



## THE CONCEPT OF JOINT CRIMINAL ENTERPRISE AND ICC JURISDICTION

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International criminal law has developed over several decades from the establishment of the Nuremberg and Tokyo Tribunals to try those who perpetrated atrocities in the course of World War II to the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The creation of the International Criminal Court (ICC) appears as the latest contour in the evolution of international criminal justice.

The development of international criminal law has been marked by the foundation and refinement of general principles, including theories of criminal responsibility. It is now well established that a person bears responsibility for war crimes, crimes against humanity, genocide and other international crimes on the basis of the principle of individual criminal responsibility.<sup>1</sup> Individual criminal responsibility embraces both commission of a crime in person and participation in a group criminality. One mode of participation, so-called Joint Criminal Enterprise (JCE), which has been mostly elaborated by the ICTY, is the focus of this paper. The concept of JCE has been a topic of broad discussions and scholarly opinion remains split: some consider the concept as a positive development that allows for prosecution of the architects of heinous crimes who otherwise might escape proper responsibility; others argue that JCE contradicts principles of criminal law, particularly the principle of culpability.<sup>2</sup> The ICTY itself has recently made several efforts to review the concept of JCE and has even attempted to apply a different concept of criminal liability.<sup>3</sup> In light of this ongoing debate, an important question is whether the concept of JCE will be adopted and used by the ICC.

The main objective of this paper is to identify any potential premises for the adoption of the JCE concept by the ICC and to consider to what extent this concept should be resorted to under the Court's jurisdiction. The first section discusses the origins and forms of the concept of JCE, as well as its objective and subjective elements, and presents major criticisms of the concept. This section also briefly introduces other modes of criminal liability, concentrating on the difference between JCE and aiding and abetting. The second

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<sup>1</sup> It is worth noting that command (superior) responsibility is deemed either as an additional ground of individual criminal responsibility or is considered separately. See Gerhard Werle, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 94 (T.M.C. Asser Press, 2005); Robert Cryer, *General Principles of Liability in International Criminal Law*, in Dominic McGoldrick, Peter Rowe, & Eric Donnelly (eds.), *THE PERMANENT INTERNATIONAL CRIMINAL: LEGAL AND POLICY ISSUES* 235 (Hart Publishing, 2004); Daryl A. Mundis, *Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY State*, in Gideon Boas & William A. Schabas (eds.), *INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY* 239 (Martinus Nijhoff Publishers, 2003).

<sup>2</sup> See Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. INT'L CRIM. JUST. 91, 91 (2007).

<sup>3</sup> See *Brdjanin* (Trial Chamber), 1 September 2004, at ¶355; *Stakic* (Trial Chamber), 31 July 2003, at ¶¶438, 528.

section examines the treatment of individual criminal responsibility by the Rome Statute of the ICC. This section introduces Article 25 of the Statute, which provides for vast modes of individual criminal responsibility, and analyzes co-perpetration as it is interpreted by the Court. Notion, origins, and use of the *control over crime* approach are examined. In comparing objective and subjective elements of the concept of co-perpetration, based on both the control over crime approach and that of the concept of JCE, this section further argues that the control over crime approach is capable of overcoming most of the deficiencies of JCE.

The paper concludes that the *basic* form of JCE (JCE I) could be partially included under the concept of co-perpetration within the meaning of the Rome Statute. It is suggested that JCE I, when it fails to reach the joint control over crime criteria, can be subsumed under aiding/abetting or complicity in group crimes. Whether *systemic* and/or *extended* forms of JCE (JCE II and III, respectively) might fall under modes of criminal liability provided for by the Rome Statute is questionable; JCE II and III may be best covered by accessory modes of liability. Moreover, application of JCE III under ICC jurisdiction is unwarranted.

## I. THE CONCEPT OF JOINT CRIMINAL ENTERPRISE

### Notion and Origins of the JCE Concept

International crimes are gross violations usually committed by groups in a systematic manner. Without a certain degree of cooperation and coordination of actions, it is virtually impossible to perpetrate atrocities such as genocide or crimes against humanity.<sup>4</sup> However, it is well-established that criminal responsibility is attributed to individuals, most precisely to natural persons;<sup>5</sup> one of the concerns of international criminal law is identification of the individual responsibility of every person cooperating in the commission of a crime.

As Ohlin observes, group criminality is one of the most difficult issues in criminal law theory, because once “criminal conduct is pursued at the collective level by gangs, militias and criminal organizations, their intention to commit the crime and their culpability resides at the collective level. In some sense, it might be correct to say that the whole group is guilty of wrongdoing.”<sup>6</sup> Nevertheless, every participant of such a collective endeavor must be brought to trial individually, in accordance with one of the general principles of international criminal law: the principle of individual criminal responsibility.<sup>7</sup>

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<sup>4</sup> Van der Wilt, *supra* note 2, at 91.

<sup>5</sup> Michael Duttwiler, *Liability for Omission in International Criminal Law*, 6 INT’L CRIM. L. REV. 1, 1 (2006).

<sup>6</sup> Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. JUST. 69, 70 (2007).

<sup>7</sup> Werle, *supra* note 1, at 116, marginal note 338; Ohlin, *supra* note, at 69-70; Attila Bogdan, *Individual Criminal Responsibility in the Execution of a “Joint Criminal Enterprise” in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia*, 6 INT’L CRIM. L. REV. 63, 64 (2006).

International criminal tribunals have faced the challenges of how to give the collective character of crimes proper consideration and how to identify the liability of persons who may not have physically committed heinous acts themselves but instead stood behind while others did the “dirty work.”<sup>8</sup> Different modes of criminal participation have developed in response to this challenge.<sup>9</sup> According to the Statutes of the ICTY and ICTR, “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in ... the present Statute, shall be individually responsible for the crime.”<sup>10</sup>

Joint Criminal Enterprise (JCE), a form of criminal participation, is a concept that was established in the case law of the ICTY in order to deal with situations where the weight of other participants’ contributions is no less than that of physical perpetrators and where the previously mentioned modes of participation do not fairly reflect “the moral gravity” of such contributions.<sup>11</sup> As explained by the ICTY Trial Chamber in the *Tadic* case,

to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.<sup>12</sup>

JCE is characterized by the existence of a “common criminal plan or purpose” pursued by a plurality of persons; all individuals who contribute to the carrying out of crimes in execution of a common purpose may be subjected to criminal liability.<sup>13</sup> Participation in a joint criminal enterprise is “a form of commission,” as opposed to accomplice liability.<sup>14</sup> As van der Wilt observes, “JCE doctrine has emerged as a ‘jack of all trades’, coping with mob violence, providing for extensive criminal responsibility for political and military leaders and addressing the responsibility of those who are involved in a criminal organization like a detention camp.”<sup>15</sup>

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<sup>8</sup> Van der Wilt, *supra* note 2, at 91.

<sup>9</sup> For more detailed discussion, see Albin Eser, *Individual Criminal Responsibility*, in Antonio Cassese, Paola Gaeta & John R.W.D. Jones (eds.), *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, VOL. 1 784 (Oxford University Press, 2002); Werle, *supra* note 1, at 117, marginal notes 339-342.

<sup>10</sup> Statute of the International Tribunal for the Former Yugoslavia, at Art. 7(1) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, at Art. 6(1) [hereinafter ICTR Statute].

<sup>11</sup> *Tadic* (Appeals Chamber), 15 July 1999, at ¶191.

<sup>12</sup> *Id.*, at ¶192; see also *Blagojevic and Jokic* (Trial Chamber), 17 January 2005, at ¶695.

<sup>13</sup> *Id.*, at ¶190; see also *Brdjanin*, *supra* note 3, at ¶258.

<sup>14</sup> *Kvočka et al.* (Appeals Chamber), 28 February 2005, at ¶179; *Blagojevic and Jokic*, *supra* note 12, at ¶696.

<sup>15</sup> Van der Wilt, *supra* note 2, at 92.