

THE CONCEPT OF JOINT CRIMINAL ENTERPRISE IN INTERNATIONAL CRIMINAL LAW

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INTRODUCTION

Contemporary International Criminal Law is chiefly concerned with holding accountable those who are responsible for mass atrocities. Joint Criminal Enterprise is a useful and a potent tool in the hands of a scrupulous prosecutor to establish personal criminal liability in International Criminal Law. As a formal concept, Joint Criminal Enterprise was specifically articulated in Tadic case¹. Since then, this concept has been used a principal of Criminal Liability in a number of cases.² This concept means, anyone who contributes to a criminal activity in order to carry out a common criminal purpose may be held personally criminally liable. This article examines the evolution of the concept of Joint Criminal Enterprise (JCE) and its principal elements.

1 THE ORIGINS OF THE JCE DOCTRINE

Ironically, JCE, the most complex and conceptually challenging liability theory in international criminal law is the only one not mentioned explicitly in the statutes of the ICTY or ICTR.³ Judges have delved into the post World War II case Law and have emerged with a notion that “JCE was irrefutably an institution of customary international law that existed and was applied long before the accused committed the offence.”⁴

1.1 POST WORLD WAR II CASE LAW:

The first traces of JCE in the customary international law are identified in the post-World War II cases in which the doctrine was used under different (common purpose) or sometimes even no

¹ ICTY, Prosecutor v Dusko Tadic, IT-94-1-A, Appeals Chamber Judgment, 15 July 1999.

² Milorad Krnojelac, Case No. IT-97-25-A, Appeal Judgement, 17 Sept. 2003, 28; Ntakirutimana, AJ 468; Momčilo Krajišnik, Case No. IT-00-39-A, Appeal Judgement, 17 March 2009, 655.

³ Alison Marston Danner and Jenny S Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the development of International Criminal Law, California Law Review [2005] (93), 75, 103.

⁴ Rašević et al., 2nd inst., p. 26

specific name. Firstly, in the Georg Otto Sandrock et al case⁵ (also known as the Almelo Trial) a British court found that three Germans who had killed a British prisoner of war were guilty under the doctrine of "common enterprise".

Then the so called "concentration camp" cases reveal the germs of the concept of JCE. Two examples of these are the Dachau Concentration Camp case,⁶ decided by a United States court and the Belsen case⁷, decided by a British military court, both sitting in Germany. In these cases the accused held some position of authority within the hierarchy of the concentration camps and based on that they were found guilty of the charges that they had acted in pursuance of a common plan to kill or mistreat prisoners and hence to commit war crimes.

Finally, the case that demonstrates the closest link to the notion of JCE is the Essen Lynching case⁸ (also called Essen West), before a British military court. In that case three British prisoners of war had been lynched by a mob of Germans in the town of Essen-West on 13 December 1944. In this case a German Captain and an escort crew who were escorting British Prisoners of War had stated in a loud voice that the escort will not interfere if the German Public were to set on the POWs. Subsequently, an angry mob set on the POWs killing them. In this case it was held that the German Soldiers were Criminally Responsible.

1.2 INTERNATIONAL INSTRUMENTS

International instruments The International Convention for the Suppression of Terrorist Bombing⁹, upholds the notion of a "common criminal purpose" as distinct from that of aiding and abetting and reads (Article 2(3)(c)) that offences envisaged in the Convention may be committed by any person who *"in any other way (other than personally committing or attempting, participating as an accomplice, or organizing or directing others to commit an offence) contributes to the commission of one or more offences by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned."*

The Statute of the International Criminal Court, adopted by a Diplomatic Conference in Rome on 17 July 1998 ("The Rome Statute"), upholds the doctrine in Article 25 paragraph 3(d) and reads: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person

⁵ Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume I, London, HMSO, 1949, case 3, Decided on 24-26, November, 1945 available at <<http://www.ess.uwe.ac.uk/wcc/almelo.htm>>

⁶ Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume XI, London, HMSO, 1949, CASE NO. 60, 15TH NOVEMBER--13TH DECEMBER, 1945 < <http://www.ess.uwe.ac.uk/WCC/dachau.htm>>

⁷ Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume II, London, HMSO, 1947 BRITISH MILITARY COURT, LUNEBURG, 17TH SEPTEMBER-17TH NOVEMBER, 1945, < <http://www.ess.uwe.ac.uk/WCC/belsen1.htm>>

⁸ Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume I, London, HMSO, 1947, CASE No. 8 . BRITISH MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS, ESSEN, 18TH-19TH AND 21ST-22ND DECEMBER, 1945 < <http://www.ess.uwe.ac.uk/wcc/essen.htm>>

⁹ adopted by the United Nations General Assembly, Resolution 52/164 of 15 December 1997

'in any other way (other than aiding and abetting or otherwise assisting in the commission or attempted commission of a crime) contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

ii. Be made in the knowledge of the intention of the group to commit the crime."

1.3 JURISPRUDENCE OF ICTY

The Statute of the ICTY, in Article 7(1) defines the forms of criminal liability and reads 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 Articles 2 to 5 of the present Statute, shall be individually responsible for the crime." As it is evident the concept of JCE does not specifically appear in Article 7(1). However, the Tadic appeal chamber advertent to the previous cases identified the concept of JCE as part of customary international law. In this regard, it is important to mention the context of the Tadic Appeal.

Tadic was indicted by the ICTY Prosecutor on a variety of charges. At his trial, he was acquitted of one of the most serious charges-murder as a crime against humanity-for the murder of five Muslim men in a Bosnian village. The Trial Chamber found that Tadic was a member of a group of armed men who entered the village and beat its inhabitants. Furthermore, the Trial Chamber noted that the five victims, who were alive when the armed group entered the town, were found shot to after the group's departure. Nevertheless, the Trial Chamber determined that it could not "on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part in the killing of the five men."¹⁰

The Appeals Chamber reviewed the language of Article 7(1) and noted that the forms of liability articulated therein described "first and foremost the physical perpetration of a crime by the offender himself." But it also found that the crimes within the jurisdiction of the Tribunal "might also occur through participation in the realisation of a common design or purpose."¹¹ After reviewing this jurisprudence, the Appeals Chamber concluded that "broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality."¹²

2 THREE CATEGORIES OF JOINT CRIMINAL ENTERPRISE CASES

2.1 JCE I

The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention¹³. Common design element has been

¹⁰ Prosecutor v. Tadic, Judgement, ICTY Trial Chamber, at para. 373, Case No. IT-94-1-T (May 7, 1997)

¹¹ Prosecutor v Tadic, Judgement, ICTY Appeals Chamber, [183], Case No. IT-94-I-A (July 15, 1999)

¹² Ibid, [95].

¹³ Ibid, [196].

interpreted as requiring that the defendants have entered into an agreement with other members of the joint criminal enterprise to commit crimes."¹⁴To be found guilty of the crime of murder via this "Category One" of JCE, for example, the prosecution must prove that the common plan was to kill the victim, that the defendant voluntarily participated in at least one aspect of this common design, and that the defendant intended to assist in the commission of murder, even if he did not himself perpetrate the killing.¹⁵ The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows:

- (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and
- (ii) The accused, even if not personally affecting the killing, must nevertheless intend this result.

2.2 JCE II

The second category of JCE relates to "systems of ill-treatment".¹⁶ For this category, the prosecution need not prove a formal or informal agreement among the participants, but must demonstrate their adherence to a system of repression."¹⁷This notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps.

This category of cases is really a variant of the first category. Cases illustrative of this category are the Dachau Concentration Camp Case¹⁸, and the Belsen Case.¹⁹ In these cases the accused held some position of authority within the hierarchy of the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes. In his summing up in the Belsen case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case:

- (i) the existence of an organized system to ill-treat the detainees and commit the various crimes alleged;
- (ii) the accused's awareness of the nature of the system; and
- (iii) The fact that the accused in some way actively participated in enforcing the system. The convictions of several of the accused appear to have been based explicitly upon these criteria.

2.3 JCE III

¹⁴ Prosecutor v Multinovid, Decision on Dragoljub Ojdani 's Motion Challenging Jurisdiction-Joint Criminal Enterprise, ICTY Appeals Chamber, Case No. IT-99-37- AR72 (May 21, 2003), [23].

¹⁵ Above, n13.

¹⁶ Above, n11, [202].

¹⁷ Prosecutor v. Kmojelac, Judgement, ICTY Appeals Chamber, Case No. IT-97-25-A (Sept. 17, 2003), [96].

¹⁸ Above, n6.

¹⁹ Above, n7.

The third category concerns cases involving a common design where one of the perpetrators commits an act which, while outside the common design, is nevertheless a natural and foreseeable consequence of the implementation of that common purpose.²⁰ An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (in other words to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is killed.²¹ All participants in the common enterprise would be guilty of this murder if the risk of death was a "predictable consequence of the execution of the common design" and if they were "reckless or indifferent" to that risk.²²

The indictments in the Milosevic cases illustrate the usage of the JCE III category as a basis of personal criminal liability.²³ The charges alleged that Milosevic participated in a joint criminal enterprise, whose purpose "was the forcible and permanent removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats from large areas of the Republic of Bosnia and Herzegovina".

3 ELEMENTS OF JOINT CRIMINAL ENTERPRISE

Despite the fact that ICTY's Statute does not specify an *actus reus* and *mens rea* of JCE. The *actus reus* of JCE comprises the simultaneous existence of the three following elements:

1. A plurality of persons. They need not be organized in a military, political or administrative structure.
2. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialize ad hoc.
3. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.

Unlike the *actus reus*, the *mens rea* differs according to the category of JCE applied:

1. The first category of cases requires the intent to perpetrate a specific crime (this intent being shared by all the co-perpetrators).
2. For the second category which, is a variant of the first, the accused must have personal knowledge of the system of ill-treatment (whether proven by express testimony or inferred from the accused's position of authority), as well as the intent to further this concerted system of ill-treatment.

²⁰ Above, n11, [204].

²¹ See, eg, illustration at Tadic above, n11, [204].

²² Ibid.

²³ Prosecutor v. Milosevic, Initial Indictment, at para. 6, Case No. IT-01-5 1-1 (Nov. 22, 2001)

3. The third category requires the intent to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or, in any event, to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, in the circumstances of the case,
 - (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and
 - (ii) The accused willingly took that risk.

4 DISTINCTION BETWEEN ACTING IN JOINT CRIMINAL ENTERPRISE AND AIDING AND ABETTING

In practice aiding and abetting might be easily confused with JCE, thus it is important to bear in mind the key differences between these. The aider and abettor is always an accessory to a crime perpetrated by another person, the principal. Under JCE liability each participant in the JCE is a principal perpetrator himself. The cases of aiding and abetting require no proof of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution. By contrast to the JCE, the existence of a common plan, design or purpose is considered to be *sine qua non*²⁴.

The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of JCE, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

It is important to underline when an aider or abettor becomes a co-perpetrator. The trial Chamber in Kvočka case²⁵, held that an aider or abettor, one who assists or facilitates the criminal enterprise as an accomplice, may become a co-perpetrator, even without physically committing crimes, if their participation lasts for an extensive period or becomes more directly involved in maintaining the functioning of the enterprise. By sharing the intent of the joint criminal enterprise, the aider or abettor becomes a co-perpetrator. Furthermore, when an accused participates in a crime that advances the goals of the criminal enterprise, it is often reasonable to hold that her form of involvement in the enterprise has graduated to that of a co-perpetrator. Finally, once the evidence indicates that a person who substantially assists the enterprise shares the goals of the enterprise, he becomes a co-perpetrator.

5 CONCLUSION

JCE is a victim-centered, far-reaching theory often used to prosecute the senior leadership as well as low-level individual perpetrators responsible for a broad range of crimes perpetrated in the

²⁴ Anto Furundžija, Case No. IT-95-17/1-A, Appeal Judgment, 21 July 2000.

²⁵ Miroslav Kvočka, et al., Case No. IT-98-30/1-A, Appeal Judgment, 28 Feb 2005.

names of former leaders. For example, there are significant benefits to its use in its expansive version (e.g.) when an international court uses the doctrine to hold a particular defendant liable for the range of crimes associated with regional ethnic cleansing in which he played some part. At the same time, this doctrine can be abused if used by a dishonest national government to suggest that all persons who provide any sort of support to a terrorist organization, however loosely defined, become liable for all crimes committed by its members. Stated differently, the uncontrolled use of joint criminal enterprise can pose serious dangers to the fairness of the proceedings.

In practice, JCE represents a transfer of power from international judges to prosecutors, who have enormous discretion to decide how much wrongdoing to assign to any particular defendant. Because the doctrine is so loose, JCE closely approaches a theory of guilt by association. When used properly, JCE can assist in connecting participants in a criminal enterprise who operated far from the crime scene. When used selectively this notion represents the infinite possibilities for unlimited interpretations and abuses.