

Joint Criminal Enterprise as a Mode of Charge

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Question: Whether cases in International Criminal tribunals consider Joint Criminal Enterprise as mode of charge, whose objective is common purpose responsibility?

Abstract

The Joint Criminal Enterprise doctrine firstly appeared in International Criminal Tribunal for Yugoslavia. (Former) The Tadic Judgment, theory of International Criminal Participation taking into account the collective context of crime, and thus helping in overcoming the difficulty in proving the contributions of individuals participants. The doctrine's image has tarnished as doubts have been raised about the broad applicability of the doctrine. The decisive question is whether the actions carried out were as much 'an integral part' of the crime as the direct and physical actions. Since the Tadic Judgment, the 'direct commission' also covers the direct perpetration by various persons, which is mode of participation most aptly captured by the term *'joint of co-participation'*.

Introduction

Criminal Law derived its existence from the legal authority of states to protect society and its members against disruptive behavior, and it focuses on individual responsibility and guilt of the offenders. In International criminal offences, the International society is confronted with two problems in the context. First, design doctrines that provide criminal responsibility for political and military leaders who command from behind scenes and never get their hands dirty in committing atrocities. Secondly, how the collective context of International Crimes can be represented in case laws.

“Joint Criminal Enterprise, defined in the Article 25 (3) (a) Individual Criminal Responsibility. 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: Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.”¹

The doctrine considers each member of the organised group individually responsible for crimes committed by group within the common objective. The concept of 'collective liability' is highlighted in this doctrine where more than one is liable to share punishment for the actions of another person who have a common intention. “The German Scholar Gunther Jakobs argues that the responsibility and culpability of the individual actors is diminished because they normally act

¹ Rome Statute of the International Criminal Court circulated as document A/CONF. 183/9 of 17 July 1998. Statute entered into force on 1 July 2002. Article 25 pg.17

under the psychological pressure of the system.”² Therefore, the system is liable to be punished along with the individual instead of the individually being responsible and liable for the act.

The Joint Criminal Enterprise doctrine, applied by International Criminal Tribunal of Yugoslavia in the Tadic Case 1999. It was judicial creativity, ex post facto application of law, invoking general principles of law which become hard laws if confirmed by subsequent case laws and if legality objections are rejected. In military, “When a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates.”³ Similarly in India, when government passes an order for enforcement of AFSPA in a particular state, not only should the soldier be held liable for the acts but the General on whose command the orders were being followed if dispute arises. However, the participation should have had a real impact on the commission of the offence, such that the person concerned must have been a part of the commission or participation, carrying out some task which was directly related to the offence.

The meaning of the term ‘committed’, the Tadic judgment held that committing means first and foremost the physical perpetration by the offender. The Trial Chamber defined ‘committing’ as participating ‘physically or otherwise directly or indirectly’. “Since the Tadic commission is to be understood foremost as ‘physical perpetration’, that is, the commission of the crime by the perpetrator the offender with their own hands.”⁴

“The ICTY decided significant number of cases with the form of participation focusing on the common criminal design or purpose of the different perpetrators. The Tadic, referred to Article 25 (3) ICC Statute, held that this principle is contained in Article 7(1) ICTY and constitutes a form of participation that is particularly necessary in order to cope with international crimes since most crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality, these crimes are carried out by groups or individuals acting in pursuance of a common criminal design.”⁵

Joint Criminal Responsibility

“The Joint Criminal Enterprise doctrine serves to link crimes to several persons, it connects person with distinct crimes and, it manages to portray the interaction and cooperation between members of a group or organization, showing the dynamics of collective action without which, according to many, International crimes cannot be understood.”⁶

The concept of conspiracy –collusion, wrapped in the cloth of the common purpose, surfaced in the case law of the ICTY. The cause of the implementation of this doctrine was in case of mob-violence in which the accused, Dusko Tadic, had participated. Tadic had indeed joined the group

² Jakobs, ‘Verhältnis’, in Goppinger and Bresser, Sozialtherapie (1982), pp. 127

³ UNWCC, LRTWC,iii (1948), p.94

⁴ Tadic, No. IT-94-1-A, para. 188

⁵ Tadic No. IT-94-1-A para. 191

⁶ Joint Criminal Enterprise Possibilities and Limitations by Harmen Van Der Wilt JICJ 5 (2007) pg. 92

that had the intention of evict Bosnian Muslims from their houses, but did not personally inflict fatal blows, the doctrine was applied to sustain his conviction for the killings as well.

The appeals chamber, however, took the opportunity to elaborate extensively upon the doctrine of Joint Criminal Enterprise. The Tadic judgment distinguished three categories of collective criminality on the basis of the case law, which today are known as Joint Criminal Enterprise I,II,III. “The first, basic form, where the participants act on the basis of a ‘common design’ or ‘common enterprise’ and with a common intention, the necessary grade of the intervention remains unclear, and controversial.”⁷ “Secondly, the systemic form, that is so-called ‘concentration camp cases’ where crimes are committed by members of military or administrative units, such as those running concentration or detention camps, on the basis of a common plan (common purpose).”⁸ The most interesting outcome of the JCE II cases related to the character of the common design and the relationships between the participants. “Thirdly, the extended Joint Criminal Enterprise where one of the co-perpetrators actually engages in acts, going beyond the common plan, but his or her acts still constitutes a foreseeable consequence of the realization of the plan.”⁹ If the co-perpetrators in Joint Criminal Enterprise share the intent to abuse the PoW, but in fact those prisoners end up being killed by one or several members of the Joint Criminal Enterprise. A participant in a joint criminal enterprise need not physically participate in any element of any crime, the contribution to a Joint Criminal Enterprise need not, in and of itself, be criminal.

The Brdjanin judgment tried to give objective elements of Joint Criminal Enterprise a precise meaning: “as to the plurality of persons it is not necessary to identify each member by his or her name, as to the common purpose, the prosecutor must determine precisely the objective and temporal, geographical, the purpose is effectively common for all members of the Joint Criminal Enterprise, but the prosecutor must prove a significant contribution of the accused to the execution of the purpose.”¹⁰ The assistance must be a ‘significant one’.

The form of mens rea of Joint Criminal Enterprise, basic form is the shared intent of the co-perpetrators to commit the crime and to participate in a common plan including a specific intent. The participation in Joint Criminal Enterprise is a form of commission, this participation must not be necessarily be an active one.

The Ntakirutimana judgment extended these principles to Article 16 (1) ICTRS and only required a ‘form of assistance in, or contribution to, the execution of the common purpose as concrete participation of the accused.

In the Furundzija judgment, it distinguished between “the nature of the assistance and its effect on the act of the principle perpetrator. Regarding the former, it stated that assistance need not be tangible but moral support and encouragement is sufficient. The mere presence at the scene of the crime suffices if it has a significant legitimizing or encouraging effect on the principles. The

⁷ Tadic No. IT-94-1-A para. 196-201

⁸ Tadic No. IT-94-1-A para. 202-203

⁹ Tadic, No. IT-94-1-A, para. 204-19

¹⁰ Brdanin, No. IT-99-36-A, para. 430

significant requirement, however implies that it would not be sufficient if the accomplice only has ‘ a role in a system without the influence.’¹¹

In holistic view, if we notice the applicability of this doctrine on case-to-case basis the tribunal has amended the meaning and applied the doctrine integrated with principles, however it suited the needs of the Tribunal.

The Special Panels follow the Ad-Hoc Tribunal in ascertaining that a person can be held “individually responsible for crime even if he did not personally commit that crime, provided that he in any way contributed to the commission of such a crime by a group of persons acting with a common purpose. The liability described in this section is often referred to as joint enterprise, common enterprise liability.”¹²

The Extraordinary Chambers in the Courts of Cambodia delivered its first judgment in 2010 in the case against the alleged Chairman of the Headquarters of a Special Branch of the Kampuchean Republic Secret Police. “The Judgment gives a detailed analysis of the relevant law on individual criminal responsibility. The Extraordinary Chambers in the Courts of Cambodia discussed two issues the development of the JCE theory, with particular reference to the time period from 1975 to 1979 and whether JCE can be applied before the Extraordinary Chambers in the Courts of Cambodia, taking into account the fact that the crimes were committed in a defined period.”¹³

Whether the Joint Criminal Enterprise Doctrine, is to be spared from being disregarded and neglect. The doctrine was impelled to extend criminal responsibility to cap members of a criminal group who could not have been held accountable on the basis of common theories of criminal responsibility. The other function of Joint Criminal Doctrine was to establish criminal responsibility which included the highest level political and military leaders who would often cooperate and conspire. “The famous and often quoted dictum in the Nuremberg Judgments was’ Crimes against International Law are committed by men, not by abstract legal entities.”¹⁴

When criminal conduct is pursued at the collective level by gangs, criminal organizations their intention to commit crime and their culpability resides at the collective level. The intent of criminal law is to administer liability across the components of a criminal act, but doing so requires “Analysis of three concepts: Intention, Foreseeability, and Culpable. The Joint Criminal Enterprise has not always successfully navigated this difficult terrain.”¹⁵

The Rome Statute Article 25, the purpose of the article is to address three problem identified with the Doctrine of Joint Criminal Enterprise: “There is an inadequate treatment of intentionality is required for a criminal contribution to a conspiracy, Secondly a misguided imputation of liability for the foreseeable actions of one’s co-conspirators and Thirdly a violation of the basic principle that individuals should only be criminally liable to the extent of their own

¹¹ Furundzija, No. IT-95-17/1-T, paras. 199,232

¹²Prosecutor v. Rudolfo Alves Correia, No. 27/2003, Final Judgment, para.61

¹³ Kaing Guek EAV, 001/18-7-2007/ECCC-TC, paras. 504, Closing Order Indicting Kaing GuekEav alias Duch

¹⁴ Nuremberg Judgment in L. Friedman, The Law of War. A Documentary History, Vol. II (NY: Random House, 1972), 940

¹⁵ Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise by Jens David Ohlin JICJ 5 (2007) pg. 70

culpability.”¹⁶ The author Jens David Ohlin states that when these three conceptual problems are addressed will the notion of Joint Criminal Enterprises flower into a sophisticated doctrine of criminal law.

The first conceptual deficiency of the doctrine is Intent, article 25 states that a contribution to the commission or attempted commission of an offence must be intentional. If we literally construe the provision, it requires that the basic underlying action must be intentional, not negligent. “The real question is how one justifies criminal liability for an intentional contribution that is not made with the aim of furthering the criminal purpose of the group, but is simply made with ‘knowledge of the intention of the group to commit the crime.’”¹⁷

The Second Conceptual deficiency of the doctrine is treatment of foreseeability. The Tadic judgment held that members of a joint criminal enterprise are criminally responsible for the actions of their co-conspirators, even if these actions were not agreed in advance. The author argues that equal criminal liability should be restricted to acts that were part of the criminal plan as it was formulated.

The Third Conceptual deficiency of the doctrine is Culpability, were accused are imposed of equal culpability for the members of joint enterprise. Culpability must be relative to the contribution of the offender in the act committed. It violated the principle of Individual Moral Responsibility a principle Rome Statute claims to uphold, it ignores the internal structure of the organization. This view the organization as a single entity whose internal structure is irrelevant. It will become impossible to prove who joined the organization first, who directed and planned its activities and who carried out its orders.

Proposal for an Alternative

The poor performance of the doctrine had raised doubts about the justification of criminal responsibility of participants in larger groups or organization. In the opinion of Harmen Van Der Wilt, the doctrine does not tally with the reality of modern bureaucracies that engage in systematic mass crime. Whether there are alternative modes of criminal responsibility that might serve the goals that the doctrine purports to advance. “In Dutch Criminal law, the concept has been refined in case laws, establishing criminal responsibility for the functional perpetrator requires that the accused accept the crimes as part of the normal course of events, which obviously implies that the offender was aware that these crimes or similar ones occurred. Moreover, the offender should have had some measure of control over their occurrence, in the sense that it was within the offender’s power whether the crimes were committed or not.”¹⁸

¹⁶ Ibid pg. 71

¹⁷ Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise by Jens David Ohlin JICJ 5 (2007) pg. 78

¹⁸ Supreme Court, 23 February 1954, NJ (Netherlands Law Reports), 1954, at 378.

Conclusion

After the discussion of Joint Criminal Enterprise doctrine used as a mode of charge and the conceptual problem, it faces in the reality of modern bureaucracies that engage in systematic mass crime. Joint Criminal Enterprise applicability has withered during the course of period, but with essential amendments, it is possible to reform the doctrine to deal adequately with the problems of intentionality, foreseeability, and culpability. Joint Criminal Enterprise, gives enormous powers to International Judges, have discretion to decide how much wrong doing to tie to any particular defendant, because the doctrine is so loose, Joint Criminal Enterprise approaches close to guilt by association as the ambit of the discretion is so wide. This is particularly in light of the dubious legitimacy of international criminal law. The Joint Criminal Enterprise, the influence of human rights and justice principles may have gone too far and has stretched the ambit of the doctrine, which a potential danger posed by the propagation of International Criminal Law.