

Conspiracy, joint criminal enterprise and command responsibility in international criminal law.

John Laughland

The Hague, 14 November 2009.

Recent years have seen considerable comment among legal scholars about the difficulties associated with the concepts of joint criminal enterprise and command responsibility.¹ These comments typically come from legal scholars who support the work of the international tribunals, but also from people like me who do not. I want to discuss some of the arguments to show that they demonstrate the inherent unfairness of international criminal law. I then want to add some comments of my own which, I believe, illustrate the real issues behind these trials.

There are three essential criticisms of joint crime enterprise. The first is that it appears nowhere in the Statute of the ICTY or the ICTR. It has no Statutory Basis (unlike in the ICC, where it is provided for by the Rome Statute). Instead, it is a form of criminal liability that differs from the definitions of liability laid down in the Statutes: Article 7 of the ICTY Statute and Article 6 of the ICTR Statute speak of planning, instigating, ordering, committing or otherwise aiding and abetting. All these forms of liability are governed by relatively stable jurisprudence in national jurisdictions: JCE is not.

The second, more important, criticism is that JCE is too vague to operate as a reliable indicator of criminal culpability. JCEs are customarily alleged involving huge numbers of people and spanning very long time scales. In the indictment of Radovan Karadzic, for instance, the other members of the joint criminal enterprise of which he is accused are said to include "members of the Bosnian Serb leadership, members of Serbian Democratic Party and Bosnian Serb government bodies at the republic, regional, municipal and local levels ... commanders, assistant commanders, senior officers, chiefs of units of the Serbian Ministry of Internal Affairs, the Yugoslav People's Army, the Yugoslav Army, the army of the Serbian Republic of BiH, the

¹ See especially "Guilty Associations, Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law" by Allison Danner and Jenny Martinez, *California Law Review*, 93 (2005) 75 - 170; Professor Alan Dershowitz, "Brief on Joint Criminal Enterprise on Behalf of Momcilo Krajisnik," ICTY Prosecutor v. Momcilo Krajisnik, 4 April 2004; "Understanding Mens Rea in Command Responsibility, From Yamashita to Blaskic and Beyond" by Jenny Martinez, *Journal of International Criminal Justice* 5 (2007) 638 - 664; "Mens Rea and the International Criminal Tribunal for the former Yugoslavia" in *New England Law Review* 37 (2003) 1015 - 1036; David L. Neressian, "Whoops! I committed genocide! The Anomaly of Constructive Liability for Serious International Crimes" in *Fletcher Forum of World Affairs* (Summer 2006). See also Allen O'Rourke, "Joint Criminal Enterprise and Brdjanin: Misguided Overcorrection" in *Harvard International Law Review* Volume 47 No 1 Winter 2006.

Bosnian Serb ministry of internal affairs, and the Bosnian Serb Territorial Defence and leaders of Bosnian Serb and Serb paramilitary forces and volunteer units".² This is a vast number of people. In the case of Slobodan Milosevic, the joint criminal enterprise of which he was accused (an accusation upheld by the judges because it was on the basis of it that they agreed to joint his three separately issued indictments into one monster trial) was said to have started in late 1991 and spanned nearly a decade to the middle of 1999 involving "persons known and unknown", according to the Prosecution.

The third criticism is a variant of the second and pertains to the way JCE has been expanded by the jurisprudence of the ad hoc tribunals. Originally formulated (at least in the ICTY) to deal with acts of small-scale mob violence where there is physical proximity between the perpetrators and a short-time scale, and where there may be grounds for saying that they could indeed share a collective guilt, the concept has now been expanded to encompass the very opposite - huge JCEs where the link between the various members of it, and between the commanders and the perpetrators, is extremely tenuous.

The basic idea is that people who embark on a common criminal enterprise must bear collective responsibility for all the acts committed by the members of the enterprise. Even at the level of very small levels of violence, this doctrine has been controversial. In the notorious case of Derek Bentley and Chris Craig in Britain in 1952, Bentley was convicted of the murder of a policeman even though it was his accomplice in burglary, Craig, who fired the shot. The basis for the conviction was the concept of "joint enterprise" and it has remained hotly contested ever since (principally because of the ambiguous sentence, "Let him have it, Chris!", which Bentley was said to have uttered just before the shot was fired and which was used to convict him. Did these words mean "Shoot him!" or did he mean "Hand over the gun!" ?)

Successive rulings of the ICTY Appeals Chamber have allowed this doctrine to get wildly out of hand. According to the rulings of the Appeals Chambers - I quote from the Yugoslav cases but the jurisprudence applies directly to the Rwanda ones too because the Appeals Chamber is the same - "A participant in a joint criminal enterprise need not physically participate in any element of any crime."³ The judgement in Kvočka ruled that "JCE responsibility does not require any showing of superior responsibility, nor the proof of a substantial or significant contribution."⁴ In Brđjanin, it ruled that "The third category of joint criminal enterprise does not require proof of intent to commit a crime."⁵ This evidently applies even to the most serious crimes like genocide: in a ruling by the ICTY Trial Chamber, it is stated that "It is not necessary for the Prosecution to prove that the Accused possessed the required intent for genocide before a conviction can be entered on this basis of

² Prosecutor v. Radovan Karadzic, Third Amended Indictment, 19 October 2009, paragraph 12.

³ Kvočka Appeal Judgement, 28 Feb 2005, par 99.

⁴ Kvočka Appeals Chamber Judgement, 28 Feb 2005, par 104.

⁵ Brđjanin, Appeal Chamber Decision on Interlocutory Appeal, 19 March 2004, par 7.

liability" (3rd category JCE).⁶ *Kvocka* ruled that "There is no specific legal requirement that the accused make a significant contribution to the joint criminal enterprise."⁷ "The contribution of the Accused need not have been either substantial or necessary to the achievement of the JCE's objective."⁸ An accused may be found guilty even if his acts or omissions do not "assist, encourage or lend moral support" to the commission of the underlying offence.⁹ JCE is therefore looser than, and not the same as, aiding and abetting. Participation in a JCE can be "passive rather than active"¹⁰

In other words, JCE allows convictions for crimes which a defendant did not perpetrate, participate in, know about, order, bear superior responsibility for, make a substantial contribution towards, or even intend !

So what about the alleged "common purpose"? In various rulings, even the concept of "plan" has itself been watered down so far that it become meaningless. For example, in the seminal *Tadic* Appeal judgement, the Appeals Chamber laid down that "There is no necessity for this plan, design or common purpose to have been previously arranged or formulated."¹¹ In *Brdjanin*, "The common purpose need not be previously arranged or formulated: it may materialise extemporaneously."¹² Moreover, the Prosecution does not have to prove that a plan existed, for instance by providing documentary or oral evidence of it. Instead, it only has to provide circumstantial evidence "which may support an inference that it must have been pursuant to a common plan."¹³ In the Military I trial at the ICTR, the Prosecution closing brief said, "The inference to be drawn from the evidence is *not* that each of the accused sat in the same room at the same time and agreed to a plan, nor that such a plan consisted of a single course of equally-divided or unified conduct."¹⁴ But if not, then what sort of a "plan" is it?

The situation is made only worse by other statements elsewhere which suggest that the level of *mens rea* and participation must be high and substantial. There is also deep confusion over whether the objective of the JCE must itself be criminal: some of the indictments contain weasel words which would permit conviction of people who have not shared a criminal objective but only one, the realisation of which has led to the commission of crimes. In other words, it is quite unclear whether JCE is itself a new crime or just a form of liability. Of course the Tribunals deny that it is a new crime because they do not have the right to include new crimes without a new

⁶ Prosecutor v. Slobodan Milosevic, Trial Chamber Decision on Motion for Acquittal, 16 June 2004, par 291.

⁷ *Kvocka* Appeal Judgement, par 97

⁸ *Kvocka* Appeal Judgement par 98.

⁹ Milutinovic et. al. Trial Chamber judgement Vol 1 par 103, quoting *Blaskic* Appeal judgement pars 49 and 50.

¹⁰ *Kvocka* Appeal Judgement, Par 309.

¹¹ *Tadic* Appeals Chamber judgement, 15 July 1999, par 227

¹² *Brdjanin* Appeal Judgement, par 418.

¹³ Milutinovic et. al. Trial Chamber judgement, Vol 1, par 102.

¹⁴ Prosecution closing brief, paragraph 35, quoted in footnote 2321 of *Bagosora* Judgement, p. 535.

Statute. In reality, they do treat JCE as a new crime. This makes it only even worse that the conditions for adjudicating whether a defendant has “participated” in a JCE are totally vague.

There are similar problems with the doctrine of command responsibility. This doctrine has been contentious ever since it was famously applied to hang General Yamashita in 1945.¹⁵ In statutory terms, the doctrine is on much firmer ground than JCE. It exists in the ICTY Statute as Article 7.3 and as Article 6.3 of the ICTR Statute, both of which state that a command bears criminal responsibility for acts committed by his subordinates “if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

On the other hand, as should be obvious from this quotation, the doctrine is conceptually unstable. The form of liability it describes is a strict liability which falls on superiors for acts they did not commit or order. (Much of the controversy about *Yamashita* turned on whether the liability was strict or not.) Now, there may well be grounds for punishing superiors in this way, but the punishment at most can be for criminal negligence. No doubt there should be a crime of criminal negligence in warfare. The problem is that the laws of war are not formulated to deal with this. On the contrary, they very often contain adverbs which emphasise that intent is a key part of war crimes – “wanton destruction”, “wilful damage”, “wilful killing”, “intent to destroy” and so on. This should mean that it is impossible to convict people under third category JCE or command responsibility for these sorts of crimes because there is not the requisite *mens rea*. You cannot commit genocide or war crimes by accident, or unintentionally, because war crimes are precisely defined as crimes committed with the maximum level of intent.

Indeed, the ICTY itself, and the International Court of Justice, have emphasised that the highest possible level of *mens rea* must be demonstrated for the worst crimes. (This applies both to JCE and command responsibility.) The need for this is all the greater when the defendants are political or military commanders, whose alleged link to the crime is precisely that he ordered it and therefore bears even greater responsibility than the actual perpetrator. One supporter of joint criminal enterprise has said that it is essential not to turn the “intuitive distribution of responsibility upside down by calling triggermen principals and others mere helpers”.¹⁶

There is a secondary problem. The formulation of command responsibility in these articles makes it a criminal offence not to predict the future. Can a commander really be said to know when a subordinate is going to commit a crime? It is a strange paradox that, in a age when the concept of sovereignty is generally decried as old-

¹⁵ On the Yamashita case, see the account by his lawyer, A. Frank REEL, *The Case of General Yamashita* (Chicago: University of Chicago Press, 1949).

¹⁶ Allen O'Rourke, “Joint Criminal Enterprise and Brdjanin: Misguided Overcorrection” in *Harvard International Law Review* Volume 47 No 1 Winter 2006, p. 323.

fashioned and outdated that war crimes statutes attribute clairvoyant powers to sovereigns. General Yamashita was controversially executed for tolerating a climate of lawlessness in his ranks and therefore encouraging by culpable omission the widespread atrocities committed by his troops. Even this decision, however, is more restrictive than the failure to foresee an atrocity committed by a subordinate because the statute does not require that it is a condition of guilt that the atrocities be systematic. These problems are all aggravated by third category JCE because it allows culpability to fall on people who were not in positions of command at all.

To these problems, which have been identified by scholars, I would like to add three analyses of my own. They all concern the use of the concept of “plan” or criminal conspiracy.

First, we should be aware of the historical precedents for convicting people for criminal conspiracy in political trials. Many of the great travesties of justice have been committed by an over-enthusiastic use of conspiracy as a charge. Louis XVI was convicted of it; Marshal Pétain was initially accused of it before the Prosecution withdrew the charge during the trial; Quisling was convicted of it although that part of his conviction is almost definitely unsafe.¹⁷ At the trial in 1938 of Nikolai Bukharin and others, the chief defendant complained that he was accused of conspiracy with people he had never met. The Chief Prosecutor of the USSR, the notorious Andrei Vyshinskii, replied with what amounts to a statement of the doctrine of third category joint criminal enterprise, saying that such an accusation was well founded in law.¹⁸ But are the Moscow show trials really the jurisprudential model modern international tribunals want to emulate?

Second, as we have seen, there is a logical incoherence in the understanding of “plan”. On the one hand, the crimes in question (especially genocide) were formulated with the Nazi genocide in mind, something which involved massive amounts of planning and logistical organisation. This is reflected in the jurisprudence, the statute law and in the *travaux préparatoires* of the Genocide Convention. As the *Akayesu* judgement itself made clear, with respect to incitement but in a quotation which deals also with organisation,

At the time the Convention on Genocide was adopted, the delegates agreed to expressly spell out direct and public incitement to commit genocide as a specific crime, in particular, because of its critical role in the planning of a genocide, with the delegate from the USSR stating in this regard that, “It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized. He asked how in those circumstances, the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really responsible for the

¹⁷ See on this my *History of Political Trials from Charles I to Saddam Hussein* (Oxford: Peter Lang, 2008)

¹⁸ *Report of Court Proceedings in the Case of the Anti-Soviet*

atrocities committed.”¹⁹

It is precisely on the basis of this model that so many different people can be accused of various forms of complicity in genocide – commanders, supporters, journalists, even musicians. But how is this same extensive liability possible if it turns out that the “plan” in fact emerged spontaneously? The logical incoherence consists in the fact that the concept of “plan” is raised to the highest level – the plan is alleged to be massive, spanning time and place – and then suddenly dropped, when it is convenient to allege that it was spontaneous.

The fact is that the notion of “plan” is so unclear that it has only a propagandistic value. Indeed, it precisely permits the prosecution of political cases. By means of the use of the concept of criminal plan, the laws of war are themselves becoming an instrument of war propaganda, a means by which collective responsibility can be attributed to large groups of people largely on the basis of their (assumed) intentions. Such accusations are in fact the cause of war, not the solution to its excesses.

Third – and this follows from the first two points – the concept of plan simply does not capture the reality of warfare. It is therefore precisely unsuitable as an instrument for the prosecution of war crimes: it does not correspond to reality. To understand this point, we should in my view turn to the greatest theoretician of warfare, Clausewitz.

It was Clausewitz who urged with great clarity the nature of war as a reciprocal act in which the acts of each side are closely connected with – perhaps even dictated by – the acts of the enemy. War is an activity in which enemies act in a state of strange intimacy. In the first chapter of “On War” (and it is the first chapter which most people read because it contains the most important thoughts of the work), he defines war as a series of reciprocal actions (*Wechselwirkung*). “War is an act of force and in every use of it there are no limits; each side imposes his law on the other, and a reciprocal action arises which by definition must lead to the extreme.” The purpose of war is to force the enemy to do one’s will, and to do so by putting him in a position where it is worse for him not to do one’s will than to do it. The most decisive way of achieving this is to disarm him. But for this very reason, “for as long as I have not thrown the enemy down, I must fear that he will throw me down and so I am not my own master. On the contrary, he gives me the law just as I give it to him.”²⁰

As the great French anthropologist and philosopher, René Girard, has argued all his life, one of the key facts about the structure of human society is that conflicts have a tendency to erupt and that, when they do, they tend to spiral out of control because

¹⁹ ICTR Prosecutor v. Jean-Paul Akayesu, Judgement, 2 September 1998, paragraph 551; footnote refers to Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly, statements by Mr. Morozov, p. 241.

²⁰ See on this not only Carl von CLAUSEWITZ, *Vom Kriege*, (Book 1, Chapter 1) but also René GIRARD’s reading, *Achever Clausewitz* (Paris: Carnets Nord, 2007).

each side imitates the other by responding to his acts. Because each person's act is determined by the acts of the enemy, there is no such thing as conscious aggression: each side believes that it is guiltless while only the opponent is guilty. The tension of mutual hatred can build up so that it can explode into violence as the result of the merest slight.

This is what we call the cycle of violence. This propensity of humans to such cycles of imitative violence is, for Girard, one of the most fundamental facts about them. Girard uses this observation to develop his two key theories, the theory of mimetic desire (humans' tendency to desire the things which other human desire, and because they desire it) and the theory of the scapegoat (the collective violence projects itself onto a single victim believed to be the cause and the cure of the outbreak of conflict).

Many of the wars under consideration before today's international tribunals have tended to lend support at least to the theory that conflicts can build up between societies to be sparked off by unexpected events. By common consent, the Rwanda conflict was started by the double assassination of the Rwandan and Burundi presidents on 6 April 1994; it is often said that the Bosnian civil war was started when some Muslims attacked a Serbian wedding party and Sarajevo and killed the bride's father. The latter case is especially illustrative of how a single act of violence (not in itself an act of war) can unleash a cycle of violence and mutual retribution which, in this case, lasted for three years and cost nearly one hundred thousand lives.

The policy, in other words, follows the violence. It is not the violence which is determined by the policy. "Plans" are not what determine wars. This is especially true in modern "democratic" wars, of the sort which have existed since the classical paradigm of law was destroyed by the Napoleonic invasions and by the response to them, and *a fortiori* especially in civil wars. According to the classical paradigm of war, war is fought by two regularly constituted armies fighting in the field along clearly determined lines. Wars are fought for limited political goals and are in some respects comparable to a duel. In the modern paradigm of war, by contrast, the army is synonymous with "the people" and fights on behalf of universal principles, i.e. it has an ideological component which is lacking from the classical paradigm. Ideological too is the specifically modern response to such democratic armies, the partisan, who does not fight as a regular soldier and who specifically exploits his illegal status for military (and political) gain.²¹ Partisan war is always "defensive" and therefore a key part of reciprocal action: it cannot be understood any other way.

All this means that passions determine the course of wars, especially in "democratic" and ideological wars, i.e. ones where mass frenzy plays a role. Civil wars are the best paradigm of this because civil wars (as their name indicates) are precisely wars between people and not just between armies. Violent combat, and especially the role which imitation plays in it (as in much of human life) causes the two warring parties to resemble each other. (It is for this reason that primitive societies put twins to

²¹ See on this especially Carl SCHMITT, *Theorie des Partisanen* (1st edition 1963) (Berlin: Duncker & Humblot, 1995).

death: their physical resemblance was considered to prefigure the resemblance which arises with the outbreak of violence.)

The point of recalling these theories is to show the decisive inadequacy of the concept of “plan” (criminal or otherwise) to describe the reality of acts committed in warfare. War simply cannot be compared to a plan to rob a bank (the usual paradigm used to describe joint criminal enterprise) because the plan of the bank robbers is usually very short-term (it lasts until the project succeeds or fails). There may well be plans in warfare, but they evaporate in the face of the enemy’s acts and especially - at the level of actual fighters - in the face of the fear which is all pervasive in wartime. As Clausewitz says, “War is never an isolated act.” There is no such thing as a totally passive enemy.

There is perhaps one exception - the Jews in Nazi Germany. The Nazi genocide, which did indeed involve a very great deal of planning, is unique precisely because it was carried out in the name of a pseudo-scientific racialist theory. It is precisely this which gives it its terrible ghoulish quality. Yet jurists, like generals, should not fight the last war. The Genocide Convention and many other parts of today’s laws of war were formulated with the Nazi genocide in mind and, *for this very reason*, they cannot be reliably used to understand or adjudicate normal acts of collective violence or even the usual acts of warfare in which retaliation and retribution are inevitable.

In contrast to the Nazis’ programme of extermination which involved massive logistical planning, huge amounts of manpower and materials, more than a decade of ideological racism, and implementation over a period of several years, the mass executions which occurred after the fall of Srebrenica took place in little over a week starting on 13 July 1995, and in a sporadic and impromptu fashion. Whereas Hitler’s anti-Semitism had been publicly expressed in *Mein Kampf*, published in 1925, and whereas he had threatened “the destruction of the Jewish race in Europe” in a speech to the Reichstag on 30 January 1939, i.e. nearly three years before he finally gave the order physically to murder the Jews²², the ICTY judges say that the genocidal plan at Srebrenica did not come into being until on or around 13 July 1995, i.e. spontaneously in the heat of battle.²³ And whereas the Nazis targeted all Jews, the genocidal plan supposedly conceived by the Bosnian Serbs did not target the Bosnian Muslims as a whole but only, according to the ICTY, “the Bosnian Muslim population of Srebrenica”.²⁴ At the Rwanda tribunal, the Prosecution originally alleged that the genocidal plan had been drawn up in 1990 but this theory was dismissed in December 2008 when the defendants in the mammoth “Military I” trial were acquitted of conspiracy to commit genocide.

²² Edouard HUSSON, “*Nous pouvons vivre sans les juifs*”, *Novembre 1941, Quand et comment ils décidèrent de la solution finale* (Paris: Perrin, 2005). For Hitler’s motives and pre-meditation, see also the excellent book by Gunnar HEINSOHN, *Warum Auschwitz? Hitlers Plan und die Ratlosigkeit der Nachwelt* (Hamburg: Rowohlt, 1995), Chapter IV.3

²³ ICTY Trial Chamber, *Prosecutor v. Radislav Krstic*, 2 August 2001, par. 573.

²⁴ ICTY Appeals Chamber, *Prosecutor v. Radislav Krstic*, Judgement, 19 April 2004, par 19, and Trial Chamber Judgement, 2 August 2001, pars 560 and 561.

Far from being able to deal with such phenomena, the use (and especially overuse) of the concept of plan projects a political programme onto events which were not, in fact, planned at all. They were instead (as the international tribunals are themselves forced awkwardly to admit) “spontaneous”. Human reason has great difficulty comprehending such acts and that is why the concept of plan is inadequate to describe or judge them. It ought to be largely abandoned, and with it the concept of joint criminal enterprise.