

# JOINT CRIMINAL ENTERPRISE & COMMAND RESPONSIBILITY

- A QUICK GUIDE TO UNDERSTANDING THE BASIS OF  
LIABILITY

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## INTRODUCTION

Much of international criminal law, as it has evolved, is focused on holding responsible individual defendants for crimes which have mass victims or have caused widespread suffering, i.e. individual criminal responsibility.

In such circumstances, the need is obvious for bases of liability that will withstand jurisprudential scrutiny and which will be consistent with the hybrid common law/civil law nature of international courts and tribunals.

International criminal law is in the truest of senses, a melting pot.

- › It is an attempt to fuse two distinct legal systems into a coherent framework of procedural rules and substantive law that is able to be applied not just to attribute, but to measure, the responsibility of an individual, against a backdrop of a process which also looks to create a 'legacy' account or historical contextual narrative of an armed conflict.
- › It seeks to combine the common law adversarial approach, with the inquisitorial procedure of the Code Napoleon; whilst at the same time allowing each judge to reflect, in approach and in rulings, the tradition that he or she brings.

But the difficulties do not end there. Although it has grown out of international humanitarian law, international criminal law has also been shaped, and continues to be, by drawing on three further traditions: national criminal law, international human rights law, and 'transitional justice'.

From the first of these comes the principle of individual culpability/responsibility and, importantly, for the present discussion, the rejection of guilt by association and collective guilt.

## THE LIABILITY OF THE INDIVIDUAL: JOINT CRIMINAL ENTERPRISE (JCE) & COMMAND RESPONSIBILITY (CR)

Any examination of JCE and CR should keep in mind the tensions that these different sources of law and procedure bring to international criminal law, and the way in which principles, such as the attribution of liability, have been arrived at only after much balancing by courts and tribunals of very often conceptually different approaches.

The approach developed since International Military Tribunal at Nuremburg (Nuremburg) is that liability of the individual may fall within either:

- › Direct: as a principal or secondary party to an offence, as the common law understands it, or as a substantive or participating offender on the civil law approach; or
- › Superior (that is to say, CR).

Direct responsibility is made up of five different forms, 2 forms of liability as a principal and 3 as an accessory or secondary party, and reflects the approach taken by all the tribunals to date, for example, Article 6(1) of the International Criminal Tribunal for Rwanda (ICTR) statute provides:

*"A person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime...shall be individually responsible..."*

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JCE holds a person liable for any or all crimes committed as part of a common plan, and is a reflection of a general principle of criminal law (although 'created' in its international criminal law form by the ICTY<sup>1</sup>) and is not, for instance, explicitly provided for in either the ICTY or ICTR statutes.

In contrast, CR is a creation of international criminal law (and, thus, expressly set out in both statutes) and can be seen as, in effect, another form of liability as an accessory or secondary party. As its name suggests, it applies when a person with command responsibility or authority, whether a civilian or a member of the military, has failed to prevent a crime (or failed to punish a crime that has already taken place) committed by one of his subordinates.

It will then come as no surprise that there are circumstances where liability could fall under either the JCE or the CR head, and would, therefore, be appropriate to consider them together.

## JOINT CRIMINAL ENTERPRISE

JCE, as now understood, developed out of the judgment of the Appeals Chamber of the ICTY in *Tadic*<sup>2</sup>. In addition to silence on the point in the ICTY and ICTR statutes, JCE and the distinctions between JCE I - III are not, as such, expressly referred to in the (ICC) Rome Statute, although Article 25(3)(d) of the Statute<sup>3</sup> refers to the commission of a crime 'by a group of persons acting with a common purpose...'

In *Tadic* the defendant was convicted on a number of counts of war crimes and crimes against humanity, but, was acquitted of a crime against humanity charge that alleged murder. In relation to that incident, five Muslim men had been killed in the village of Jaskici. At trial, the tribunal found as a fact that Tadic was one of five armed men who had entered the village and inflicted beatings on villagers. It also found that the five Muslims had been alive when the group of which Tadic was a part entered the village, but that they had been found shot dead following the departure of the group. However, despite those findings, the Trial Chamber reached the view that they could not be satisfied beyond reasonable doubt that Tadic had played a role in the killings (the facts also having been complicated by the presence, in a nearby village, of a larger group of Serb soldiers who were carrying out an 'ethnic cleansing' operation). The Prosecutor appealed the findings of the Trial Chamber.

The Appeals Chamber held that the only reasonable conclusion was that the armed group (of which Tadic was part) had killed the five men. It then went on to address the issue of whether Tadic could be convicted in circumstances where there was no evidence that he had personally shot the men. It examined the language of Article 7(1) in respect of direct responsibility and concluded that its provisions addressed "*first and foremost the physical perpetration of a crime by the offender himself*", whether as principal or secondary party. However, it then went on to find that Tribunal crimes, in other words, international crime, "*might also occur through participation in the realisation of a common design or purpose*"; in other words, a similar general principle as that of joint enterprise familiar to common law practitioners in their national law. JCE is, therefore, a form of 'commission' of an offence.

Having reached that view, the Appeals Chamber considered the basis and the requirements for JCE. It relied to a large extent on the case law of the WWII military tribunals and concluded that such a principle of common purpose existed as a matter of customary international law. The Appeals Chamber subdivided JCE into three categories of liability:

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<sup>1</sup> International Criminal Tribunal for the Former Yugoslavia

<sup>2</sup> Prosecutor v Dusko Tadic (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, para 185ff.

<sup>3</sup> See The Prosecutor v. Bosco Ntaganda ICC-01/04-02/06; The Prosecutor v. Germain Katanga ICC-01/04-01/07 for the Court's approach to Article 25(3)(d)

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1. The First (or 'basic') Category: Where the participants act on the basis of a common purpose or design and with a common intention or *mens rea*;
2. The Second (or 'systemic') Category: Where an international crime is committed by members of the military or by administrators, such as those operating concentration camps, on the basis of a common, systemic plan or strategy;
3. The Third (or 'extended') category: Where one of the participants to a common design engages in an act or acts that go beyond the common design, but that act or acts nevertheless constitutes a natural and foreseeable consequence of the realisation of the design.

The First Category of JCE presents little conceptual difficulty and can be satisfactorily explained as a basis of liability. It reflects, one might suggest, recognition that the distinction between principal and secondary party is not always an easy one, in practice, to make and that there will be occasions when individuals truly are parties to a joint enterprise. At the same time, though, JCE carries with it the notion of co-perpetration, whereas secondary party liability, strictly, may not.

The Second Category (based on those WWII tribunal cases examining the conduct of those operating concentration camps) is, for its part, also untroubling if seen as a specific example of the more general First Category. However, it becomes problematic if one follows the line of reasoning adopted by the ICTY in the case of *Kvocka et al*<sup>4</sup>. It is an important authority as it is the first time that the ICTY applied the Second Category of JCE. The case concerned the prison camp Omarska at Prijedor and the five accused were responsible for security and the keeping of detainees in the camp. Kvocka himself was a police officer, some of his co-defendants, reservists. The acts for which they were convicted ranged from persecution and torture to murder within the camp. Applying the Second Category of JCE, the Appeals Chamber concluded that, on the systemic basis, a participant did not need to make a 'substantial' contribution to the enterprise, but that membership of the 'system' and foreseeability of consequences would, in themselves, be sufficient to create criminal liability. If that is right, how can this category of JCE be considered co-perpetration? Rather, it looks suspiciously like secondary party liability, perhaps, aiding and abetting. But even as accessory involvement, it does not fit at all satisfactorily within a natural reading of Article 7(1) of the ICTY Statute.

A similar, but even starker, objection may be taken in respect of the Third Category of JCE. In arriving at this category, the Appeals Chamber in *Tadic* relied upon cases involving the unlawful killing of POWs by German soldiers/citizens<sup>5</sup>. A note of caution is needed in relation to the view taken in *Tadic* of the *Essen* case. The original report of *Essen* does not set out the basis of liability for the convictions, nor does it assist as to the *mens rea*, or mental element, required or, indeed, exhibited by the defendants. The court in *Tadic*, however, took this case as an example of what has been called 'extended' JCE. In other words, liability where one of those engaged in the common design engages in an act or acts going beyond the common purpose.

Moreover, the conflict between the common law approach and that of the ICTY is stark in this instance. The common law position is clear: Where two or more persons embark upon a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise. That includes liability for unusual consequences if they arise from the execution of the agreed common design; it does not, though, include the situation where a person who is part of the joint enterprise goes beyond what has been explicitly or tacitly agreed as part of that enterprise. In such circumstances, the other participant(s) is not liable for the consequences of that unauthorised act.

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<sup>4</sup> Prosecutor v Miroslav Kvocka et al (Trial Judgment), IT-98-30/1-T, ICTY, 2 November 2001.

<sup>5</sup> The *Essen Lynching Case*: Trial of Heyer & 6 others, British Military Court for the Trial of War Criminals, Essen, Dec. 1945, 1 Law Reports of Trials of War Criminals, UN War Crimes Commission, 88 (1947).

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Much has been written about this extended category, with both academic and practitioner criticism levelled at its formulation. To what extent then is the Third Category of JCE consistent with the principle of culpability, if all members of an enterprise are held liable for an act carried out by only some of their number in circumstances where the act was not agreed upon, but merely foreseeable?<sup>6</sup> Should the requirement of knowledge be also read in? If so, how does knowledge relate to foreseeability? Can it be a basis for liability for specific intent crimes?<sup>7</sup> The Appeals Chamber of the Special Tribunal for Lebanon<sup>8</sup> found that JCE III is inapplicable to specific intent crimes such as terrorism. The Appeals Chamber acknowledged that its approach differed to that taken by the ICTY where JCE III can form the basis of liability for specific intent crimes of genocide and persecution as a crime against humanity. According to the Appeals Chamber, *“(h)e must have the required special intent for terrorism; he must specifically intend to cause panic or to coerce a national or international authority. In such a case, the ‘secondary offender’ should not be charged with the commission of terrorism, but at the utmost only with a form of accomplice liability, in that he foresaw the possibility that another participant in the criminal enterprise might commit a terrorist act, willingly accepted that risk and did not drop out of the enterprise or prevent the perpetration of the terrorist offence. This person’s attitude should therefore be assessed as a form of assistance to the terrorist act, not as a form of perpetration-and provided of course that all other necessary conditions are met.”*

## COMMAND RESPONSIBILITY

The doctrine of command responsibility goes to the core of what international criminal tribunals seek to achieve: the assignment of individual responsibility for mass atrocities.

Command responsibility (CR) is made up of two different bases of liability:

- › Direct, or active, CR, where the commander takes an active step to bring about a crime (by, for instance, ordering a subordinate to carry out an unlawful act). The codification of direct CR is, of course, simply reflected within direct liability provisions (e.g. Article 7(1) of the ICTY statute; Article 6(1) of the ICTR; Article 28(a) of the Rome Statute).
- › Indirect, or passive, CR is engaged under the ICTY and ICTR Statutes if the superior *‘knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof’*<sup>9</sup>. Article 28(b) of the Rome (ICC) Statute is a detailed distillation of CR and provides that *‘a superior shall be criminally responsible for crimes...committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates...’*<sup>10</sup>

The detailed treatment of CR in Article 28 of the Rome Statute has led some commentators to describe its effect as creating a *‘separate crime of omission’*<sup>11</sup>. Article 28 clearly illustrates the underlying principle of CR that the commander (which includes civilian leader) is culpable for:

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<sup>6</sup> See Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, and Vinko Pandurević, ICTY, Case No.: IT-05-88-A, 31 January 2015 for discussion on JCE3.

<sup>7</sup> Antonio Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’ (2007), 5 JICJ 121.

<sup>8</sup> Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I (Feb. 16, 2011).

<sup>9</sup> Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR Statute; Article 3(2) of the Special Court for Lebanon follows a similar approach (<http://www.stl-tsl.org/en/documents/stl-documents/statute-of-the-tribunal/statute-of-the-special-tribunal-for-lebanon>)

<sup>10</sup> Article 28(b) of the Rome Statute; Article 7(3) of the ICTY Statute; Article 6(3) of the ICTR Statute

<sup>11</sup> See, for example, Kai Ambos, Joint Enterprise and Command Responsibility, JICJ 5 (2007), 159 – 183, at p176; and Kai Ambos, ‘Superior Responsibility’, in A. Cassese, P. Gaeta & J. Jones (eds.), ‘The Rome Statute of the ICC: A Commentary’, Vol I (Oxford, 2002), at p.850f.

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- › lack of control and supervision as a form of direct liability
- › deemed culpable, indirectly or vicariously, for the acts of those under his command or otherwise subordinate to his authority.

The mental element for guilt under the ICTY and ICTR statutes, and under the Rome Statute, is knowledge or constructive knowledge. However, there has been considerable debate as to the *mens rea* position under customary international law.

For a commander to be liable he must have effective command; in other words, he must have the command and authority to control his subordinates and the capacity to issue orders. But, additionally, any crime of omission presupposes, of course, a duty or obligation to act. The duty of a commander as a 'supervising guarantor' as to the behaviour of those under his command and his responsibility for control of his subordinates is an integral part of customary law and is reflected in Article 1 (and the Annex thereto) of the Hague Convention 1907. The duties of the commander to prevent, suppress and report breaches of the Geneva Conventions implicit within the definition of 'armed forces' in Article 43 (1) of the First Additional Protocol 1977 (AP I) and, in the case of the military commander, are specifically set out in Article 87 of AP I.

The elements, then, of the doctrine of CR are:

- › The existence of a commander/subordinate relationship of effective control on the part of the commander;
- › The requisite mental element, or *mens rea*, which, in the light of the ICTY and ICTR case law and the provisions of Article 28 of the Rome Statute can be said to be knowledge or constructive knowledge on the part of the commander of the unlawful act(s) of the subordinate. (Although customary international law has prompted much debate of whether negligence, gross negligence or recklessness would suffice);
- › A failure by the commander to take necessary action to prevent, suppress or punish the unlawful act(s) of the subordinate<sup>12</sup>.

In any investigation or prosecution that is put on the footing of CR, it is the first two elements, above, which are, almost inevitably, going to be the subject of contention. On the second element, there is likely to be not just factual/evidential dispute, but also argument as to the scope of the crime(s) committed by a subordinate. The Trial Chamber of the ICTY in *Oric*<sup>13</sup> favoured a broad approach as to the range of acts of a subordinate that a commander would be liable for, and included not just commission offences, but all forms of participation (including aiding and abetting) and omissions and both inchoate and full offences. If *Oric* has created difficulties, these have not been resolved when the case went to the Appeals Chamber.<sup>14</sup>

Its historical development is to be found in the recommendations to the Allies (at the conclusion of WWI), based on legal opinion, that senior German military leaders be tried for war crimes committed by subordinates. However, the obligation for commanders to assume responsibility for the actions of those under their command became explicit in treaties, notably the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field which, at Article 26, established an express duty 'of a commander in chief' to ensure compliance by his army of the laws of war in so far as they were set out in the Convention.

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<sup>12</sup> See Celebici Trial judgment, at para 346.

<sup>13</sup> Prosecutor v Oric, ICTY, IT-03-68-T

<sup>14</sup> IT-03-68-A

Perhaps the next landmark in the application of CR was its application in the trial of Tomoyuki Yamashita<sup>15</sup>, the commanding officer of the Imperial Japanese Army in the Philippines, who was convicted and sentenced to death by a US military commission for crimes committed by his soldiers. He appealed, but the conviction was upheld by the US Supreme Court in a majority judgment<sup>16</sup>. Both the initial verdict and the Supreme Court's decision are troubling. The conviction appears to have been on the basis that atrocities were committed by Japanese troops, who were usually supervised by Japanese officers, and that Yamashita "failed to provide effective control of troops as required by the circumstances"<sup>17</sup>. That crimes were indeed committed was clear and evidenced; however, Yamashita's knowledge of the crimes was not. In fact, his defence was that the US counter-offensive had cut off his chain of command and communication, and made him incapable of knowing of, or preventing, the crimes. It is unclear, therefore, what mental element was applied at first instance or by the Supreme Court. The possibilities are threefold: that what was effectively strict liability was applied, that actual knowledge was inferred, or that the very inefficiency and chaos pleaded by Yamashita was, effectively, used to convict him on what amounted to negligence.

The definitive statement of CR is that contained in the ICTY judgment in *Prosecutor v Delalic, the Celebici Trial case*<sup>18</sup>. The Trial Chamber held that negligence was not sufficient for *mens rea*, and that actual or constructive (wilful blindness) knowledge was required to establish CR. Importantly, the Chamber found that, as a matter of customary international law, a superior may only be held criminally responsible if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. At the same time, that information did not have to provide conclusive proof of crimes, but had to be enough to demonstrate that additional investigation into the actions of the subordinates is necessary. The Appeals Chamber confirmed the Trial Chamber's ruling on CR, and affirmed that a commander will only be liable if he had knowledge, or if he had information available to him which would have put him on notice of crimes.<sup>19</sup>

Confusingly, however, the later ICTY case of *Blaskic*<sup>20</sup> purported to apply a negligence, perhaps even a strict liability test, which the Appeals Chamber overturned and reaffirmed the *Celebici* Appeals Chamber judgment.

A word needs to be said, at this point, about the nature of the commander/subordinate relationship. It has already been said that the test for CR is whether the commander had 'effective control'; in the formulation of the *Celebici* case Appeals Chamber judgment<sup>21</sup>, the material ability to prevent and punish the offences. But what about the practical evidential difficulties for a court or tribunal at arriving at a definitive decision in any given case before it?

The reality of a modern conflict is that the *de facto* command structure may not be easily discernible or reflected in formal legal norms. However, effective control in fact will suffice, even if a commander does not have formal *de jure* authority over what are alleged to be subordinates.<sup>22</sup> Similarly, it is worth reiterating that a civilian may be a superior for CR purposes, on the basis that if a civilian exercises a level of control over subordinates comparable to that of a military commander, he should not be able to avoid liability on the basis that he was not part of the military hierarchy. Of course, however, the effective control requirement does mean that he must have the ability to prevent or punish.

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<sup>15</sup> <http://lawofwar.org/Yamashita%20Commission.htm> or [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-4.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-4.pdf)

<sup>16</sup> In re Yamashita, 327 US.

<sup>17</sup> IV Law Reports of Trials of War Criminals 35 (UN War Crimes Commission 1947)

<sup>18</sup> IT-96-21-T

<sup>19</sup> IT-96-21-A, at para 241.

<sup>20</sup> Prosecutor v Blaskic, IT-95-14-T & A

<sup>21</sup> IT-96-21-A, at para 197.

<sup>22</sup> IT-96-21-A, at para 192 -3

The converse, namely that a military commander with *de jure*, but not effective, control is not liable on the doctrine of CR, also remains true in the light of the *Celebici case*. As the Appeals Chamber found:

*In general, the possession of de jure power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power prima facie results in effective control unless proof to the contrary is produced.*<sup>23</sup>

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<sup>23</sup> At para 197; see also Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, and Vinko Pandurević, ICTY, Case No.: IT-05-88-A, 31 January 2015

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