

ICTY Judge FREDERIK HARHOFFs
EMAIL to 56 CONTACTS, JUNE 6, 2013

Dear friends,

Some of you may by now have read the two articles I sent round, and I thought it only proper to add a few personal comments to what you have read. The articles are good because they focus on measures that cause deep concern both for me and among colleagues here in the corridors of the court.

In brief:

Right up until autumn 2012, it has been a more or less set practice at the court that military commanders were held responsible for war crimes that their subordinates committed during the war in the former Yugoslavia from 1992-95, when the Dayton Agreement brought an end to the war in December 1995.

The responsibility then was either normal criminal responsibility as either (1) contributing to or (2) responsibility for the top officers with command responsibilities in a military system of command authority where these failed to prevent the crime or punish the subordinates. There is nothing new in this. We had also developed an extended criminal responsibility for people (ministers, politicians, military leaders, officers and others), who had supported an overall goal to eradicate ethnic groups from certain areas through criminal violence, and which in one way or another contributed to the achievement of such a goal; it is this responsibility that goes by the name of "joint criminal enterprise".

But then the court's Appeals Chamber suddenly back-tracked last autumn with the three Croatian generals and ministers in the Gotovina case. They were acquitted for the Croatian army's war crimes while driving out Serbian forces and the Serbian people from major areas in Croatia - the so-called Krajina area in August 1995 (home to generations of Serbians).

Shortly after, the Appeals Chamber struck again with the acquittal of the Serbian Commander Chief of Staff, General Perisic, when the Chamber decided that even though his military and logistical support from Serbia in the Bosnian-Serbian forces in Bosnia had contributed to the forces' crimes against Bosnian Muslims and the Bosnian Croats in Bosnia, Perisic had "*not intended*" for his forces to be used to commit crimes. He

provided the support, but was unaware, according to the Appeals Chamber, that the support would be and was used to commit crimes in Bosnia. This despite the media's daily coverage of the Bosnian-Serbian forces' macabre crimes against Muslims (and to a less extent Croats) in Bosnia.

It is however very hard to believe that Perisic didn't know what the plan was in Bosnia, and what his support was actually used for.

And now follows the judgement last week that acquitted the head of the Serbian secret service, General Jovica Stanisic and his henchman Franko Simatovic, for their assistance in the Bosnian-Serbian forces' notorious crimes in Bosnia against the Bosnian Muslims and Croats, and with the same reason used for Perisic, that those in question were "unaware" that their efforts would be used to commit crimes.

What can we learn from this?

You would think that the military establishment in leading states (such as USA and Israel) felt that the courts in practice were getting too close to the military commanders' responsibilities. One hoped that the commanders would not be held responsible unless they had actively encouraged their subordinate forces to *commit crimes*. In other words: The court was heading too far in the direction of commanding officers being held responsible for every crime their subordinates committed. Thus their *intention* to commit crime had to be specifically proven.

But that is exactly what the commanders get paid for: They **MUST** ensure that in their area of responsibility no crimes are committed, and if they are they must do what they can to prosecute the guilty parties. And no one who supports the idea of ethnic eradication can deny the responsibility of, in one way or another, contributing to the achievement of such a goal.

However, this is no longer the case. Now apparently the commanders must have had a *direct intention* to commit crimes – and not just knowledge or suspicion that the crimes were or would be committed. Well, that begs the question of *how* this military logic pressures the international criminal justice system? Have any American or Israeli officials ever exerted pressure on the American presiding judge (the presiding judge for the court that is) to ensure a change of direction?

We will probably never know. But reports of the same American presiding judge's tenacious pressure on his colleagues in the Gotovina - Perisic case makes you think he was determined to achieve an acquittal - and especially that he was lucky enough to convince the elderly Turkish judge to change his mind at the last minute. Both judgements then became majority judgements 3 -2.

And so what of the latest judgement in the Stanistic-Simatovic case? Here it was not the Appeals Chamber that passed the judgement, but a department in a premium authority with the Dutch judge Orié as presiding judge supported by the Zimbabwean judge, but with dissent from the female French judge...? Was Orié under pressure from the American presiding judge? It appears so! Rumour from the corridors has it that the presiding judge demanded that the judgement against the two defendants absolutely had to be delivered last Thursday – without the three judges in the premium authority having had time to discuss the defence properly – so that the presiding judge's promise to the FN's security service could be met. The French judge only had 4 days to write the dissent, which was not even discussed between the three judges in the department. A rush job. I would not have believed it of Orié.

The result is now that not only has the court taken a significant step back from the lesson that commanding military leaders have to take responsibility for their subordinates' crimes (unless it can be proven that they knew nothing about it) – but also that the theory of responsibility under the specific "joint criminal enterprise" has now been reduced from contribution to crimes (in some way or another) to demanding a *direct intention* to commit crime (and so not just acceptance of the crimes being committed). Most of the cases will lead to commanding officers walking free from here on. So the American (and Israeli) military leaders can breathe a sigh of relief.

You may think this is just splitting hairs. But I am sitting here with a very uncomfortable feeling that the court has changed the direction of pressure from "the military establishments" in certain dominant countries.

In all the courts I have worked in here, I have always presumed that it was right to convict leaders for the crimes committed with their knowledge within a framework of a common goal. It all boils down to the difference between knowing on the one hand that the crimes actually were committed or that they were going to be committed, and on the other hand planning to commit them.

That's the bottom line!

How do we now explain to the 1000s of victims that the court is no longer able to convict the participants of the joint criminal enterprise, unless the judges can justify that the participants in their common goal actively and with direct intent contributed to the crimes? Until now, we have convicted these participants who in one way or another had showed that they agreed with the common goal (= to eradicate the non-Serbian population from areas the Serbians had deemed "clean") as well as, in one way or another, had contributed to achieving the common goal – without having to specifically prove that they had a direct intention to commit every single crime to achieve it. It is almost impossible to prove...

And I always thought that was right. I have delivered my judgements in trust that those at the top could see that the plan to "eradicate the others" from "own" areas contradicted the basic order of life, a challenge of right or wrong, and not least in a world where internationalisation and globalisation rejects any notion of someone's "natural right" to live in certain areas without the presence of others. Seventy years ago we called it Lebensraum.

However, apparently this is no longer the case. The latest judgements here have brought me before a deep professional and moral dilemma, not previously faced. The worst of it is the suspicion that some of my colleagues have been behind a short-sighted political pressure that completely changes the premises of my work in my service to wisdom and the law.

Kind regards
Frederik