98bis.1, 11 July 2013.

¹¹ *Prosecutor v. Tadić*, Judgment of the Appeals Chamber, Case No. IT-94-1-A, 15 July 1999, paras. 227–228. JCE (II)—the so-called ‘concentration camp variety’—is irrelevant in the context of Srebrenica.

Mladić had signed an agreement in the spring of 1993, recognizing Srebrenica as a *safe area* that would be under the protection of the United Nations Protection Force (UNPROFOR).¹² It was only in March 1995 that the Army of the Republika Srpska (VRS) and the Bosnian-Serb Ministry of the Interior (MUP) decided to remove the entire Muslim population forcibly from Srebrenica, Žepa and Goražde. Directive 7 which was issued on 8 March 1995, dispatched to the commanders of the various Corpses and undersigned by the Supreme Commander Karadžić, bears testimony to this resolve. It ordered that the Drina Corps was to carry out the ‘complete physical separation of Srebrenica and Žepa as soon as possible, preventing even communication between individuals in the two enclaves’ and by ‘planned and well thought-out combat operations create an unbearable situation of total insecurity with no hope of further survival or life of the inhabitants of Srebrenica and Žepa’.¹³ The Directive also stated ‘through the planned and unobtrusively restrictive issuing of permits, reduce and limit the logistics support of the UN protective force, hereinafter UNPROFOR, to the enclaves and the supply of material resources to the Muslim population, making them dependent on our goodwill, while at the same time avoiding condemnation by the international community and international public opinion’.¹⁴ The obvious intent of the Bosnian Serb Army was to conquer Srebrenica by strangulation and isolation. The attack on Srebrenica started on 6 July and the enclave fell to the Bosnian Serbs on 11 July. Whether the genocide was contemplated at the time of the attack is unclear, but the Trial Chamber in *Popović* found that the plan to murder Bosnian Muslim men had already materialized on 12 July 1995 and had started being implemented by the separation of the Muslim men.¹⁵

At this juncture, the Trial Chamber interestingly made a distinction between a JCE to Murder and a JCE to Forcibly Remove Persons from the safe area. The first JCE to Murder encompassed amongst others Popović, Beara and Nikolić, who all shared the intent to carry out the common purpose to murder the Bosnian Muslim men. The Trial Chamber meticulously identified the contributions of each of the accused. Popović was the ‘lieutenant-colonel who directed the executions that took place at Orahovac and coordinated logistics for the killings that took place at the Branjevo Military Farm and the Piluca Cultural Centre on 16 July 1995’. Beara was ‘implicated in identifying locations, securing personnel and equipment, and overseeing the execution of the murder plan at individual killing sites’. Whereas Nikolić was ‘involved behind the scenes, securing personnel to guard and execute prisoners as well as giving directions at one of the killing sites’.¹⁶

¹² Mient Jan Faber, *Srebrenica; De genocide die niet werd voorkomen*, Interkerkelijk Vredesberaad (IKV), March 2002, pp. 21–22.

¹³ *Prosecutor v. Mladić*, Rule 98bis Judgment summary in the case of Ratko Mladić, The Hague 15 April 2014, p. 12.

¹⁴ *Ibidem*, p. 13.

¹⁵ *Prosecutor v. Popović et al.*, *supra* n. 5, paras. 1051–1052.

¹⁶ *Prosecutor v. Popović et al.*, *supra* n. 5, paras. 1166–1168 (Popović), paras. 1300–1302 (Beara), paras. 1390–1392 (Nikolić).

The JCE to Forcibly Remove emerged earlier with the issuance of Directive 7 at the latest, and consisted mainly of other military officials, amongst them the accused Miletić. The Trial Chamber had found that he had made a significant contribution to the common purpose through his involvement in the drafting of Directives 7 and 7/1, by restricting humanitarian aid and an UNPROFOR re-supply, and through his role, in the exercise of his functions, in monitoring and coordinating work and information for the VRS Main Staff.¹⁷ However, both the Trial Chamber and the Appeals Chamber held Miletić also responsible under JCE III for ‘opportunistic killings’ committed by the Bosnian Serb Forces (BSF) in Potočari, as these killings were foreseeable consequences of the JCE to Forcibly Remove and he had taken the risk that such killings would occur.¹⁸

The distinction between the JCE to Murder the Muslim men and the JCE to Forcibly Remove the women, children and the elderly is sound from the perspective of the fair attribution of guilt. It suggests that, in the build-up to the massacre, a certain degree of functional specialization was accomplished within the ranks of the BSF and MUP. It is plausible that those occupying the highest positions in the political and military leadership, like Karadžić and Mladić, were members of the overarching JCE to eliminate the Bosnian Muslims in Srebrenica, because the operation comprised both the killings and the forcible removals. The division of labour apparently occurred lower down the chain of command.¹⁹ A certain degree of cross-breeding and reciprocal responsibility is reflected in the findings that members of the JCE to Forcibly Remove—like Miletić—were also liable for the killings, because they could have surmised that their activities would further those crimes. Nonetheless, the representation of the factual situation can only be sketchy and incomplete. There may have been more intermingling between both JCEs that simply could not be proven beyond a reasonable doubt. In its ambitions to capture the collective dimension of international crimes, the JCE doctrine inevitably leaves many gaps and issues for speculation. This is candidly avowed by the Trial Chamber in *Popović*, where the Chamber acknowledged that killings had been committed by persons outside the JCE or by unknown members of the JCE.²⁰ As long as we do not know who (all) the members of the respective JCEs were, we are ignorant of their contributions, intentions and interactions. And we are ultimately left in the dark on the precise nature and composition of the JCEs.

Obviously, legal qualifications are by definition rather coarse and abstract. They offer a stylized representation of an unruly reality. There is merit in fine-tuning the legal instruments to the facts and in this respect the ICTY did a great job in the *Popović* case. However, while there is clear evidence to show that there was a certain division of labour within the ranks of the Bosnian Serb Army, one should be careful not to conclude that the functions were strictly separated.

¹⁷ *Prosecutor v. Popović et al.*, *supra* n. 5, para. 1606.

¹⁸ *Ibidem*, paras. 1734–1735.

¹⁹ The Trial Chamber found that neither Popović (para. 1174), nor Beara (para. 1309), nor Nikolić (para. 1395) had been a member of the JCE to Forcibly Remove.

²⁰ *Popović et al.*, *supra* n. 5, para. 1174.

3 Assisting the Ethnic Cleansing in Srebrenica

Article 7(1) of the ICTY Statute stipulates that a person who ‘[...] aids and abets in the planning, perpetration or execution of a crime [under the jurisdiction of the ICTY] shall be individually responsible for that crime’. The *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.²¹ According to the Trial Chamber in the *Furundžija* case, the accomplice need not share the *mens rea* of the perpetrator, in the sense of a positive intention to commit the crime. It suffices that the accomplice knows that his actions will assist the perpetrator in the commission of the crime.²² In the *Perišić* case the Appeals Chamber defined aiding and abetting more narrowly by adding the element of ‘specific direction’ to the *actus reus*. Following the *Tadić* Appeal Judgment, the Appeals Chamber found that the assistance provided must be ‘specifically’—rather than ‘in some way’—directed towards relevant crimes.²³ The Chamber thus forged a closer link between the assistance and the crimes and heightened the threshold for criminal responsibility. While Perišić, as Chief of Staff of the army of Yugoslavia (VJ), had indeed rendered assistance to the VRS—a separate military entity—he had been remote from the actions of the principal perpetrators and his activities could have been directed towards sustaining the VRS’ general war effort, rather than having specifically facilitated the VRS crimes in Srebrenica.²⁴ The Appeals Chamber of the Sierra Leone Court in the *Taylor* case rejected the ‘specific direction’ approach of the *Perišić* Appeals Chamber.²⁵ And the Appeals Chamber in *Sainović* sided with *Taylor* and explicitly distanced itself from *Perišić*, leaving the issue somewhat in abeyance.²⁶

Whatever the final outcome in the ‘specific direction’ debate may be, it is certain that ‘aiding and abetting’ connotes a more secondary form of criminal participation. In the context of Srebrenica, this was particularly corroborated in the trial of Blagojević and Jokić, the Commander of the Bratunac Brigade of the Bosnian Serb Army and the Chief of Engineering of the VRS Zvornik Brigade, respectively.²⁷ The Bratunac Brigade had been involved in separating the population, loading and escorting the buses and patrolling the area around which the population was held until the transfer was complete. Jokić had been instructed to deliver heavy machinery that was used to dig mass graves. The Trial Chamber was convinced

²¹ *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998, paras. 234–235.

²² *Prosecutor v. Furundžija*, *supra* n. 21, para. 245.

²³ *Prosecutor v. Perišić*, Judgment of the Appeals Chamber, Case No. IT-04-81-A, 28 February 2013, paras. 27 and 39.

²⁴ *Prosecutor v. Perišić*, *supra* n. 23, para. 61.

²⁵ *Prosecutor v. Taylor*, Judgment in the Appeals Chamber, Case No. SCSL-03-01-A, 26 September 2013, para. 481.

²⁶ *Prosecutor v. Šainović et al.*, Judgment in the Appeals Chamber, 23 January 2014, para. 1650: ‘Consequently, the Appeals Chamber [...] unequivocally rejects the approach adopted in the Perišić Appeal Judgment as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard’.

²⁷ *Prosecutor v. Blagojević & Jokić*, Judgment, Case No. IT-02-60, 17 January 2005.

beyond a reasonable doubt that Jokić was aware of this purpose. Neither Blagojević, nor Jokić, nor their subordinates had personally been involved in the killings or the forcible transfers. Nonetheless, their contributions had a substantial effect on the commission of the crimes and Blagojević and Jokić had known that they assisted the forcible transfer or the killings. Moreover, Blagojević was initially even convicted of ‘aiding and abetting genocide’. However, this verdict was reversed on Appeal.²⁸ The Appeals Chamber considered that from Blagojević’ mere knowledge of the forcible transfer—which did not in and of itself constitute a genocidal act—his awareness of the principal perpetrators’ genocidal intent could not be inferred.²⁹

The Trial Chamber confirmed that Blagojević and Jokić were not key players in the human drama of Srebrenica.³⁰ However, this does not imply that those imputed with ‘complicity’ in Srebrenica were only minor figures, acting on the fringes of the massacre. An excellent example of the contrary is General Radislav Krstić, Commander of the Drina Corps, whose assistance was sought by Mladić and Karadžić for the conquest of the Srebrenica enclave. Initially, Krstić had been convicted, as a member of a JCE, of genocide, persecution, inhumane acts (forcible transfer), extermination and murder, because he had been involved, as the high commander, in both the forcible transfers and the killings.³¹ It was questionable, however, whether Krstić shared the genocidal intent of his co-perpetrators in the JCE, as the Trial Chamber itself seemed to admit. The Trial Chamber characterized Krstić as a ‘reserved and serious career officer who is unlikely to have ever instigated a plan such as the one devised for mass execution of Bosnian Muslim men, following the take-over of Srebrenica in July 1995’, adding that ‘left to his own devices, it seems doubtful that Krstić would have been associated with such a plan at all’.³² Krstić had been aware of the genocidal intent of some of the members of the VRS Main Staff and, although he did not support the plan, he had allowed the Main Staff to employ the resources of the Drina Corps which were indispensable for the implementation of the plan. According to the Appeals Chamber, his criminal responsibility was ‘therefore more properly expressed as that of an aider and abettor to genocide, and not as that of a perpetrator’.³³ Engaging in a discussion on the proper relationship between ‘complicity’ under Article 4(3) of the Genocide Convention and ‘aiding and abetting’ in Article 7(1) of the ICTY Statute, the Appeals Chamber found the former to be the wider concept, ‘because the terms “complicity” and “accomplice” may encompass conduct broader than that of aiding and abetting’.³⁴ For aiding and abetting knowledge of the principal perpetrator’s specific genocidal intent would suffice, whereas, ‘by contrast, there is authority to suggest that complicity in genocide, *where it prohibits conduct broader*

²⁸ *Prosecutor v. Blagojević & Jokić*, Judgment in the Appeals Chamber, Case No. IT-02-60, 9 May 2007.

²⁹ *Prosecutor v. Blagojević & Jokić*, *supra* n. 28, para. 123.

³⁰ *Prosecutor v. Blagojević & Jokić*, *supra* n. 27, paras. 835–836.

³¹ *Prosecutor v. Krstić*, Judgment, Case No. IT-98-33-T, 2 August 2001, para. 653.

³² *Prosecutor v. Krstić*, *supra* n. 31, para. 420.

³³ *Prosecutor v. Krstić*, Judgment of the Appeals Chamber, Case No. IT-98-33-A, 19 April 2004, para. 137.

³⁴ *Prosecutor v. Krstić* (Appeals Chamber), *supra* n. 33, para. 139.

than aiding and abetting, requires proof that the accomplice had the specific intent to destroy a protected group'.³⁵ The qualification of Krstić as an aider and abettor of genocide had implications for the charges of murder as a war crime and extermination and persecution as crimes against humanity. Logic dictated that in respect of these crimes which were different legal qualifications of the same facts he also incurred criminal responsibility as an aider and abettor. Krstić's conviction on the basis of his membership of a JCE was only confirmed in respect of the forcible transfer and the ensuing 'opportunistic crimes' that were committed at Potočari and that had been foreseeable and natural consequences of the forcible transfer.³⁶

In view of their rather divergent positions and contributions, it is remarkable that both Blagojević/Jokić and Krstić incurred criminal responsibility as aiders and abettors. Apparently, the Appeals Chamber cherished the opinion that the secondary significance of an aider and abettor could exclusively reside in his lower level of *mens rea*. That seems to be corroborated in the Chamber's finding that other accomplices would necessarily require the specific intent to destroy a group, although the Chamber did not further explain which accomplices it had in mind. One would be inclined to think of instigators or inducers, whose position is characterized by their taking the initiative in the crime. At the end of the day, the considerable difference in contribution (*actus reus*) was reflected in the prison sentence: whereas Blagojević and Jokić were sentenced to respectively 18 and 9 years imprisonment, Krstić received 35 years imprisonment.³⁷ This refinement at the sentencing stage does not alter the fact that the equal qualification of these dissimilar actors in the Srebrenica tragedy is somewhat counter-intuitive.

4 Superior Responsibility at Srebrenica: A Rare Phenomenon

A (military or civilian) superior will incur criminal responsibility if he knew or had reason to know that his subordinates were about to commit international crimes or had done so and he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof (Article 7(3) ICTY Statute). The doctrine of superior responsibility which is rooted in the time-honoured notion of military command has been elaborated by the Trial Chamber in *Delalić and Others* (the so-called 'Čelibići case').³⁸ The first element of the doctrine—a superior-subordinate relationship—implies the effective control of the superior over persons committing the underlying international crimes, in the sense of having the material ability to prevent and punish the commission of those crimes. Such control can be predicated on a *de jure* position as a commander, but can also derive from the possession of *de facto* powers of control.³⁹ Secondly, the Trial Chamber emphasized

³⁵ *Prosecutor v. Krstić* (Appeals Chamber), *supra* n. 33, para. 142 (emphasis added).

³⁶ *Prosecutor v. Krstić* (Appeals Chamber), *supra* n. 33, para. 144.

³⁷ Krstić's initial sentence of 40 years imprisonment by the Trial Chamber was reduced by 5 years by the Appeals Chamber.

³⁸ *Prosecutor v. Delalić and Others*, Judgment, Case No. IT-96-21-T, 16 November 1998.

³⁹ *Prosecutor v. Delalić*, *supra* n. 38, para. 370 and para. 378.

that the *mens rea* standard of ‘had reason to know’ was stricter than the purely normative notion of ‘should have known’, which entails an obligation to keep abreast at all times. It implied the presence and availability to the superior of some specific information which would provide notice of offences committed by his subordinates.

That information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.⁴⁰

And finally the Trial Chamber held that the duty to take ‘necessary and reasonable measures’ would pertain to the measures within the material possibility of the superior.⁴¹

The concept of superior responsibility has only be rarely applied to sustain the criminal responsibility of the accused who stood trial for their criminal involvement in the Srebrenica massacre, but when it was applied, it yielded interesting legal findings. Pandurević, the Commander of the Zvornik Brigade, had been convicted of murder as a crime against humanity and as a violation of the laws and customs of war for failing to take necessary and reasonable measures to prevent his subordinates from committing crimes. However, Pandurević had been physically absent from 4 to 15 July 1995 and he had only been apprised of the criminal acts of his subordinates when he returned to the Zvornik Brigade on 15 July 1995. Meanwhile, his deputy—Obrenović—was running the affairs and this man had not informed him of the crimes. Pandurević censured the Trial Chamber for applying an unduly formalistic standard, but the Appeals Chamber approved the Chamber’s verdict, holding that Pandurević maintained the ability to exercise control over both his deputy and the rest of the Zvornik Brigade during his period of absence.⁴² Even Pandurević’s claim that his command authority over the Zvornik Brigade had been interrupted—and in fact superseded by Beara and Popović who had been directing orders from Mladić to his subordinates, did not obtain a hearing from the Appeals Chamber. The Chamber recalled that the exercise of effective control by one commander does not necessarily exclude effective control by a different commander and that Pandurević was legally obliged to ensure that international humanitarian law was applied even when faced with manifestly unlawful orders issued by *his* superiors.⁴³ The Appeals Chamber addressed the situation of parallel command and made it perfectly clear that a commander remained responsible, even if he had ‘delegated’ his authority to his immediate subordinate or was confronted by orders of his superiors. The second interesting element in the findings of the Appeals Chamber in the case of Pandurević concerned the scope of the commander’s duty to punish his subordinates for international crimes. The Appeals Chamber recalled that

⁴⁰ *Prosecutor v. Delalić*, *supra* n. 38, para. 393.

⁴¹ *Prosecutor v. Delalić*, *supra* n. 38, para. 395.

⁴² *Prosecutor v. Popović et al.*, *supra* n. 8, para. 1878.

⁴³ *Prosecutor v. Popović et al.*, *supra* n. 8, para. 1897.

a superior's duty to punish the perpetrators of a crime, absent his own powers to sanction them, could entail an alternative obligation to report them to the competent authorities, which would only fulfil the duty to punish if such a report is likely to trigger an investigation or initiate disciplinary or criminal proceedings. As Pandurević had not informed the Military Prosecutor, nor his higher ranking officer, Krstić, nor the MUP, he had failed to discharge his duty as a commander and therefore was convicted on the basis of command responsibility.⁴⁴

Pandurević's second in command, Dragan Obrenović, had been Acting Commander of the Zvornik Brigade during the former's absence and was Deputy Commander and Chief of Staff after Pandurević had returned. He had entered a guilty plea and showed remorse for his contribution in the killing of Muslim prisoners. Whereas Obrenović was convicted under both individual responsibility, under Article 7(1) Statute, and superior responsibility (Article 7(3) Statute), the Trial Chamber found that his liability primarily derived from his responsibilities as a commander.⁴⁵ He had released seven of his soldiers to prepare for the arrival of the Muslim prisoners and only two of his men had participated in the burial of prisoners, but he knew or had reason to know that several units of the Zvornik Brigade had participated in the guarding, executing and burying of Muslim prisoners. The Trial Chamber touched on the gist of the doctrine of superior responsibility, by holding that 'the central part of Dragan Obrenović's responsibility arises from his failure to act in the face of the commission of the crime of persecutions—by being passive when he should have prevented his subordinates from committing the criminal acts or punished them for such crimes afterwards'.⁴⁶

While the Trial Chambers in the cases against Pandurević and Obrenović captured the essence of superior responsibility, Krstić did not incur criminal responsibility on the basis of command responsibility. The Trial Chamber acknowledged that General Krstić satisfied the three-pronged test for the participation of the members of the Drina Corps in the killings.⁴⁷ Krstić knew about the killings and wielded effective control that would have enabled him to prevent Drina Corps officers and soldiers from participating in the commission of the crimes. Not only did he fail to prevent those crimes, he did not punish a single officer or soldier, nor did he report the grave violation of international humanitarian law to the civil authorities. Krstić advanced a fear for the safety of himself and his family as the reason why he had been passive, but the Trial Chamber did not find this to be credible. The fact that he had been publicly extolled by Mladić and Karadžić for his courageous role in the conquest of the enclave and that he had supported Mladić's position as Commander of the Main Staff of the VRS 'demonstrated Krstić solidarity with, rather than his fear of, the highest military and civilian echelons of the Republika Srpska'.⁴⁸ However, the Trial Chamber did not convict Krstić on the

⁴⁴ *Prosecutor v. Popović et al.*, *supra* n. 8, paras. 1932–1944.

⁴⁵ *Prosecutor v. Obrenović*, Sentencing Judgment, Case No. IT-02-60/2-S, 10 December 2003, para. 88.

⁴⁶ *Ibidem*.

⁴⁷ *Prosecutor v. Krstić* (Judgment of Trial Chamber), para. 648.

⁴⁸ *Prosecutor v. Krstić*, *supra* n. 31, para. 651.

basis of superior responsibility, because his responsibility was sufficiently reflected in his individual responsibility as an aider and abettor.⁴⁹

The judgment of the Trial Chamber in the *Krstić* case shows that, in the case of concurrence between individual and superior responsibility, courts are inclined to give preference to the former, presumably because it connotes a more direct involvement in the crime(s). While it is debatable whether *Krstić*'s responsibility is most aptly captured under the heading of 'aiding and abetting' or 'command responsibility', it is irrefutable that the extent and relevance of the latter is obscured by the prevalence of the former. It is another example of how legal concepts can distort reality.

5 The Legal Representation of the Srebrenica Massacre: Some Final Reflections

It has been the purpose of this article to explore how the massacre at Srebrenica has been represented in the case law of the ICTY. Undoubtedly, the Tribunal left us with a very rich and detailed account of the tragic events, with numerous cross-references between the cases. It is very difficult, if not impossible, to assess to what extent this comprehensive case law accurately reflects reality. This is intrinsic to the application of (criminal) law. By its very nature, criminal law enforcement is selective. It simply cannot deal with all incidents and put all perpetrators to trial. What I have tried to demonstrate in this article, though, is that some of the distortions of reality can be attributed to the idiosyncrasies of the concepts of individual criminal responsibility. The Tribunal has used several tools in order to capture the different positions and contributions of the accused within the wholesale cataclysm. These concepts serve distinct purposes. The JCE doctrine is applied if several persons share a common plan and make some contribution to implement that plan. It reflects both the organizational and collective dimension of system criminality. 'Aiding and abetting' refers to persons 'on the fringes' who 'merely' assist the commission of crimes, without necessarily sharing the intent of the principals. And superior responsibility reflects the reality that war crimes and other very serious international crimes proliferate when military commanders, though perhaps not intending these crimes themselves, turn a blind eye or otherwise fail to exercise the effective control that comes with their position within the military hierarchy.

However, these 'ideal types' of concepts of criminal responsibility may suggest too much or may not always correspond with the way they are applied in practice. A JCE in legal terms only implies that some persons have a common purpose, which entails the commission of one or more crimes and that they employ some activities to realize that purpose. It does not explain what the contributions of all the members have been and how they have interacted, because not all the members of the JCE have been brought to trial and the exact composition and scope of the enterprise therefore remains unknown. In the context of Srebrenica the ICTY concluded that

⁴⁹ *Prosecutor v. Krstić*, *supra* n. 31, para. 652.

(at least) two JCEs co-existed, one planning to forcibly remove the women, children and the elderly from the enclave and one that had been established for the purpose of killing the male Muslims. From the perspective of the fair attribution of guilt, this separation made perfect sense. A literal reading of ‘joint criminal enterprise’ would however suggest that both these groups had a more or less fixed composition and clear-cut intentions. The ICTY has candidly avowed that ‘unknown members’ had committed ‘opportunistic crimes’, outside the purview of the (original) criminal purpose, suggesting that both the composition and the ‘plans’ of a JCE may have been far more fluid and uncertain than one would be inclined to assume. It serves as a good admonition not to take the simplified and reductionist reality of legal concepts at face value.

The concept of aiding and abetting produces other problems in the realm of distorting reality. An aider and abettor differs from a principal in respect of his *actus reus* and/or his *mens rea*, which implies that these distinguishing features need not be cumulative. The legal assessment of perpetrators’ criminal responsibility in Srebrenica has demonstrated that a key player like General Krstić and comparatively minor figures like Blagojević and Jokić could all qualify as aiders and abettors, either because they lack the requisite *mens rea* (Krstić), or because they render a subsidiary contribution to the crimes (Blagojević and Jokić). The *mens rea* and *actus reus* serve as communicating vessels. Aiding and abetting as a legal category diminishes in explanatory power if such divergent *dramatis personae* can be brought under its heading.

One might have expected that superior responsibility would have abounded in the case law of the ICTY to sustain the conviction of military commanders. After all, Srebrenica collapsed after an attack by a regular army, organized along modern command structures. However, there have only been few convictions on the basis of this doctrine. Several explanations have been advanced for this remarkable paucity. The Trial Chamber in the *Krstić* case indicated that aiding and abetting better reflected the involvement and culpability of the accused. It has been suggested that command responsibility after the lapse of time has become almost impossible to prove.⁵⁰ One perhaps less obvious reason may be that the light requirements in respect of the *mens rea* of superior responsibility—‘had reason to know’ does not imply concrete knowledge and certainly not ‘intent’, are hard to reconcile with the demanding ‘specific intent to destroy a group’ of genocide. It is remarkable that all convictions of Srebrenica participants on account of superior responsibility have been entered in connection with war crimes or crimes against humanity, i.e., *not* genocide. But even in the case of crimes against humanity international criminal tribunals might be reluctant to combine such highly serious crimes with an omission, connoting a lack of supervision and a dereliction of duties, rather than vile intent.⁵¹

⁵⁰ Compare the speech of former President Izetbeković during the ICTY Legacy Conference: ‘20 Years of the ICTY: Anniversary Events and Legacy Conference Proceedings’, publication of the ICTY Outreach Programme, 2014, p. 25.

⁵¹ In a similar vein Mettraux (2009), pp. 226–228. See also Schabas (2009), pp. 364–366. Superior responsibility has been applied in combination with genocide in *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-T, 21 May, paras. 551–571. Zahar and Sluiter (2008), p. 270 qualify the juxtaposition of individual responsibility and command responsibility in this case as ‘almost absurd’.

Other international criminal tribunals and the ICC have similarly wrestled with the question of which concepts of criminal responsibility should be employed in order to capture the involvement of the accused that had been brought before them. The Trial Chamber of the Special Court for Sierra Leone held Liberia's former President Charles Taylor responsible for aiding and abetting war crimes and crimes against humanity, a verdict that was confirmed by the Appeals Chamber.⁵² The judgment has provoked a similar surprise and indignation as the *Krstić* case. The ICC has largely rejected the JCE doctrine and has opted for co-perpetration and indirect perpetration by means of control over a person or an organization.⁵³ Although these novel efforts have not been spared from criticism, the 'control theory' has been praised as well for its fair labelling qualities.⁵⁴ The ICTY has served as an example for other international tribunals and the ICC, either inviting them to follow suit, or prompting them to break new ground. In that sense we can conclude that the ICTY in general and the judgments in respect of Srebrenica in particular have left a certain legacy.

The three examples that have been discussed in this article serve to demonstrate that one should be cautious in interpreting the use of legal concepts as a direct reflection of reality. It is to my mind an important mission of international criminal tribunals to faithfully reconstruct what has happened. If we take the limitations of the courtroom into account, the ICTY has accomplished this task in respect of the carnage in Srebrenica. However, criminal law follows its own logic and one should take this to heart when assessing the case law of the Tribunal.

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⁵² *Prosecutor v. Charles Taylor*, Judgment, SCSL-03-01-T, 18 May 2012 and Case No. SCSL-03-01-A, 26 September 2013, paras. 526–541.

⁵³ *Prosecutor v. Thomas Lubanga*, Judgment, ICC-01/04-01/06, 14 March 2012, paras. 976–1018 (co-perpetration) and *Prosecutor v. Germain Katanga*, Judgment, ICC-01/04-01/07, 7 March 2014, paras. 1404–1412 (control over an organization).

⁵⁴ See Ohlin et al. (2013), p. 726.