

Paralleling ICTY's jurisprudence with the incoming developments of the Kosovo's Specialized Chambers in Hague

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PARALLELING ICTY'S JURISPRUDENCE WITH THE INCOMING DEVELOPMENTS OF THE KOSOVO'S SPECIALIZED CHAMBERS IN HAGUE

I. INTRODUCTION

Despite the absence of indictments by the Specialist Prosecutor's Office (SPO) in 2019, the SPO delivered numerous summons in Kosovo. Among these, Kosovo Liberation Army (KLA) elites and main political and institutional figures in Kosovo have been summoned; such as the former Prime Minister of Kosovo Mr. Ramush Haradinaj, the Former Speaker of the Assembly of Kosovo Mr. Kadri Veseli and the former Minister of Justice Mr. Abelard Tahiri.

Although there is no indictment filed against Mr. Haradinaj (or any other invitee), he was allegedly interviewed by the SPO for purposes of prosecution. His SPO invitation was followed by his resignation from the post of Prime Minister, causing the collapse of Kosovo's government.¹ It must be mentioned that Mr. Haradinaj's resignation in July 2019 marked the second time that he resigned as Prime Minister of Kosovo due to his past engagement with the KLA. The first time he resigned, he was charged with war crimes by the International Tribunal for Former Yugoslavia (ICTY).² It remains to be seen on how the SPO will proceed with regard to the Council of Europe's report "Inhuman treatment of people and illicit trafficking in human organs in Kosovo*"³ (Marty's report), which presents allegations towards Mr. Haradinaj⁴. Questions that come forward are if he will ever be charged by the SPO or not. And if it is the first option, under which international doctrine will he be charged: the command responsibility doctrine; the joint criminal enterprise doctrine, under which he has already been tried by the ICTY; or other criminal responsibility under the jurisdiction of the Specialist Chambers (Sch). Or as mentioned, it is also possible that he will not be charged at all. The same questions apply for the other KLA elites, and other people which have been summoned by the SPO regarding their executive role during the Kosovo war. In addition, the summons referred to the former Minister of Justice and to the Head of the Ministry of Justice Division on the legal aid fund, raises concerns that they might have been allegedly interviewed for

¹ BBC News, "Kosovo PM Haradinaj resigns over war crimes summons", July 2019, available at: <https://www.bbc.com/news/world-europe-49047355>

² As a result of the Kosovo parliamentary elections of 2004, and the party coalition between LDK and AAK, Mr. Ramush Haradinaj was proposed by the former President Rugova and was voted by the members of the parliament as the Prime Minister of Kosovo. Right after his '100 days as Prime Minister', in March 2005, he was indicted for alleged war crimes during the time he was a leader of Kosovo Liberation Army (KLA) in the late 1990's. He stepped down from his position and resigned from the post to offer himself for trial. He was initially acquitted due to lack of evidence. Later on, the court ordered a retrial on the grounds that the witnesses might have been intimidated. Nevertheless, on November 2012, Mr. Haradinaj was acquitted again, and as an article from the Guardian concluded: 'the 'new' evidence was in turn exposed as fabricated and groundless.' Another article has reported that: 'Haradinaj's acquittals have been dogged by accusations of witness intimidation.' Hence, Mr. Haradinaj spent eight years being accused of war crimes to finally be acquitted by the court.

³ Council of Europe, "Inhuman treatment of people and illicit trafficking in human organs in Kosovo*", Committee on Legal Affairs and Human Rights, AS/Jur (2010) 46, point 114, 12 December 2010, available at: <http://www.assembly.coe.int/CommitteeDocs/2010/ajdoc462010prov.pdf>

⁴ Mr. Haradinaj has only been mentioned by name two times in Marty's report on a footnote upon where Marty explains that based on a report prepared for the German Federal Ministry of Defense "Thaqi is considered, in security circles, as much more dangerous than Haradinaj, who as former head of KLA possesses a wider international network." Moreover, the footnote mentions another report of the German Secret Service which names "Thaqi, Llluka and Haradinaj as key personalities of organized crime in Kosovo and explores in particular, in 27 pages of thorough analysis, the ramifications of the "Drenica Group"."⁴ Except in these two points, Haradinaj is not mentioned by name in the report.

purposes of prosecution in relation to acts of obstruction or contempt of the SCh proceedings. This is considering that there are no public allegations that they have been part of the KLA and they are not referred to in Marty's report.

Nevertheless, considering the material jurisdiction of the SCh and the abovementioned developments, one can divide the delivered summons in three groups: first, summons related to allegations of command responsibility of former KLA elites; second, summons related to allegation on the executive role of certain individuals during the Kosovo war, e.g. soldiers' or jailers; and third, summons relating to allegations of justice obstruction in the context of SCh proceedings. All summons intend to investigate the invitees' conducts during the war.

This note will discuss similar cases tried by the ICTY with the purpose of deconstructing possible formal and material basis which the court may use against those summoned, and according to the topics, the paper has been divided in three main parts. The first and second part of the paper elaborates on the ICTY's jurisprudence in relation to the doctrine of command responsibility and the doctrine of the joint criminal enterprise. These are the main doctrines used to prove individual criminal responsibility of individuals in high level positions of military forces and of those who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime during an armed conflict. SCh will likely be based on the same premise when construing its alleged enquiry over some of these individuals. And on the third part, this paper considers the ICTY's jurisprudence in adjudicating cases alleging obstruction of justice or contempt of the Tribunal's work when adjudicating war crimes. This is in order to bring a clearer view of the international practice when confronted with such acts, and expose the potential character of investigation being pursued against several officials of Kosovo's government by the SCh.

a) Allegations relating to command responsibility of former KLA elite

The doctrine of command or superior responsibility has developed in the jurisprudence of the ICTY and has been relied upon on many occasions such as the *Čelebići* case, the *Strugar* case, the *ORIĆ Naser* case and also on *Limaj et al.* case. The *Limaj et al.* case is one of the numerous ICTY trials regarding Kosovo war. As noted, there have been several cases for the ICTY which rely on the doctrine of command or superior responsibility, that now can be used by other international or hybrid courts to charge and incriminate superiors of the commissions or their subordinates. SCh jurisdiction is materially based on allegations raised on Marty's report,⁵ clearly making the case for possible use of the ICTY precedent in deconstructing that bulk of law.

A report from Human Rights Watch published in 1998 described the KLA as a guerrilla army, active between February and September 1998, with no rigid hierarchical structure and with separate internal fractions. The report concluded that the KLA was an organized military force for purposes of international humanitarian law.⁶ This report was later on admitted as evidence in *Limaj et al.* case, for the purposes of trying KLA elites before ICTY. Once it was established that the KLA must be considered as a guerrilla army and an organized military force, the ICTY moved forward with trying the defendants under the Statute of the ICTY. Numerous KLA elites were charged under the ICTY under Article 7 (3) of the Statute, which charges defendants on the principal of individual

⁵ Council of Europe, "Inhuman treatment of people and illicit trafficking in human organs in Kosovo*", Committee on Legal Affairs and Human Rights, AS/Jur (2010) 46, point 114, 12 December 2010, available at: <http://www.assembly.coe.int/CommitteeDocs/2010/ajdoc462010prov.pdf>

⁶ Human Rights Watch, *Legal Standards and the Kosovo Conflict*, in *FEDERAL REPUBLIC OF YUGOSLAVIA: HUMANITARIAN LAW VIOLATIONS IN KOSOVO*, Vol. 10, No. 9 (D), October 1998.

criminal responsibility of the superior for failure to prevent or to punish crimes committed by subordinates.⁷

Considering that the SCh will have a broader jurisdiction in terms of time and territory than the ICTY had, one can conclude that a number of SPO invitees consists of suspects that allegedly had command responsibility over the commissions written in Marty's report. Moreover, Marty's report explained the alleged KLA detentions in wartime, which precluded that the KLA operatives were aligned with the "Drenica Group". Based on Marty's report (2010):

*"The evidence gathered in the course of these processes seem to indicate that these KLA operatives – along with their Regional Commander for Northern Albania, the now deceased Xheladin Gashi – were aligned with the "Drenica Group", under the direction of Hashim Thaqi, and were acting in concert with, among others, Kadri Veseli."*⁸

Moreover, in point 58 of the same report it is stated that:

"... the "Drenica Group" had as its chief – or, to use the terminology of organised crime networks, its "boss" – the renowned political operator and perhaps most internationally recognized personality of the KLA, Hashim Thaqi".⁹

Consequently, if the SPO will decide to charge KLA elites based on their command positions within the KLA, it will have to establish the nexus between the three elements of the doctrine of command responsibility with the ones being charged by the SPO; a doctrine explained below.

The doctrine of individual criminal responsibility of superiors for failure to prevent or to punish crimes committed by subordinates in international and internal armed conflicts¹⁰, is an established principle of international customary law.¹¹ Moreover, Article 28 of the Rome Statute of the International Criminal Court specifies the grounds of criminal responsibility of commanders and other superiors, referred to as 'the doctrine of Superior/Command Responsibility'. This doctrine talks about the superior responsibility for omission to act: a superior may be held criminally responsible under that doctrine where, despite his awareness of the crimes of subordinates, he culpably fails to fulfill his duties to prevent and punish these crimes.¹² The doctrine applies to instances where the superior knew, or due to the circumstances should have known about such crimes, and failed to take all necessary and reasonable measures to prevent their commission.

⁷ *Prosecutor v. Limaj et al. (Trial Judgment)*, IT-03-66-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 30 November 2005, available at: <https://www.refworld.org/cases,ICTY,48ac17cc2.html> [accessed 20 March 2020]

⁸ Council of Europe, *"Inhuman treatment of people and illicit trafficking in human organs in Kosovo"*, Committee on Legal Affairs and Human Rights, AS/Jur (2010) 46, point 114, 12 December 2010, available at: <http://www.assembly.coe.int/CommitteeDocs/2010/ajdoc462010prov.pdf>

⁹ Council of Europe, *"Inhuman treatment of people and illicit trafficking in human organs in Kosovo"*, Committee on Legal Affairs and Human Rights, AS/Jur (2010) 46, point 58, 12 December 2010, available at: <http://www.assembly.coe.int/CommitteeDocs/2010/ajdoc462010prov.pdf>

¹⁰ For application of the principle of command responsibility to internal armed conflicts, see *Prosecutor v. Hadzihasanović et al.*, Case No IT-01-47-AR72, Appeals Chamber Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para 31.

¹¹ *Čelebići Camp, Prosecutor v. Delalić (Zejnir) and ors, Appeal Judgment, Case No IT-96-21-A, ICL 96 (ICTY 2001), 20th February 2001, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY]; Appeals Chamber [ICTY]*, para 195; *Prosecutor v. Pavle Strugar (Trial Judgment)*, IT-01-42-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 January 2005, available at: <https://www.refworld.org/cases,ICTY,48ad42092.html> [accessed 20 March 2020], para 357.

¹² The Peace and Justice Initiative, *"The doctrine of Superior/Command Responsibility"*, available at: <https://www.peaceandjusticeinitiative.org/implementation-resources/command-responsibility>

Thus crimes committed come as a consequence of the failure of the commander to properly exercise control over its subordinates. In addition, as forming part of this doctrine are the elements of: a) *the existence of a superior-subordinate relationship*; b) *the superior knew or had reasons to know that the criminal act was about to be or had been committed*; and c) *the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof*.¹³

The existence of the position of command may arise from the formal *de jure* status of a superior, or from the existence of the *de facto* powers of control. As decided in *Čelebići* case by the ICTY, the existence of the position of command derives essentially from the “*actual possession or non-possession of powers of control over the actions of subordinates*.” The ICTY, in the Appeals Judgment in the *Čelebići* case (para 256), went further on determining the degree of control standard, as the material ability to prevent or punish such commissions. In *Strugar* Trial Judgment (para 326), the ICTY determined that there is no requirement that the relationship between the superior or the subordinate be permanent in nature. Further, in the *Blaskić* Trial Judgment (para 303), the court elicited that “the test of effective control [...] implies that more than one person may be held responsible for the same crime committed by a subordinate”.

In line with comparable ICTY jurisprudence, the SPO will hence have to argue that there is enough evidence that proves that the invitees, who have been interviewed for purposes of prosecution, were military commanders or that they were effectively acting as such.

In the *Čelebići* case, it was emphasized that the ultimate standard to prove the doctrine of command responsibility one should demonstrate effective control in both *de jure* and *de facto* of the superiors; which is *prima facie* a reasonable basis for assuming that an accused has effective control over his subordinate. This might be the case when the accused challenges having exercised such control, despite his commanding position. Even when the commander is proven to have had *de jure* authority over his subordinates, the Prosecution must hence prove beyond reasonable doubt that the accused effectively exercised control over his subordinates.

In addition, in order to fulfill the second element of the doctrine, the SPO will need to prove that the invitees, who have allegedly been interviewed for purposes of prosecution, knew or had reasons to know that their subordinates were about to commit or had committed such crimes. As decided in the *Čelebići* case, the superior’s actual knowledge that his subordinates were committing or were about to commit a crime may be established by circumstantial evidence. Collection of evidence for that purpose is rather difficult at this point in time, considering that 20+ years have also passed. Furthermore, if the SPO will try to argue that the invitees “had reasons to know” that their subordinates were committing or about to commit a crime, it needs to be proven

¹³ *Čelebići Camp, Prosecutor v Delalić (Zejnil) and ors, Appeal Judgment, Case No IT-96-21-A, ICL 96 (ICTY 2001), 20th February 2001, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY]; Appeals Chamber [ICTY], para 346. See also Prosecutor v. Dario Kordić, Mario Cerkez (Trial Judgment), IT-95-14/2-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 February 2001, available at: <https://www.refworld.org/cases,ICTY,41483e9be.htm> [accessed 20 March 2020], para 401; Prosecutor v. Tihomir Blaskić (Trial Judgment), IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 March 2000, available at: <https://www.refworld.org/cases,ICTY,4146f1b24.html> [accessed 20 March 2020], para 294; The Prosecutor v. Jean-Paul Akayesu (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, available at: <https://www.refworld.org/cases,ICTR,40278fbb4.html> [accessed 20 March 2020], para 314; Prosecutor v. Pavle Strugar (Trial Judgment), IT-01-42-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 January 2005, available at: <https://www.refworld.org/cases,ICTY,48ad42092.html> [accessed 20 March 2020], para 358; Prosecutor v. Limaj et al. (Trial Judgment), IT-03-66-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 30 November 2005, available at: <https://www.refworld.org/cases,ICTY,48ac17cc2.html> [accessed 20 March 2020], para 520.*

that specific information was in fact available to the invitees which would have provided notice of offences by his subordinates.¹⁴ It is sufficient that the superior was in possession of sufficient information, even of general in nature, to predict the likelihood of illegal acts by his subordinates.

The third element which must be proven in order to pass the test, is the question of whether the superior has failed to take the necessary and reasonable measures to prevent the commission of a crime or punish the perpetrators. This is hence connected to the superiors' possession of effective control. A superior shall thus be held responsible if he failed to take such measures that are within his material ability. Moreover, the *ORIĆ Naser* case underlined the fact that *de jure* authority is not synonymous with effective control. Therefore, the Prosecution must prove effective control beyond reasonable doubt in establishing a superior-subordinate relationship within the meaning of Article 7(3) of the Statute.¹⁵ Although the possession of the *de jure* powers suggest the material ability to control the subordinates, it is not sufficient to prove such ability.¹⁶ Factors which should among others be considered are the failure to protest against or to criticize criminal action, the failure to take disciplinary measures to prevent the commission of atrocities by the troops under his command.¹⁷ Moreover the superior has the competence to punish the perpetrator of the commission, and the failure to do so fulfills the third element as well.

In *Limaj et al. case*, the Prosecution argued that Mr. Limaj's criminal ability arose also from his position of a superior pursuant to Article 7(3) of the Statute. It continued to argue that he exercised *de jure* and *de facto* control over KLA members operating a prison camp in Llapushnik, where at least thirty-five civilians were abducted by KLA and detained under inhumane conditions and routinely subjected to assault, beatings and torture. On top of that, fourteen named detainees have allegedly been murdered in the course of their detention. Mr. Limaj has been accused for these murders. Lastly, Mr. Limaj had the authority to discipline and punish his subordinates.¹⁸ But the Chambers found that the Prosecution was not able to prove beyond reasonable doubt that Fatmir Limaj exercised command. It appeared hence impossible to prove that Fatmir Limaj had effective control, *de jure* or *de facto*, in the prison camp and over the KLA soldiers running the camp, or over the KLA guards who escorted the remaining prisoners from the prison camp to the nearby Berishe/Berisa Mountains on 25 or 26 July 1998.¹⁹ In other words, the prosecution failed to prove that Mr. Limaj had command responsibility over a specific region in Kosovo where the alleged commissions were undertaken. And therefore he was found not guilty.

¹⁴ *Prosecutor v. Pavle Strugar (Trial Judgment)*, IT-01-42-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 January 2005, available at: <https://www.refworld.org/cases,ICTY,48ad42092.html> [accessed 20 March 2020], para 369.

¹⁵ *Prosecutor v. Hadzihasanovic and Kubura (Appeal Judgment)*, IT-01-47-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 April 2008, available at: <https://www.refworld.org/cases,ICTY,48aaefec2.html> [accessed 20 March 2020], para. 20

¹⁶ See *Prosecutor v. Halilovic (Appeal Judgment)*, IT-01-48-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 October 2007, available at: <https://www.refworld.org/cases,ICTY,48ac3b0c2.html> [accessed 20 March 2020], para. 85: "In fact, [de jure power] may not in itself amount to [effective control]." Cf. also *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appeal Judgment)*, ICTR-99-52-A, International Criminal Tribunal for Rwanda (ICTR), 28 November 2007, available at: <https://www.refworld.org/cases,ICTR,48b5271d2.html> [accessed 20 March 2020], paras. 625 and 787, fn. 1837.

¹⁷ *Prosecutor v. Pavle Strugar (Trial Judgment)*, IT-01-42-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 January 2005, available at: <https://www.refworld.org/cases,ICTY,48ad42092.html> [accessed 20 March 2020], para 374.

¹⁸ *Prosecutor v. Limaj et al. (Trial Judgment)*, IT-03-66-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 30 November 2005, available at: <https://www.refworld.org/cases,ICTY,48ac17cc2.html> [accessed 20 March 2020], para 601.

¹⁹ *Ibid.*

Consequently, if the SPO intends to charge the KLA elites in regards to the command responsibility doctrine, it will have to factually prove the existence of three elements of the doctrine against each accused. ICTY's jurisprudence shows that it is very hard to prove the criminal liability of high level commanders of the KLA, bearing in mind it was not a well-organized military force. Besides that, it is highly likely that the same people which have been tried by the ICTY and were found not guilty will be accused by the SPO and tried by the SCh as well. But, as mentioned earlier, the SCh has a little different perspective on its jurisdiction which might change the end result.

b) Allegation relating to executive role of certain individuals during the Kosovo war

The Joint Criminal Enterprise doctrine (JCE doctrine) is another form of individual criminal liability set by Article 7 (1) of the ICTY Statute. Article 7 (1) of the ICTY Statute indicates the individual criminal responsibility of a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred in the Statute. Among these crimes are grave breaches of the Geneva Conventions of 1949 violations of the laws or customs of war, genocide and crimes against humanity.²⁰ In other words, whoever planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these crimes shall be individually responsible for the crime.

The JCE doctrine has been very present in the ICTY jurisprudence since the *Tadić* Appeal Judgment, upon where the ICTY has decided that in cases of collective criminality every member of the joint enterprise may be held criminally liable. This implies that every member is held equally responsible, and therefore share the liability and punishment for the actions of another person part of the group which he himself belonged to. The ICTY has specified the material content and the mental elements of the doctrine. As the first element which must be fulfilled is that there must be a group of people; a plurality of persons is thus required.²¹ There is no necessity for the criminal enterprise to be organized in a military, political, or administrative structure, which is an element specified in the *Tadić* Appeal Judgment. Moreover, the first element can be fulfilled even without identifying all the persons involved in the criminal enterprise.²² The second element to be fulfilled is the existence of a common plan or purpose, which results in a crime or involves the commission of a crime.²³ As in *Brñanin* Appeal Judgment, it has to be proven beyond reasonable doubt the common criminal purpose and the temporal and geographic limits of this goal. Moreover, it must be proven the general identities of the intended victims. In addition, the crime should have been committed as opposed to tried only. The third element required is the situation in which the accused should have directly participated or should have significantly contributed in the design of the agreed crime, or should have assisted or contributed to the execution of it. ICTY clarified that that contribution can be considered either when the accused commission as a principal

²⁰ United Nations 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, Updated Statute of the International Tribunal for the Former Yugoslavia, September 2009, available at: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

²¹ Prosecutor v. Mitar Vasiljevic (Appeal Judgement), IT-98-32-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 25 February 2004, available at: <https://www.refworld.org/cases,ICTY,41483ce34.html> [accessed 20 March 2020], para. 100

²² Prosecutor v. Limaj et al. (Appeal Judgment), IT-03-66-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 27 September 2007, available at: <https://www.refworld.org/cases,ICTY,48ac19112.html> [accessed 20 March 2020], para. 104

²³ Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, available at: <https://www.refworld.org/cases,ICTY,40277f504.html> [accessed 20 March 2020], para 227.

perpetrator, or as a conduct which is not criminal when considered alone but still satisfies this element when it involves assisting the execution of the common criminal purpose.²⁴

In *Haradinaj et al.* case, which was a partial retrial²⁵, the Prosecution charged Mr. Ramush Haradinaj, Mr. Idriz Balaj and Mr. Lahi Brahimaj as criminally responsible for the crimes allegedly committed as participants in a Joint Criminal Enterprise (JCE), with the common purpose to consolidate the total control of the KLA over the Dukagjini Operational Zone. It was further alleged that they unlawfully removed and mistreated Kosovo Serb, Kosovo Albanian and Kosovo Roma civilians, and other civilians, who were, or were perceived to have been, collaborators with the Serbian forces or otherwise not supporting the KLA. Moreover, based on the indictment the JCE included the establishment and operation of KLA detention facilities and the mistreatment of detained persons at these facilities.²⁶

Hence, the three of them were charged with individual criminal responsibility under Article 7 (1) of the Statute, for having committed as part of the JCE the crimes described in the Indictment. Article 7 (1) of the Statute provides that: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Article 2 to 5 of the present Statute, shall be individually responsible for the crime”. But the Chamber found that the individual criminal responsibility of the three accused had not been established due to the lack of evidence.²⁷

It is very likely that SCh must consider the ICTY precedent created in the *Tadić* Appeal Judgment specifying that “committing” a crime is “the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law”.²⁸ Furthermore, the Chamber specified that according to the *mens rea*, there are different requirements on the three categories of the JCE doctrine. With regard to the *Haradinaj et al.* case, the Prosecutor used only two of them to charge the accused; the first being the one when the accused and other perpetrators intend to perpetrate a crime, something which can be proven by having knowledge on the crime or by continuing participation.²⁹ And the second type of *mens rea* used by the Prosecutor on this case concerns cases in which one of the participants commits a crime outside the common design.

When deciding on the *Haradinaj et al.* case, the ICTY explored all four situations described in the Statute in which the criminal ability of the accused may arise. First, the Chamber elaborated on the criminal liability for planning, as a liability which may be incurred when one or more people design the commission of a crime on the preparatory and execution phases. As regards the *mens rea*, the accused must have acted with intent to commit the crime, or with an awareness of the substantial likelihood that a crime will be committed in the execution of the plan. The accused

²⁴ Ibid.

²⁵ Mr. Ramush Haradinaj, Mr. Idriz Balaj and Mr. Lahi Brahimaj were charged in the case *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84 with 16 counts of crimes against humanity and 19 counts of violations of the laws or customs of war. Ramush Haradinaj was also charged of committing crimes against humanity and violating the laws of war. On April 2008, the Chamber acquitted Ramush Haradinaj and Idriz Balaj of all charges in the indictment and found Lahi Ibrahimaj guilty of two counts. The Prosecution appealed the trial judgment, alleging that by not allowing additional time to secure the evidence of two critical witnesses, the Trial Chamber breached its right to a fair and impartial trial.

²⁶ *Prosecutor v. Haradinaj et al. (Trial Judgment)*, IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008, available at: <https://www.refworld.org/cases,ICTY,48ac3cc82.html> [accessed 20 March 2020], para 5.

²⁷ Ibid. para 669 – 672.

²⁸ Ibid. para 682-685.

²⁹ *Prosecutor v. Momcilo Krajisnik (Appeal Judgment)*, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 March 2009, available at: <https://www.refworld.org/cases,ICTY,49bfb0252.html> [accessed 20 March 2020], para. 697

does not necessarily need to be in a position of authority.³⁰ Second, the ICTY defined “instigating” as “prompting another to commit an offence”, by intending that the crime must be committed, or through being aware that the crime might be committed as a consequence of the instigation.³¹ It must be proven before the court that a nexus between the instigation and the perpetration of the crime exists, in such a way that the instigation substantially contributes to the commission of the crime.³²

On another note, the Chambers clarified that the *actus reus* of ordering derives from the *de jure* or *de facto* authority of a person to instruct another person to commit an offence.³³ The accused must hence have the authority to order such a commission and must have requested or authorized it. It does not have to be a formal superior-subordinate relationship.³⁴ Finally, ICTY clarified that aiding and abetting is defined as acts or omission that assist, encourage or lend moral support to the perpetrator of a specific crime and have a substantial effect on the commission of the crime. The assistance provided must have a substantial effect on the commission of the crime.³⁵

After adjudicating and analyzing all the alleged commissions of the Prosecution in this case, the Chamber found that the existence of the Joint Criminal Enterprise (JCE) was not established, and therefore Mr. Haradinaj is not criminally responsible for the charges regarding his participation in a JCE.³⁶ Moreover, the Chamber found that he is neither responsible for charges related to ordering, instigating or aiding and abetting the crimes discussed in the indictment.³⁷ As regards Mr. Lahi Ibrahimaj as a member of the KLA, the ICTY applied the same legal logic. Ibrahimaj was stationed in Jabllanica and a subordinate of Ramush Haradinaj. It was alleged that from 23 June 1998 to 5 July 1998 Lahi Ibrahimaj was the deputy commander of the Dukagjin Operational Staff, after which he continued to serve as the finance director of the KLA General Staff. Hence, he was charged with individual criminal responsibility under Article 7(1) of the Statute.³⁸ But, similar to Mr. Haradinaj, Mr. Ibrahimaj was found not guilty on all charges under the Article 7 (1) of the ICTY Statute. Mr. Idriz Balaj, another KLA-member and the direct subordinate to Ramush Haradinaj, was the commander of a rapid intervention special unit known as the “Black Eagles”. The “Black Eagles” was allegedly created with the approval of Ramush Haradinaj in April 1998. Consequently, Balaj was also charged under Article 7 (1) of the ICTY Statute.³⁹ The Chamber found him nevertheless not guilty on all charges filed against him.

³⁰ Kanyarukiga Appeal Judgement, para 258.

³¹ Prosecutor v. Limaj et al. (Trial Judgment), IT-03-66-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 30 November 2005, available at: <https://www.refworld.org/cases,ICTY,48ac17cc2.html> [accessed 20 March 2020], para. 514

³² Prosecutor v. Dario Kordic, Mario Cerkez (Appeal Judgement), IT-95-14/2-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 December 2004, available at: <https://www.refworld.org/cases,ICTY,47fdb53d.html> [accessed 20 March 2020], para. 27

³³ Prosecutor v. Boskoski and Tarculovski (Appeal Judgment), IT-04-82-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 May 2010, available at: <https://www.refworld.org/cases,ICTY,4bff84af2.html> [accessed 20 March 2020], para. 132.

³⁴ Prosecutor v. Dario Kordic, Mario Cerkez (Trial Judgment), IT-95-14/2-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 February 2001, available at: <https://www.refworld.org/cases,ICTY,41483e9be.html> [accessed 20 March 2020], para. 388

³⁵ Prosecutor v. Haradinaj et al. (Trial Judgment), IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008, available at: <https://www.refworld.org/cases,ICTY,48ac3cc82.html> [accessed 20 March 2020], para 625.

³⁶ Ibid. para 670.

³⁷ Ibid. para 671.

³⁸ Ibid. para 8.

³⁹ Ibid. para 7.

Consequently, as the ICTY widely relied upon the JCE doctrine when adjudicating cases related to the war in Kosovo, therefore the same doctrine will most likely be used by the SPO as well in relation to the majority of senior KLA figures summoned lately. SPO would have to base its assessment on ICTY's precedent, therefore little innovation may be expected by the SCh in this regard.

c) Allegations relating to persons who have obstructed justice in the context of SC proceedings

During the active years of the ICTY, the Chamber had to also adjudicate cases of contempt of the Tribunal including cases where persons disobeyed or disrespected the chambers decisions or its officers. The ICTY's jurisdiction regarding contempt is not expressly outlined in its Statute. It has nevertheless been established that the ICTY possessed an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction may not be subject to misuse of justice principles. And, as an international criminal court, the Tribunal possessed the power to deal with conduct interfering with its administration of justice.⁴⁰ Therefore, based on the Rules of Procedure and Evidence of the ICTY, the Tribunal could have initiated contempt proceedings where there was a reason to believe that a person using his official position knowingly and willfully interfered with the administration of justice. Interference could be established in one of the following cases: the act of intimidation or other instances of tampering with witnesses, refusing to answer questions in court or refusing to comply with an order to attend a hearing or to produce documents, or disclosing confidential court documents and breaching protective measures.⁴¹

In the ICTY case *Prosecutor v. Beqa Beqaj*, the Prosecutor accused Mr. Beqaj of contempt of the Tribunal, punishable under Rule 77 (A) (iv); attempted contempt of the Tribunal, punishable under Rule 77 (A) (iv) and Rule 77 (B); and incitement to contempt of the Tribunal, punishable under Rule 77 (A) (iv) and Rule 77 (B). The allegations of the Prosecution stated that Mr. Beqaj, from on or about 17 February 2003 through to on or about 19 October 2004, individually and in concert with others, incited, attempted to commit, committed or otherwise aided and abetted the commission of contempt of the Tribunal. During this period, Mr. Beqaj moreover knowingly and willfully interfered with the administration of justice by threatening, intimidating, offering bribes to, or otherwise interfering with witnesses or potential witnesses in the case of *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*.⁴²

More precisely, the Prosecution argued that between June and October 2004, Mr. Beqaj sought on six occasions to "convince" two potential witnesses to withdraw their statements against the accused in *Limaj et al.* case.⁴³ While adjudicating this case, the Chamber set out the modes of commission of "threat", "intimidation" and "offering a bribe". According to the Chamber, a "threat" is a "communicated intent to inflict harm or loss on another person or another property, especially one that might diminish a person's freedom to act voluntarily or with lawful consent".⁴⁴ Moreover, the Chamber specified that a threat can also be defined as the expression of an intention to inflict

⁴⁰ *Prosecutor v. Blagoje Simic et al.* (Trial Judgement), IT-95-9-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 October 2003, available at: <https://www.refworld.org/cases,ICTY,414839e14.html> [accessed 20 March 2020]

⁴¹ United Nations 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, Rules of Procedure and Evidence, Rule 77, July 2015, available at: https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf

⁴² *Prosecutor v. Beqa Beqaj* (Trial Judgement), IT-03-66-R77, International Criminal Tribunal for the former Yugoslavia (ICTY), 27 May 2005, available at: https://www.icty.org/x/cases/contempt_beqaj/tjug/en/050527.pdf, para. 1

⁴³ *Ibid.* para. 2.

⁴⁴ *Ibid.* para. 16.

unlawful injury or damage of some kind so as to intimidate or overcome the will of the person to whom it is addressed.⁴⁵ Moving forward with “intimidation”, the Chamber based its interpretation of the Committee of Experts of Intimidation of Witnesses and the Rights of the Defense of the Council of Europe as “any direct, indirect or potential threat to a witness, which may lead to interference with his/her duty to give testimony free from influence of any kind whatsoever”.⁴⁶ On the other hand, the Chamber clarified the meaning of “bribe” as liberally construed as an inducement offered to procure illegal or dishonest action or a decision in favor of the giver; which is also defined as a price, reward, gift or favor bestowed or promised with the objective to pervert the judgment of or influence the action of a person in a position of trust.⁴⁷

While adjudicating the case of Mr. Beqaj, the Chamber stated that the expression “otherwise interfering with a witness or a potential witness” is an indication that Rule 77 gives a non-exhaustive list of modes of commission of contempt of the Tribunal, so it is not meant to encompass the acts of “threat”, “intimidation”, “causing of injury” or “offering of a bribe” which are already specifically provided, but rather all other acts which are intended to influence a witness or potential witness. So, in view of *mens rea* indicated in Rule 77 (A), the Chamber considers that otherwise interfering with witnesses encompasses any conduct that is intended to disturb the administration of justice by deterring a witness or a potential witness from giving full and truthful evidence, or in any way to influence the nature of the witness’ or potential witness’ evidence.⁴⁸ After the Chamber designated all the necessary definitions, the Prosecution had to establish that the accused acted willfully and knowingly, with the specific intent to interfere with the Tribunal’s administration of justice.⁴⁹ On the case in hand, the Chamber found the accused not guilty on all counts, except on count 4 upon which the Chamber was satisfied that there was sufficient evidence to establish beyond reasonable doubt that Mr. Beqaj willfully and knowingly interfered with witnesses, conducting contempt of the Tribunal.⁵⁰

In addition, the ICTY convicted numerous journalists and found them guilty of contempt of tribunal for publishing information that revealed the identity of witnesses protected by a Chamber’s orders.⁵¹ Rule 77 (A) (ii) was the legal bases for these charges upon which the ICTY created a well-developed jurisprudence on its authority on protective measures related to witnesses. The rule foresees that “*The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and willfully interfere with its administration of justice, including ay person who(...) (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber*”.⁵²

Mr. Baton Haxhiu was accused of revealing the identity of the Witness which was protected by Orders of the Trial Chamber, issued in *Prosecutor v. Haradinaj et al*, in a newspaper article that he wrote and published.⁵³ During the trial, the defense had argued that the witness’ identity was

⁴⁵ Ibid. para. 16

⁴⁶ Ibid. para. 17

⁴⁷ Ibid. para. 18

⁴⁸ Ibid. para. 21

⁴⁹ Ibid. para. 23

⁵⁰ Ibid., para. 55

⁵¹ *Prosecutor v. Marijačić & Rebić (Trial Judgement)*, IT-95-14-R77.2, International Criminal Tribunal for former Yugoslavia (ICTY), 10 March 2006, available at: https://icty.org/x/cases/contempt_marijacic_rebic/tjug/en/reb-tcj060310e.pdf; *Prosecutor v. Jovic (Trial Judgment)*, IT-95-14 & IT-95-14/2-R77, International Criminal Tribunal for the former Yugoslavia (ICTY), 30 August 2006, available at: <https://www.refworld.org/cases,ICTY,48ad24062.html> [accessed 20 March 2020]

⁵² Ibid.

⁵³ United Nations 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, Rules of

protected by an order and not orders; and that later on the decision was superseded by an oral decision, and as such was not in force at the time of the article's publication.⁵⁴ Moreover, the defense had argued that once that information that should have remained confidential had become a "public secret", that information could not thereafter be disclosed, and therefore no violation of Rule 77 was possible.⁵⁵ In addition, the defense offered evidence that it was a "public secret" in Kosovo that the person was a witness in the Haradinaj's case trial prior to the publication of the newspaper article. But the prosecution counter-argued that "if it is permissible that a name of a protected witness be published when a select group of people believe that they know the name, that would be contrary to the Tribunal's jurisprudence and it would "eviscerate the authority of the Tribunal orders protecting the identity of the witnesses."⁵⁶

When adjudicating this case, the Chamber relied in the *Jović* Appeal Judgment, where the ICTY stated that: "An order remains in force until a Chamber decision otherwise. The fact that some portions of the Witness's written statement or closed session testimony may have been disclosed by another third party does not mean that this information was no longer protected, that the court had been de facto lifted or that its violation would not interfere with the Tribunal's administration of justice."⁵⁷ In addition, the Prosecutor of the case submitted that Mr. Haxhiu knew that his disclosure of the name of the witness was in violation of an order of a trial chamber, because in his article Mr. Haxhiu referred to the witness as a protected witness and stated that his name was found in the list of witnesses who were to testify under full confidentiality.

Furthermore, the defense had argued that "because the witnesses name was known in Kosovo by "Ramush Haradinaj's people", "government ministers", and the public, he published the name to protect the witness because the Tribunal had failed to do so." But the Chamber relied on the finding of the *Marijadic and Rebic* Trial Chamber that "individuals, including journalists, cannot ... decide to publish information in defiance (of protective measures) order(s), on the basis of their own assessment of the public interest in that information."⁵⁸ Therefore, the Chamber found him guilty on this account since it was proven beyond reasonable doubt that Mr. Haxhiu disclosed confidential information relating to proceedings before the Tribunal in breach of an order of a Trial Chamber.

Considering that the ICTY's jurisprudence provided the elements necessary to prove that someone obstructed justice, and that the SCh have jurisdiction over criminal offenses regulated in the Criminal Code of Kosovo such as crimes against Administration of Justice and Public Administration, against public order, and official corruption and duty, it is expected that some persons already summoned may be indicted on this basis.⁵⁹ Recourse to ICTY's case-law on this issue will be likely made by the SCh.

Procedure and Evidence, Rule 77 (A) (ii), July 2015, available at: https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf

⁵⁴ *Prosecutor v. Baton Haxhiu (Trial Judgement)*, IT-04-84-R77.5, International Criminal Tribunal for former Yugoslavia (ICTY), 24 July 2008, available at: https://www.icty.org/x/cases/contempt_haxhiu/tjug/en/080724.pdf, para 13.

⁵⁵ *Ibid.* para 15.

⁵⁶ *Ibid.* para 75 -76.

⁵⁷ *Prosecutor v. Jovic (Appeal Judgment)*, IT-95-14 & 14/2-R77-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 March 2007, available at: <https://www.refworld.org/cases,ICTY,48ad24602.html> [accessed 20 March 2020], para 30.

⁵⁸ *Prosecutor v. Marijačić & Rebić (Trial Judgement)*, IT-95-14-R77.2, International Criminal Tribunal for former Yugoslavia (ICTY), 10 March 2006, available at: https://www.icty.org/x/cases/contempt_marijadic_rebic/tjug/en/reb-tcj060310e.pdf para. 39.

⁵⁹ Assembly of Kosovo, Law No.05/L- 053 on Specialist Chambers and Specialist Prosecutor's Office, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=11036>

To note, SCh have jurisdiction on adjudicating persons which commit criminal offenses in relation to SCh official proceedings and officials.⁶⁰ Article 384 specifies the meaning of ‘*official proceedings*’ as any criminal proceeding defined in the Kosovo Criminal Code; before any court of law of the Republic of Kosovo.⁶¹ Having said that, one can only await the new undertakings of the SPO and presume the outcome of the SPO invitation to Mr. Tahiri and the questioning of Mr. Lajçi. It remains to be expected if 2020 will be marked with the first indictments as official response to all these allegations and presumptions, or if it will be a continuance of 2019 as per the numerous SPO summons with no concrete actions.

II. Conclusion

2018 marked the operationalization of the SPO, followed by the initial invitations and the first interviews. Considering the high number of invitations directed towards senior officials in Kosovo, these endeavors were expected to result in concrete indictments by late 2019. Nevertheless, 2019 did not differ much from the previous year: the summons was not followed by other concrete measures. While a number of high ranking politicians and former KLA elites have been invited by SPO, almost nothing was revealed by the SPO on the nature and form of these interviews. It remains to be seen if 2020 will bring any filed indictments which would intensify the work of the SPO and the comments of any adjudications.

Bearing in mind the other international criminal court jurisprudence, one can expect that SPO will rely on the well-developed doctrines of ICTY, on issues such as command responsibility, Joint Criminal Enterprise doctrine as well as elements set by the ICTY jurisprudence when trying to prove the alleged interference into the administration of justice by officials in Kosovo institutions. 2020 may clarify much of this uncertainty, adding that the EU would need to decide on the new mandate of the SCh – considering that by 2020 it will already terminate its first five-year mandate.

⁶⁰ In other words, the Law No.05/L- 053 on Specialist Chambers and Specialist Prosecutor’s Office in Article 6, para.2 has specified the subject matter jurisdiction of the Specialist Chambers over offences under Chapter XXXII, Articles 384-386, 388, 390-407, Chapter XXXIII, Articles 409-411, 415, 417, 419, 421, and Chapter XXXIV, Articles 423-424 of the Kosovo Criminal Code 2012, Law 04/L-082 where they relate to its official proceedings and officials.

⁶¹ Assembly of Kosovo, Law No.05/L- 053 on Specialist Chambers and Specialist Prosecutor’s Office, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=11036>

Policy Analysis

Policy Analysis in general is a policy advice paper which particularly aims to influence the key means through which policy decisions are made in both local and central levels of government. The purpose of Policy Analysis is to address, more in-depth, a particular problem, to examine the arguments related to a concerned policy, and to analyze the implementation of the policy. Through Policy Analysis, Group for Legal and Political studies seeks to stimulate wider comprehensive debate on the given issue via presenting informed policy-relevant choices and recommendations to the key stakeholders and parties of interest.



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