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# Taking a Consenting Part

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# “Taking a Consenting Part” The Lost Mode of Participation

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## I. INTRODUCTION

Consider the following scenario, which is based on the *Hadžihasanović* case<sup>1</sup> at the ICTY:

A high-ranking military officer overhears a group of soldiers discussing their intention to torture and execute civilians during an upcoming military operation. The officer has been informed that he will assume formal command over the soldiers' unit in a couple of months, but as of now they are not his subordinates and he has no power over them. He considers speaking to their commanding officer, the man he is replacing, but ultimately decides that rocking the boat simply isn't worth it. True to their word, the soldiers commit unspeakable atrocities during the operation.

Under modern international criminal law, the incoming commander's silence was morally reprehensible but not criminal. He did not personally commit the atrocities. He did not order, solicit, or induce them. He did not aid and abet them. Because the soldiers were not under his effective control, either *de facto* or *de jure*, at the time of the crimes, he had no duty as a commander to punish or prevent them.<sup>2</sup>

Now make the commander an SS-Standartenführer, the soldiers SS-Schütze, and the generic civilians Jews; put the Standartenführer on trial before a Nuremberg Military Tribunal (“NMT”)—inter-Allied spe-

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1. See generally *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Jul. 16, 2003).

2. See, e.g., Rome Statute of the International Criminal Court art. 28 ¶ 1(a), Jul. 17, 1998, U.N. Doc. A/Conf.183/9 (“A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be.”).

cial tribunals<sup>3</sup> created by the United States pursuant to Control Council Law No. 10,<sup>4</sup> enacted by the Allied Control Council on 20 December 1945.<sup>5</sup> The outcome will now be completely different: the Standartenführer will almost certainly be convicted for “taking a consenting part” in the soldiers’ crimes. Here is article II(2) of that Law:

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.<sup>6</sup>

Article II(2) resembles Article 25 of the Rome Statute. The primary difference—apart from membership in a criminal organization and the “high-position” provision, the latter of which the NMTs uniformly refused to use<sup>7</sup>—is subparagraph (c), which deemed an individual responsible for an international crime if he “took a consenting part therein.” That mode of participation is unique to the NMT. No modern tribunal has ever convicted a defendant, military or civilian, of taking a consenting part (“TCP”) in an international crime. Indeed, TCP has been mentioned only once post-Nuremberg, at the ICTY: in *Čelebići*, the prosecution cited the *Hostage* case for the proposition that a superior’s ability to exert “substantial influence” over someone who was neither a *de jure* nor a *de facto* subordinate was sufficient to establish command responsibility.<sup>8</sup> Both the Trial Chamber and the Appeals

3. See generally KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* (Oxford Univ. Press 2011).

4. See Control Council Law No. 10, art. III(1)(a), reprinted in TELFORD TAYLOR, *FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10*, at 251–52 (U.S. Gov’t Printing Office 1949) (“Each Occupying Authority, within its zone of occupation. . . shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested and shall take under control the property, real and personal, owned or controlled by the said persons, pending decisions as to its eventual disposition.”).

5. See HELLER, *supra* note 3, at 12–17.

6. Control Council Law No. 10, *supra* note 4, at art. II(2) (emphasis added).

7. HELLER, *supra* note 3, at 251.

8. *Prosecutor v. Čelebići*, Case No. IT-96-21-T, Judgment, ¶ 647 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (“The Trial Chamber is unable to agree with the submission

Chamber rejected that argument, insisting—correctly—that effective control was the minimum required by customary international law.<sup>9</sup>

This article, which is divided into three sections, critically examines “taking a consenting part” as a mode of participation in an international crime. Section I briefly explains how the NMTs understood the basic principles of individual criminal responsibility. Section II notes that the tribunals were divided concerning the legal nature of TCP and then presents the essential elements of TCP as a *sui generis* omission-based mode of participation. Finally, using *Hadžihasanović* as a case study, Section III asks whether international criminal law would be better off if it rediscovered TCP.

## II. BASIC PRINCIPLES OF RESPONSIBILITY

In his book *The Nuremberg Trials*, August von Knieriem—I.G. Farben’s general counsel and one of the ten defendants acquitted in the *Farben* case—noted that reading the NMT judgments with regard to individual responsibility is an exercise in frustration:

[M]ost of the Nuremberg Tribunals did not even take the trouble to state clearly on which of the alternatives enumerated in [Article II(2)] their sentences were based in a particular case. Frequently it is impossible to ascertain whether a sentence is based on the fact that somebody was a principal or an accessory, or whether he was regarded as having participated in the crime only by consenting . . . In most of the cases where more than one person acted, the opinions say no more than that a certain defendant “took part in the act.” It is then left to the reader to ponder which of the various alternatives of CCL No. 10 may have been applicable.<sup>10</sup>

The *Medical* case is an excellent example of von Knieriem’s point. In convicting Karl Brandt, Hitler’s personal physician, for his role in the Nazis’ barbaric medical experiments, Tribunal I made no attempt to identify the specific mode(s) of participation on which it had relied. It simply held—unhelpfully—that he “was responsible for, aided and abetted, took a consenting part in, and was connected with plans and enterprises involving medical experiments conducted on non-German na-

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of the Prosecution that a chain of command is not a necessary requirement in the exercise of superior authority.”).

9. *Prosecutor v. Čelebići*, Case No. IT-96-21-A, Appeal Judgment, ¶ 266 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (holding that “substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions”).

10. AUGUST VON KNIERIEM, *THE NUREMBURG TRIALS* 211 (Henry Regnery Co. 1959).

tionals against their consent, and in other atrocities.”<sup>11</sup>

Despite the lack of precision in many of the judgments, however, it is clear that the NMTs generally adopted a consistent approach to individual criminal responsibility. According to all of the tribunals, such responsibility consisted of three basic elements: (1) the commission of a crime specified in the indictment; (2) the defendant’s knowledge of the crime; and (3) the defendant’s participation in the crime in a manner proscribed by Article II(2).<sup>12</sup> In *Farben*, for example, Tribunal VI began by establishing the corporation’s involvement in plundering private property in occupied territory and then held:

As the action of Farben in proceeding to acquire permanently property interests in the manner generally outlined is in violation of the Hague Regulations, any individual who knowingly participated in any such act of plunder or spoliation with the degree of connection outlined in Article II, paragraph 2 of Control Council Law No. 10, is criminally responsible therefore.<sup>13</sup>

What it meant to “knowingly participate” in a crime differed, of course, depending on the mode of participation in question. Two considerations nevertheless applied to all of the modes. To begin with, the tribunals uniformly insisted that the requisite knowledge could not be inferred from the defendant’s official position. The *Pohl* tribunal, for example, noted “the necessity of guarding against assuming criminality, or even culpable responsibility, solely from the official titles which the several defendants held.”<sup>14</sup> Similarly, the *Krupp* tribunal specifically held that “guilt must be personal. The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient.”<sup>15</sup>

The tribunals also agreed that the participation requirement could

11. *United States v. Brandt (The Medical Case)*, II TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 198 (U.S. Gov’t Printing Office Oct. 1946–Apr. 1949).

12. *United States v. Altstötter (The Justice Case)*, III TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1093 (U.S. Gov’t Printing Office 1951).

13. *United States v. Krauch. (The I.G. Farben Case)*, VIII TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1141 (U.S. Gov’t Printing Office 1952).

14. *United States v. Pohl*, V TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 980 (U.S. Gov’t Printing Office 1950).

15. *United States v. von Bohlen und Halbach (The Krupp Case)*, in IX TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1448 (U.S. Gov’t Printing Office 1950).

be satisfied by either an act or an omission. Tribunal V's statement in the *Hostage* case is typical: "[i]n determining the guilt or innocence of these defendants, we shall require proof of a causative, overt act or omission from which a guilty intent can be inferred before a verdict of guilty will be pronounced."<sup>16</sup> The tribunals emphasized, however, that an omission was "not sufficient to warrant a conviction except in those instances where an affirmative duty exists to prevent or object to a course of action."<sup>17</sup> Liability for omission was thus limited in practice to taking a consenting part in a crime and command responsibility.

### III. TAKING A CONSENTING PART

"Taking a consenting part" in a crime was first mentioned in the Moscow Declaration, which promised punishment for Nazis who "have been responsible for or have taken a consenting part in . . . atrocities, massacres and executions."<sup>18</sup> It also appeared in Article 3(b) of JCS 1023/10, the directive issued by the Joint Chiefs of Staff in July 1945 to authorize military trials in the American zone of occupation, as well as in the Preamble to the London Agreement.<sup>19</sup>

The Joint Chiefs of Staff apparently considered TCP to be functionally equivalent to command responsibility. A 21 October 1944 draft of JCS 1023/10 provided that the category specifically included "persons who have taken a consenting part in war crimes" and gave the example of "a superior officer who has failed to take action to prevent a war crime when he had knowledge of its contemplated commission and was in a position to prevent it."<sup>20</sup> None of the NMTs, however, followed the JCS. On the contrary, they either viewed TCP as another way to describe participating in a criminal enterprise or considered it a *sui generis* mode of participation in a crime similar to, but broader than, command responsibility.

The critical difference between the two positions was whether TCP required a positive act or could be satisfied by an omission. The *Pohl*

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16. *United States v. List (The Hostage Case)*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1261 (1950).

17. *United States of America v. von Weizsaecker (The Ministries Cases)*, XIV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 625 (U.S. Gov't Printing Office Oct. 1946–Apr. 1949).

18. *Joint Four-Nation Declaration*, THE MOSCOW CONFERENCE, October 1943, *reprinted in* S. COM. ON FOREIGN RELATIONS, A DECADE OF AMERICAN POLICY, 1941–1949, at 834 (U.S. Gov't Printing Office 1950).

19. London Agreement of Aug. 8, 1945, 82 U.N.T.S. 280.

20. Draft Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders, *reprinted in* TAYLOR, *supra* note 4, at 247 (Appendix C).

tribunal took the former position, holding that “[t]here is an element of positive conduct implicit in the word ‘consent.’ Certainly, as used in the ordinance, it means something more than ‘not dissenting.’”<sup>21</sup> The requirement of a positive act then determined which defendants Tribunal II convicted for taking a consenting part in a crime. For example, Leo Volk, Head of the Legal Section in the Executive Office of the WVHA’s Division W, was convicted of mistreating concentration-camp inmates even though he had not personally committed the mistreatment and “did not have the power” to prevent it. The judges held that “[i]f Volk was part of an organization actively engaged in crimes against humanity, was aware of those crimes and yet voluntarily remained a part of that organization, lending his own professional efforts to the continuance and furtherance of those crimes, he is responsible under the law.”<sup>22</sup> By contrast, the judges acquitted Josef Vogt, Chief of Office IV of the WVHA’s Division A, of taking a consenting part in similar crimes. In their view, “[t]he only consent claimed arises from imputed knowledge—nothing more,” while “[t]here is an element of positive conduct implicit in the word ‘consent.’”<sup>23</sup>

Unlike the *Pohl* tribunal, the *Einsatzgruppen*, *Farben*, and *Ministries* tribunals specifically viewed TCP as an omission-based mode of participation. In their view, a defendant took consenting part in a crime if three requirements were satisfied: (1) he knew that a crime had been or was going to be committed; (2) because of his authority, he was in a position to object to the criminal activity; and (3) he nevertheless failed to object to it. Thus understood, TCP was *sui generis*—a mode of participation similar to, but broader than, command responsibility.

### A. Knowledge

To begin with, the NMTs emphasized that a defendant accused of TCP must have known that a crime had been or was going to be committed. The *Einsatzgruppen* tribunal, for example, noted that Waldemar von Radetzky, a Deputy Chief in Einsatzgruppe C, “knew that Jews were executed by Sonderkommando 4a because they were Jews” when it convicted him of taking a consenting part in those executions.<sup>24</sup> Similarly, the *Farben* tribunal relied on the fact that Hermann Schmitz, the

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21. *United States v. Pohl*, *supra* note 14, at 1002.

22. *Id.* at 1048.

23. *Id.* at 1002.

24. *United States v. Ohlendorf (Einsatzgruppen)*, IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 577 (U.S. Gov’t Printing Office Oct. 1946–Apr. 1949).

Chairman of the company's Vorstand, "knew of Farben's program to take part in the spoliation of the French dyestuffs industry" to convict him of taking a consenting part in that spoliation.<sup>25</sup> Importantly, there is no indication that the *Einsatzgruppen*, *Farben*, or *Ministries* tribunals would have applied a negligence standard to TCP—something that distinguishes TCP from command responsibility, because most of the NMTs held that negligence was sufficient for the latter.<sup>26</sup> That distinction makes sense: because effective control over the perpetrators of the crime was not an essential element of TCP, it would have been manifestly unfair to convict a defendant for failing to object to a crime of which he was unaware. The defendant's duty was to object to the crime, not to prevent it.

### *B. Authority*

According to the tribunals, failing to object to a known crime qualified as TCP only if the defendant had been in a position to influence the organization or the individuals responsible for its commission. In *Einsatzgruppen*, for example, Lothar Fendler, Deputy Chief of Einsatzgruppe C's Sonderkommando 4b, was convicted for failing to object to executions because, "as the second highest ranking officer in the Kommando, his views could have been heard in complaint or protest against what he now says was a too summary procedure, but he chose to let the injustice go uncorrected."<sup>27</sup> Similarly, in *Farben*, Schmitz's conviction depended on the fact that he failed to object to the company's spoliation activities even though "[h]e was in a position to influence policy and effectively to alter the course of events."<sup>28</sup> By contrast, the *Einsatzgruppen* tribunal refused to convict Felix Ruehl, a low-level officer in Einsatzgruppe D, for taking a consenting part in Sonderkommando 10b's executions because, although he knew about the executions, the prosecution had failed to prove "that he was in a position to control, prevent, or modify the severity of [the] program."<sup>29</sup>

TCP's "authority" requirement, it is important to note, differs from command responsibility's superior/subordinate requirement. None of the defendants convicted of taking a consenting part in a crime had either *de jure* or *de facto* effective control over the individuals who committed it, which is what makes TCP a unique mode of participation.

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25. *United States v. Krauch*, *supra* note 13, at 1155.

26. See *HELLER*, *supra* note 3, at 267–69.

27. *United States v. Ohlendorf*, *supra* note 24, at 572.

28. *United States v. Krauch*, *supra* note 13, at 1155.

29. *United States v. Ohlendorf*, *supra* note 24, at 580.



Schmitz might have been *primus inter pares* as the Chairman of Farben's Vorstand, but he did not have the power to approve or disapprove the activities of his colleagues. Fendler was an SD officer in Division III of Sonderkommando 4b, while the executions themselves were committed by units subordinate to the Gestapo officers in Division IV.<sup>30</sup> Von Radetzky was in the same position in Sonderkommando 4a—and the *Einsatzgruppen* tribunal specifically declined to find that he had taken de facto control of Sonderkommando 4a when Paul Blobel, its regular commanding officer, was absent because of illness.<sup>31</sup> Most revealing of all, however, is the *Einsatzgruppen* tribunal's explanation of why it convicted Adolf Ott, the commanding officer of Sonderkommando 7b of Einsatzgruppe B, for executions committed by his unit:

In view of the fact that Ott arrived in Bryansk on 19 February for the specific purpose of taking over control of Sonderkommando 7b, it is not clear why he should have waited until 15 March to assume leadership of the unit. But even if this unexplained delay in the technical assumption of command were a fact, this would not of itself exculpate Ott from responsibility for the operation involved. Under Control Council Law No. 10 one may be convicted for taking a "consenting part in the perpetration of crimes" and it would be difficult to maintain that Ott, while actually with the Kommando, did not (even though technically not its commanding officer) consent to these executions.<sup>32</sup>

This interpretation of the difference between TCP and command responsibility is confirmed by Judge Powers' dissent in *Ministries*. Judge Powers derisively described TCP as convicting a defendant for "failure to either openly protest or go on a sit-down strike in time of war, after receiving knowledge that somebody somewhere in the government committed a crime."<sup>33</sup> That was a mischaracterization of TCP even as endorsed by *Ministries* itself: the majority had acquitted Ernst von Weizsaecker, the Foreign Office's State Secretary, of taking a knowing and consenting part in *Einsatzgruppen* atrocities precisely because it concluded that "the Foreign Office had no jurisdiction or power to intervene" in the program.<sup>34</sup> Judge Powers' statement nevertheless indicates that he did not view TCP as equivalent to command responsibility. Indeed, he insisted in the next paragraph of his dissent that he be-

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30. *Id.* at 571–72.

31. *Id.* at 577.

32. *Id.* at 560 (emphasis added).

33. *United States v. von Weizsaecker*, *supra* note 17, at 874–75 (Powers, J., dissenting).

34. *Id.* at 472–73.

lieved that the two were synonymous: “[a]ny person who can order a crime committed can consent to its commission with equal effect and with equal responsibility. To take a consenting part means no more than that.”<sup>35</sup>

### *C. Failure to Object*

If a defendant had knowledge of a crime and the authority to influence it, the tribunals agreed that he had a duty to use his authority to try to “control, prevent, or modify the severity” of the crime.<sup>36</sup> It was the existence of that duty that justified holding the defendant responsible for an omission.<sup>37</sup> Accordingly, Fendler was convicted because, as noted earlier, he did nothing even though “his views could have been heard in complaint or protest.”<sup>38</sup>

## IV. SHOULD WHAT IS LOST BE FOUND AGAIN?

The NMT is the only tribunal that has ever viewed “taking a consenting part” as a mode of participation in an international crime. After Nuremberg, TCP disappeared into the dustbin of ICL history. For example, the 1954 Draft Code of Offences against the Peace and Security of Mankind, which were drafted immediately after the NMT trials and specifically addressed modes of participation, criminalized everything in Article II(2) of Law No. 10 *except* TCP and membership in a criminal organization.<sup>39</sup>

We know why membership in a criminal organization died at Nuremberg: it was widely viewed as inconsistent with the principle of culpability, which—at least in its current form—requires an individualized connection between a defendant and specific crimes.<sup>40</sup> Similar concerns about culpability likely led to the abandonment of TCP; the architects of modern ICL might simply have concluded that command responsibility represented the outer limits of omission-based criminal responsibility, making it unfair to convict a defendant of crimes committed by individ-

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35. *Id.* at 875 (Powers, J., dissenting)

36. *United States v. Ohlendorf*, *supra* note 24, at 580.

37. *See, e.g., United States v. von Weizsäcker*, *supra* note 17, at 625.

38. *United States v. Ohlendorf*, *supra* note 24, at 572; *see also Pohl*, *supra* note 14, at 1011; *United States v. Wilhelm von Leeb (High Command)*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 543–44 (1950).

39. *See Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries* (1954), reprinted in 2 Y.B. Int'l L. Comm'n 137, ¶ 49, U.N. Doc. A/CN.4/SER.A/1954.

40. *See, e.g., SHANE DARCY, COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW* 290 (Translational 2007).

uals not subject to his effective control “merely” because he was powerful enough to have objected to them.

If that is the reason, the architects of modern ICL might have been too hasty—at least given the restrictive interpretation the NMTs gave to “taking a consenting part.” There is no question that TCP’s authority requirement is much more easily satisfied than command responsibility’s requirement of effective control. But the NMTs were aware of that fact and compensated for it in two ways: (1) by interpreting the authority requirement very narrowly, limiting it to high-ranking individuals whose protests would have been taken seriously within their organization; and (2) by requiring knowledge that a crime had been or was going to be committed, in contrast to command responsibility’s negligence standard—the standard that still applies today, at least with regard to military commanders.<sup>41</sup> On balance, therefore, TCP seems no less based on “personal guilt” than command responsibility.

A strong normative case can also be made for TCP. As the authority requirement indicates, “taking a consenting part” does not purport to extend criminal responsibility to mere bystanders to criminal activity—not even bystanders whose protests might well have prevented the criminal act. The NMTs specifically limited TCP to powerful individuals in hierarchical organizations who were in a position to influence the actions of the less powerful—their subordinates *in spiritu*, if not actually *de jure* or *de facto*. It is not unreasonable, much less a violation of the principle of culpability, to suggest that such individuals should be held responsible for remaining silent in the face of crimes they know are going to be committed and might be able to stop. After all, the NMTs did not require the defendant to *succeed* in preventing the crimes in question; he simply had to make reasonable efforts to do so.

Finally, there is little question that TCP would be of great practical use for—if not the darling in the nursery of—international prosecutors. Recall the *Hadžihasanović* scenario at the beginning of this article. That scenario closely tracks the actions of Amir Kubura, the acting commander of the Bosnian Army 3rd Corps, 7th Muslim Mountain Brigade, whose soldiers committed a variety of international crimes two months before he became their (acting) commander.<sup>42</sup> On interlocutory appeal, the Appeals Chamber struck the prosecution’s allegation that Kubura was responsible for failing to punish those crimes after assuming con-

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41. Rome Statute of the International Criminal Court, *supra* note 2, at 13 (“That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.”).

42. See *Prosecutor v. Hadžihasanović*, *supra* note 1, ¶ 38.

trol of the Brigade, holding by majority that “no practice can be found, nor is there any evidence of *opinio juris* that would sustain, the proposition that a commander can be held responsible for crimes committed by a subordinate prior to the commander’s assumption of command over that subordinate.”<sup>43</sup>

The Appeals Chamber’s conclusion regarding customary international law is almost certainly correct.<sup>44</sup> Yet both judges and scholars have persuasively argued that *Hadžihasanović* has a deleterious practical effect on the enforcement of international humanitarian law.<sup>45</sup> Here, for example, is Judge Schomburg in *Orić*:

Considering thus the purpose of superior responsibility, it is arbitrary—and contrary to the spirit of international humanitarian law—to require for a superior’s individual criminal responsibility that the subordinate’s conduct took place only when he was placed under the superior’s effective control. Given the rapid succession of military commanders in armed conflicts, the result of such an interpretation would be to grant impunity to those who committed war crimes under a predecessor. What is required of superiors is that they have to take the necessary and reasonable measures to initiate investigations and report any alleged violation of international humanitarian law which comes to their knowledge, regardless of when it occurred.<sup>46</sup>

This problem might well have been avoided had “taking a consenting part” been included in Article 7(1) of the ICTY Statute.<sup>47</sup> Kubura’s situation was not materially different than Adolf Ott’s: both were high-ranking military commanders who failed to punish crimes that were committed not long before they assumed effective control over the perpetrators. Kubura was clearly in a position where “his views could have been heard in complaint or protest,” yet—like Lothar Fendler, Ott’s colleague—he “chose to let the injustice go uncorrected.” The only question at trial would have been whether Kubura, like Ott and Fendler, had

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43. *Id.* ¶ 45.

44. *See, e.g.*, Christopher Greenwood, *Command Responsibility and the Hadžihasanović Decision*, 2 J. INT’L CRIM. JUST. 598, 605 (2004).

45. *See generally* Joakim Dungel & Shannon Ghadiri, *The Temporal Scope of Command Responsibility Revisited: Why Commanders Have a Duty to Prevent Crimes Committed After the Cessation of Effective Control*, 17 U.C. DAVIS. J. INT’L L. & POL’Y 1 (2010).

46. *Prosecutor v. Orić*, Case No. IT-03-68-A, Separate and Partially Dissenting Opinion of Judge Schomburg, ¶ 17 (Int’l Crim. Trib. for the Former Yugoslavia Jul. 3, 2008).

47. Stat. of the Int’l Crim. Trib. for the Former Yugoslavia, art. 7(1), SC Res. 827, UN Doc. S/RES/827 (May 25, 1993) (“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”).

actual knowledge of his new subordinates' criminal activity. If Kubura had actual knowledge, he could have been convicted of taking a consenting part in those crimes, even if he was not responsible for them as a commander.