Individual criminal liability under the forms of command responsibility and joint criminal enterprise

By December 2021, three indictments have been filed with the Kosovo Specialist Chambers[1], against six individuals, for war crimes and crimes against humanity. The Specialist Prosecutor's Office (SPO) accuses the defendants of having committed criminal offenses under two forms of criminal liability, namely under the form of *command responsibility* and under the form of *the joint criminal enterprise* (JCE).

This analysis prepared by Humanitarian Law Center Kosovo (HLCK) elaborates in details the form of *command responsibility* and the form of *joint criminal enterprise*, based on which these persons are accused.

Command responsibility

One of the most important novelties in the post-World War II period has been the construction of the doctrine of *command responsibility* which attributes to military and civilian leaders' responsibilities, not only when they have directly or indirectly participated in the commission of crimes, but also when the crimes of their subordinates have not been prevented or sanctioned.

There were no mechanisms in earlier international law that would criminalize the leader's passive compliance with the crimes committed by his subordinates.

Command responsibility doctrine is related to the criminal proceedings against General Tomoyuki Yamashita for war crimes in front of the United States military commission in Manila.

Yamashita was being accused that between October 2, 1944 and September 2, 1945 in the Philippine Islands, while leading the Japanese armed forces in the fight against the US and their allies, he illegally neglected and did not perform his duty as commander for controlling persons or his subordinates who have been under his command, by allowing them to commit brutal crimes against the people of the United States and their allies, especially the Filipinos, in which case he (Yamashita) has violated the rules of war. For the commission, the fact that the general "did not maintain control over his own unit" was sufficient for his conviction.

This has remained a precedent case in international law, where the commander under international law can be criminally responsible for the crimes committed by his people.

Just like the precedent law, international law is also developed through decisions and judgments brought by courts.

[1] Specialist Prosecutor against Salih Mustafa; Specialist Prosecutor against Hashim Thaçi and others; and the Specialist Prosecutor against Pjetër Shala.

The right of command responsibility has been developed through courts and tribunals, as in the cases of the so-called *de facto* bearers - commanders (here we are dealing with informal structures, paramilitaries and other groups that play an important role in wars), as well as *de jure* bearers (army commanders, civilian state superiors).

Therefore, besides military commanders, the doctrine of command responsibility also applies to civilian superiors.

The main factor in the development of this doctrine has been the creation of *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda. These tribunals have prosecuted international crimes and encouraged local jurisdictions to prosecute these crimes at the state level as well.

According to the statutes of these two tribunals, any crime that falls under the jurisdiction of the tribunal (genocide, crimes against humanity, war crimes) can be charged to individuals based on the doctrine of command responsibility.

Command responsibility does not deal with the criminal responsibility of the leader or commander who has been personally or directly involved in the commission of criminal offenses and for whom it can be proven that he *planned, ordered, committed or assisted in the commission of criminal offenses*, but deals with criminal liability for **omission** to prevent or punish crimes committed by persons who are in a position of subordination in relation to the accused.

Under international law, a superior who is proven to be liable for failing to fulfil his or her duty to prevent or punish the crimes of his or her subordinates will be held liable not for "negligence on duty" but directly, in relation to with the offense committed and for the criminal consequences, due to his own omission. Where he has not convicted or prevented the crime, e.g., murder, he too will be held liable for murder, because international law does not recognize "negligence in duty" as a criminal offense; such *negligence* is a vector by which the superior may be held criminally liable for the crimes, which are committed by his subordinates.

According to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), the prosecution was required to prove that the accused had knowledge, whether real or constructive, of the crimes committed by his subordinates. Just proving that the information has been in the possession of the accused is sufficient for establishing *mens rea*[2] of that person, while the failure to provide such information is not sufficient to initiate liability. *Mens rea* is a Latin expression, which in translation means "guilty mind".

The Criminal Code of the Republic of Kosovo recognizes four different levels of *mens rea*: intent, recognition (had knowledge), recklessness and negligence.

According to the statute of the International Criminal Court (ICC), the superior must take the necessary

[2] The intent or knowledge of the wrongdoing that constitutes part of a crime, as opposed to the act or conduct of the accused.

and fair measures, which includes the three obligations that the superior must undertake: prevent, prohibit or report the case to the competent bodies of investigation. Under customary international law, however, there are generally two obligations: to prevent and to punish.

Command responsibility as a form of liability for failure

The doctrine of command responsibility has developed over time not as a separate category of war crimes, but as a form of criminal responsibility that applies not only to war crimes but also to other categories of international crimes, such as crimes against humanity and genocide.

The superior may be held criminally liable not for his role in the acts committed by his subordinates, but that he personally has not acted in such a way as to take reasonable measures in order to prevent or sanction such acts.[3]

In the case of the superior's responsibility, the superior's action is causally linked to the crime of his subordinates, in the sense that his **omission** has been the main factor, although not the only one, which has contributed to the commission of the criminal offense ("omission"), or the significant factor which has contributed to the failure to call upon the competent authorities to investigate such criminal offenses, to identify and punish the perpetrators ("impunity").

Command responsibility was born and is being developed in the international context and not in local processes, which later has to be adopted in domestic jurisprudence.

Under international law, command responsibility is presented based on the superior's omission. Liability exists if they personally do not do what is required of them under international law, who has not taken the necessary and reasonable measures to prevent or punish the crimes of his subordinates.

Under international law, the superior is not responsible for the actions of his subordinates, nor for those who have participated in these actions, except for not performing the duty of the superior in exercising the necessary control over his subordinates.

The ICTY Appeals Chamber, in the case against Čelebić, alleges that when it comes to the superior's responsibility, the accused is not charged with the crimes of his subordinates, but with those who did not perform their duty as superiors in carrying out the control.[4] According to this doctrine, the superior is not considered responsible for committing or participating in the commission of the crime by subordinates.

On the other hand, it does not mean that the superior bears the same responsibility for the crimes as the subordinates for their own crimes. The superior is responsible for his own personal omission.[5] The very fact that the superior has been unsuccessful in preventing the crime or in identifying the culprits is not allowed to draw a conclusion that he has not performed his duty.

For the criminal liability to be related to the failure of the superior, three elements are necessary:

[3] Judgment of the Trial Chamber at the ICTY in in the case against Halilović, paragraph 54.
[4] Judgment of the Appeals Chamber at the ICTY, in the case against Čelebić, paragraph 239.
[5] Judgement of the Trial Chamber at the ICTY, in the case against Halilović, paragraph 54

- Knowledge about the criminal offenses committed by his subordinates,
- Power to prevent or punish the wrongdoing of others, and
- Duty to do this.

Under international law, only those duties and responsibilities which the superior must perform when he becomes aware of the possibility that his subordinates have committed or will commit a crime, can act in such a way as to activate his responsibility.[6]

Failure to act when there is a de jure obligation to act is "the essence of this form of superiors' responsibility".[7]

When it comes to *de jure* responsibility of the superior, this can only be activate if he had the duty and legal competence to do so.[8]

Liability based on command responsibility depends not only on the fact that the superior has a legal duty that he did not commit due to their own fault, but also on proving that he had the material (practical) ability to approve or implement measures that would be adopted in the given circumstances.

The general duty of superiors to adopt measures aimed at preventing or punishing their subordinates for crimes committed is rooted in the basic principles of humanitarian law: "responsible commands".[9] Supervisors are required to ensure that forces are under their command control, properly organized, disciplined and that able to comply with humanitarian standards.[10]

Command responsibility arose from the responsible commands, and though in part they do coincide, the two concepts remain quite separate, because the concept of "responsible commands" examines the duties of commanders in general, while the doctrine of command responsibility is directed to criminal responsibility which arises with violations of "specific" legal duties which are mandatory for the superior.

The responsibility of the superior to prevent or punish the crimes of their subordinates in some circumstances can be fulfilled in such a way that a *report is submitted to the competent bodies*.

In the case against Hadzihasanović, the trial panel took into account the fact that General Hadzihasanović had fulfilled his duty of punishment in relation to the specific case, after submitting a report to the competent judicial authorities.

International law does not provide under any circumstances that the superior should personally engage in the investigation or attempt to prevent or punish the crimes of their subordinates. The superior may delegate the implementation of certain aspects of responsibility to prevent or punish crimes.

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[6] Judgment of the Appeals Chamber at the ICTY, in the case against Čelebić, paragraph 226.
[7] Judgment of the Trial Chamber at the ICTY, in the case against Halilović, paragraphs 79 to 90, especially paragraph 88.
[8] Judgment of the Appeals Chamber at the ICTY, in the case against Halilović, paragraphs 184 and 214.
[9] Judgment of the Trial Chamber at the ICTY, in the case against Halilović, paragraph 40; and Judgment of the Appeals Chamber at the ICTY, in the case against Hadzihasanović case, paragraph 22.
[10] Judgment of the Trial Chamber at the ICTY, in the case against Hadzihasanović, paragraph 66.

In case that the competent body does not perform its duty, then that body would bear the responsibility for omission, not the commander who submitted the report or delegated the matter.

However, if the superior has knowledge that that body is incapable or unable to perform its duty or in other ways it has shown unwillingness to perform such a task, or if that body is subordinate to that superior, than the superior may have additional tasks in order to take other measures and to ensure that the delegated issue will be processed efficiently.

Relationship between superior and subordinate - effective control

The first element that connects the superior with the primary act is the relationship which connects the superior with those who have committed the act, which is the basis of their accusation - the condition of "effective control" which the superior had to apply to his subordinates, i.e., the practical ability of the superior to stop the commission or punish the perpetrator. "Effective control" depends on proving that the superior was practically in position in the given circumstances to prevent or punish crimes that were later imposed on him

Mens rea

There is no responsibility if there was no knowledge. According to customary law, the responsibility of the superior is not an objective form of responsibility, thus this kind of responsibility cannot be placed on the superior in the absence of evidence that the superior has known or had reason to know about the crimes committed by their subordinates, or that they would commit.

Under the international customary law, a superior's responsibility can only appear where the superior "knew" or "had reason to know" that his subordinates had committed or would commit crimes.

The expression "knew" means that one should have real knowledge of those crimes and for the participation of one's subordinates. Whereas the expression "had reason to know" means that the superior was in possession of information which would at least inform them of the risk of such crimes, where it would prompt them for the need for further investigation to determine whether their subordinates would commit those crimes.

In both cases, the superior had to be in possession of sufficient information to conclude that his subordinates had committed or are preparing to commit the crime.[11]

The superiors' lapse is related to the primary offense in another way: it must be proven that the superior, based on their actions or in any other way, silently approved the crimes of their subordinates, for which they knew, or had reasons to know.

[11] Judgment of the Appeals Chamber at the ICTY, in the case against Stanislav Galić, paragraph 184; and Judgment of the Appeals Chamber at the ICTY, in the case against Čelebić, paragraph 241.

The superior can be held criminally liable in connection with this doctrine only if he knew or had reason to know that the crimes were committed or will be committed, and deliberately did not perform his duty by neglecting it.[12]

Thus, the main elements that must be met for a superior to be punished for war crimes are: *the superior-subordinate relationship, the superior had knowledge or had reason to know that his subordinates will commit or have already committed the crime and the superior has not taken the necessary and reasonable measures to prevent such an action or to have punished the perpetrators of that offense.*

These three elements are not very difficult to understand but are very difficult to prove in practice, before the court.

In order to establish the first element of the *superior-subordinate relationship*, the prosecutor must provide convincing evidence of the circumstances through which it must be proved: To which unit do the subordinate-perpetrators belong? To which area do those subordinates belong? Who was their superior? Who was the superior of that area? What kind of uniform did they have? How were they dressed? Did they hold a ribbon in their hand? What signs did that uniform have?

The prosecution must provide convincing evidence for all these circumstances to complete only the first element.

In order for the second element to be established, whether *they knew or had reason to know*, the prosecutor must bring evidence at least for the following circumstances: Has the superior received reports from the field? Can it be proved that such a report has at least gone to the superior's desk? Was that crime reported in media? When did he accept the position of superior? Did the crime happen, while he was in the duty?

Finally, to prove the third element, *the superior has not taken the necessary and reasonable measures to prevent or punish*, the prosecution must bring evidence regarding the following circumstances: How could the superior know that the killings can occur? For those that have committed these killings or other crimes, what was their past? How would the superior punish them? Is it enough for the superior to only report the case to the competent justice bodies?

All these questions raised must be substantiated through the facts administered in court, by which it will be proved that a superior is liable under command responsibility. Circumstantial evidence is the main and very important evidence by which these facts can be proved.

The responsibility of the superior basically does not require that the real perpetrator of the criminal offense be identified.[13] For the superior to be considered responsible it is not necessary that the perpetrator be charged or convicted of the criminal offense that is the basis of the charge regarding the responsibility of the superior. It suffices to prove that the perpetrator was a subordinate of the accused (superior) at the given time, and that he was under his/her effective control, and that the defendant was adequately informed

[12] Judgment of the Appeals Chamber at the ICTY, in the case against Ignace Bagilishema, paragraph 35.
[13] Judgment of the Appeals Chamber at the ICTY, in the case against Blagojević, paragraph 287.

of his crime and that through his own fault he did not prevent or punish him.

Joint Criminal Enterprise - JCE

The Joint Criminal Enterprise is a legal doctrine used during war crimes trials in front of the tribunals, to allow the prosecution of members of a group for the actions of the group. This doctrine holds each member accountable for crimes committed by the group within a common plan or purpose. It arose out of the application of the idea of common goal and was implemented by the International Criminal Tribunal for the former Yugoslavia to prosecute political and military leaders for mass war crimes, including genocide, committed during the 1991-1999 Yugoslav wars.

Joint Criminal Enterprise as a way of responsibility includes three forms or categories: **basic**, **systematic** and **extended**.

In its **basic** form (JCE 1), several perpetrators act based on a common goal; It includes a case where all participants, acting in accordance with a common purpose, share the same criminal purpose and act to give effect to that purpose.

Example:
JCE 1: There is a common goal to deport the civilian population from a certain territory. (Common goal is to deport the civilian population).

In the **systematic** form (JCE 2), a variant of the first form, crimes are committed within an organized system of ill-treatment, by members of military or administrative units, such as in concentration camps or detention centres;

Example:
JCE 2: The common goal, the organization, e.g., the case of ill-treatment of prisoners. Punishment is based on the contribution, punishment of the superior is higher, and then guard, driver and others, is lesser.

In the **extended** form (JCE 3), criminal liability is defined for the actions of one or more co-perpetrators that go beyond the joint plan but that were a foreseeable consequence of the implementation of the plan.

Example:
JCE 3: Some military and political superiors have decided to clear a territory, they did not plan to kill people but only to move them away from a certain territory, but a group of soldiers committed several killings of unarmed civilians and voluntarily have taken responsibility. In this case, the soldiers have a bigger responsibility, while the responsibility of the superiors is smaller.

The responsibility of the JCE requires the existence of a common plan, project or goal. The existence of a common plan or purpose must be proven by the prosecution through field

evidence. For example, the ICTY Chamber of Appeals, in the judgment[14] against Nikola Šainović and others, regarding the allegations related to war crimes in Kosovo, namely the displacement of Albanians from Kosovo, found that this common goal is verified by the facts or evidence of large-scale forcible displacement of the population which was orchestrated, using the destruction of identity cards or other identification documents. These two factors have been sufficient to draw a reasonable conclusion that there was a common intention to forcibly expel a number of Kosovo Albanians.

In cases where the prosecution intends to support a theory of joint criminal enterprise, it must state the purpose of the enterprise, the identity of its participants, the nature of the accused's participation in the enterprise, and the period of the enterprise. The indictment must also clearly indicate which form of joint criminal enterprise is alleged. Failure to specifically disclose the joint criminal enterprise, including the supporting material facts and the category, constitutes a defect in the indictment.

The difference between a joint criminal enterprise and a criminal enterprise

Following the filing of the first indictments in Kosovo Specialized Chambers, it was noted that the general public did not fully understand what we mean by a *joint criminal enterprise*, and it was often heard that "the prosecution has designated the KLA as a criminal enterprise." This expression is wrong, as the joint criminal enterprise is deeply different from a criminal enterprise.

Membership in a criminal enterprise is intended for committing crimes, and we are dealing with a mindful membership in an organization that commits crimes. Whereas criminal liability under a joint criminal enterprise is not for mere membership or conspiracy of committing crimes, but is a form of liability relating to participation in the commission of a crime as part of the JCE.[15]

Thus, in this case we are not dealing with a criminal enterprise that commits crimes, but rather dealing with a form of responsibility that is related to participating in the commission of a crime as part of a joint criminal enterprise.

Overlapping command responsibility and joint criminal enterprise

The prosecution often uses the right to charge the defendant with one or more forms of liability. So, in practice it can be seen that we have indictments which, for the same criminal offenses of war crimes or crimes against humanity, the prosecution accuse the defendant under two forms of criminal responsibility, namely according to the form of command responsibility and under the joint criminal enterprise.

Following the filing of an indictment, which in itself contains two types of liability or it, contains an overlapping of command responsibility and joint criminal enterprise, the court must decide whether it is fair to try the defendant for both forms of liability or only for one.

[14] Paragraph 611 and 654.
[15] See Decision of the Appeals Chamber at the ICTY, dated 21 May 2003, in the case against Milan Milutinović and others, paragraph 25.

The jurisprudence of the *ad hoc* tribunals shows that it would be illogical and not fair for the superior to be convicted for the command responsibility as well as for the other form of responsibility for the same actions.[16]

United Nations tribunals show a clear preference to convict them for one form of responsibility rather than two. This preference is always chosen when there is evidence that the defendant acted directly and not under command responsibility, where the evidence enables the sentencing judgment under two forms of liability.[17]

It is unfair for someone to be convicted of direct involvement in the commission of a criminal offense, and on the other hand that same person to be liable for omission or for failing to take measures to prevent the commission of a criminal offense (command responsibility). In this case, the abuse of the position of the superior during the measurement of the sentence will be taken only as an aggravating circumstance.[18]

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[16] Judgment of the Appeals Chamber at the ICTY, in the case against Blaškić, paragraphs 91
[17] First scale judgment at the ICTY, in the case against Krnjojelać, paragraphs 173.
[18] Judgment of the Appeals Chamber at the ICTY, in the case against Blaškić, paragraphs 91.