

SEPARATE OPINION OF JUDGE KUNIKO OZAKI

1. I agree with the conclusion, and with most of the reasoning, in the Decision. However, I write separately to elaborate my views on the Court's statutory framework on sentencing, especially with regard to command responsibility.

2. First, I wish to re-emphasize that, unlike many domestic criminal codes, the Statute does not provide any individualised sentencing range for specific crimes or any sentencing principles for modes of liability.¹ In this context, the Appeals Chamber stressed "broad discretion"² to be exercised by trial chambers. It is also important to note that in actual sentencing, the particular circumstances of each case bear more weight than abstract scaling of penalties. However, I find it useful, as a basis for *in concreto* assessment, and in order to minimise any perception of arbitrariness,³ to clarify some sentencing principles arising from the elements of crimes and the mode of liability.

3. The starting point in this regard is the principle of proportionality,⁴ which requires that the penalty, both *in abstracto* and *in concreto*, should be proportionate to the harm done by the crimes and to the culpability of the perpetrator. I note that while certain early case law of the *ad hoc* tribunals appeared to distinguish between genocide, crimes against humanity and war crimes,⁵ subsequent jurisprudence has maintained that there is no inherent hierarchy of gravity between these categories of crimes.⁶ In terms

¹ Decision, para. 91.

² Lubanga Sentencing Appeal Judgment, para. 40.

³ Katanga Sentencing Judgment, para. 39.

⁴ Lubanga Sentencing Appeal Judgment, para. 40.

⁵ See, for example, *Tadić* Sentencing Judgment, para. 73.

⁶ See, for example, *Tadić* Sentencing Appeal Judgment, para. 69; *Rutaganda* Appeal Judgment, para. 590; *Furundžija* Appeal Judgment, para. 247; *Kunarac et al.* Appeal Judgment, para. 171; *D. Nikolić* Sentencing Appeal Judgment, footnote 25; and *Haradinaj et al.* Appeal Judgment, para. 367.

of underlying offences, distinctions may be drawn, including, for example, between crimes against life and those against property.⁷

4. As for the mode of liability, I note the jurisprudence of the *ad hoc* tribunals cited in the Decision that command responsibility is not an inherently less grave mode of liability.⁸ Such findings, however, appear to be based on a rejection of an abstract hierarchy, in favour of a concrete consideration of the gravity of the offence and individual circumstances of the convicted person.
5. In assessing the gravity of command responsibility in the abstract, I concur with the Decision that it is essential to bear in mind that it is a distinct mode of liability,⁹ and is of a *sui generis* nature.¹⁰ Such assessment would necessarily involve comparison with the modes of liability under Article 25(3), in order not to disturb the balance of culpability within the statutory framework.¹¹ In this regard, I believe that there are two important elements to be considered. One is the derivative nature of command responsibility¹² and the other is the gravity of the duty of a commander.
6. It is clear from the structure and language of the Statute that Article 25(3)(a) is designed to capture the liability of perpetrators. I also note the Appeal Chamber's finding, in the context of perpetrator and accessory liability in Article 25(3), that "generally speaking and all other things being equal, a person who is found to commit a crime him- or herself bears

⁷ Katanga Sentencing Judgment, para. 43. *See also* ICTY, *Delali et al.* Appeal Judgment, para. 732.

⁸ Decision, footnote 52. For a review of actual sentencing practice at the *ad hoc* Tribunals see Holá *et al.*, International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR, 9 Journal of International Criminal Justice (2011), page 411 (see especially pages 429-430 and Table 5 in respect of modes of liability).

⁹ See Separate Opinion of Judge Kuniko Ozaki, ICC-01/05-01/08-3343-AnxII ('Separate Opinion'), para. 9, footnote 11 (noting differing approaches).

¹⁰ Decision, para. 16.

¹¹ Separate Opinion, para. 22.

¹² Separate Opinion, para. 22.

more blameworthiness than a person who contributes to the crime of another person or persons”¹³ and that “the blameworthiness of the person is directly dependent on the extent to which the person actually contributed to the crime in question.”¹⁴

7. Rule 145(1)(c) mandates that the “degree of participation” and “degree of intent” of the convicted person be considered in determination of the sentence.¹⁵ A consideration of the elements of Article 28(a) indicates that it is only required that a commander knew, or should have known, that the crimes were being or were about to be committed. There is no requirement that the commander intended the crimes to be committed. Similarly, as indicated in the Judgment, the degree of nexus between the commander’s failure to exercise control properly and the commission of the crimes need not, as a matter of law, be such that the commander would have prevented the crimes had he exercised control properly.¹⁶ In these circumstances, command responsibility might, as an abstract matter, be seen as requiring a lesser degree of participation and/or intent than certain other modes of liability. This naturally does not exclude the possibility that the degree of participation through omission and/or intent of a particular superior may have reached that required as a matter of law under Article 25(3)(a),¹⁷ most

¹³ Lubanga Appeal Judgment, para. 462.

¹⁴ Lubanga Appeal Judgment, para. 468.

¹⁵ Relatedly, with regard to the relationship between Article 78(1) and Rule 145(1)(c), I consider that the factors listed in the latter provide the scope of the factors in the former. Despite the phrases ‘such factors as’ in Article 78(1) and ‘in addition to’ in Rule 145(1)(c), in my view, Article 78(1) would be almost meaningless, as the only provision in the Statute stipulating sentencing criteria, if the elements in the provision only refer to the gravity of the offence or individual circumstances of the convicted person *in abstracto* rather than *in concreto*, the latter being of far more relevance in determining individual sentence. *See* Lubanga Sentencing Appeal Judgment, paras 61-64.

¹⁶ Judgment, ICC-01/05-01/08-3343, para. 213.

¹⁷ Separate Opinion, para. 7.

typically as a co-perpetrator. In that case, his or her conduct should be assessed as such rather than under command responsibility.¹⁸

8. This should be balanced with the particular position of the superior as a person with effective control over the subordinate perpetrators, and his or her duty under international humanitarian law to exercise proper control over the forces under his or her command. As emphasised in the Judgment, Article 28(a) reflects the fundamental responsibilities of commanders to ensure the effective enforcement of international humanitarian law and the protection of protected persons and objects during armed conflicts.¹⁹ This distinct function of command responsibility also forms part of the consideration of the culpability of the convicted person.²⁰
9. In this regard, it is recalled that command responsibility presupposes multiple causes of the crime, including the conduct of the direct perpetrators.²¹ There have been different views on how to assess the nature and degree of the culpability of a person who contributes, through omission, to a crime perpetrated by others, when the person is under a legal duty to protect the victim and/or to prevent the crime.²² In any case,

¹⁸ I note in this regard the jurisprudence of the *ad hoc* tribunals with respect to the treatment of superior responsibility as a residual form of liability. See Judgment, footnote 388.

¹⁹ Judgment, ICC-01/05-01/08-3343, para. 172.

²⁰ ICTY, *Popović et al.* Appeal Judgment, para. 1997. See also Separate Opinion, para. 6. It should be noted that this factor is an inherent element of command responsibility and therefore distinct from the principle of gradation, which may be applicable regardless of the mode of liability (see Decision para. 17).

²¹ Separate Opinion, para. 20.

²² See, for example, Roxin, *Strafrecht Allgemeiner Teil (General Criminal Law)*, Volume II, 2003, p. 671 *et seq*; Schönke and Schröder, *Strafgesetzbuch (Criminal Code)*, 26th ed, 2001, marginal notes 103-109; Gallas, *Strafbares unterlassen im Fall einer Selbsttötung (Punishable omissions in the case of suicide)*, JZ 1960, p.687; Kielwein, *Unterlassung und Teilnahme (Omission and Participation)*, GA 1955, p.227; Jescheck and Weigend, *Lehrbuch des Strafrechts Allgemeiner Teil (Textbook of General Criminal Law)*, 5th ed, 1996, p.682; Nishida, *Husakui niyuru kyōhan (Accomplice through omission)*, *hougaku-kyōkai-zasshi*, vol.122-4, pp.417. See *relatedly*, Section 357-1 of German Criminal Code. Specifically for command responsibility, see Gropengießer in Eser & Kreicker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Bd. 1, Freiburg 2003, pp. 295-296. See also Separate Opinion, para. 19.

under certain circumstances, depending, for example, on the person's particular influence on the perpetrator's conduct and/or nature and scope of his or her duty to prevent the crime, the culpability of the person could be regarded as being as grave as that of the perpetrator. Considering the nature of the commander's duty mentioned above, certain types of command responsibility may be typical examples of such circumstances. Indeed in some national jurisdictions, the same sentencing range as applies to the perpetrator is specified, in certain circumstances, to apply also to the superior.²³

10. It is based on those considerations that I agree with the finding in paragraph 16 of the Decision, that command responsibility, as a *sui generis* mode of liability, "is not, inherently, a hierarchically lower or higher mode of liability in terms of gravity than commission of a crime under Article 25(3)(a), or any other mode of liability identified in Article 25(3)(b) to (e)".

Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki

Dated 21 June 2016

At The Hague, the Netherlands

²³ Section 4 of the German Code of Crimes against International Law (VStGB); Swiss Criminal Code, Article 264-k-1. It is important to note that this legislation only covers a particular range of liability under Article 28.