

# POJEM SPOLEČNÉHO ZLOČINECKÉHO PLÁNU JAKO FORMA SPÁCHÁNÍ ZLOČINU PODLE MEZINÁRODNÍHO PRÁVA

## THE CONCEPT OF „JOINT CRIMINAL ENTERPRISE“ AS A FORM OF COMMISSION OF CRIMES UNDER INTERNATIONAL LAW

**KATEŘINA NOVOTNÁ**

Právnická fakulta, Masarykova univerzita

### **Abstrakt**

Tento příspěvek poskytuje úvod do problematiky konceptu „společného zločineckého plánu“. Rozebírá podmínky pro vznik trestní odpovědnosti jednotlivce na základě tohoto konceptu a snaží se zdůvodnit oprávněnost jeho používání. Koncept „společného zločineckého plánu“ zakládá odlišný způsob spáchání zločinů podle mezinárodního práva přivozující individuální trestní odpovědnost v mezinárodním trestním právu. Použití konceptu nemusí být omezeno pouze na válečné zločiny a zločiny proti lidskosti. Koncept „společného zločineckého plánu“ nabývá v současnosti na významu i v jiných oblastech. Dochází k pokusům o efektivnější stíhání například organizovaného zločinu či teroristických činů, u kterých se využití principů akcesority a tradiční pojetí účastenství často jeví jako nedostatečné.

### **Klíčová slova**

Mezinárodní trestní právo, koncept „společného zločineckého plánu“, trestní odpovědnost jednotlivce, zločiny podle mezinárodního práva, Mezinárodní trestní tribunál pro bývalou Jugoslávii

### **Abstract**

This paper provides a starting point for an exploration of the concept of joint criminal enterprise (hereinafter, JCE) while explaining the underlying justification and the conditions for responsibility under this concept. The concept of JCE legally establishes a different mode of commission of crimes under international law and constitutes an important theory of incurring individual responsibility used in contemporary international criminal law. The use of this concept is not limited only to the context of war crimes and crimes against humanity.

In the recent years, attempts to deal more effectively with organised crime and terrorist activity other than the use of offences of „membership“ have been made. The model may therefore be seen as one of increasing contemporary significance.

### **Key words**

International criminal law, the concept of joint criminal enterprise (JCE), individual criminal responsibility, commission of crimes under international law, the International Criminal Tribunal for the former Yugoslavia (ICTY)

### **I. Introduction to the concept of „Joint Criminal Enterprise“**

*[The accused were] cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs.<sup>1</sup>*

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter, ICTY) found joint criminal enterprise (hereinafter, JCE) established in customary international law through an analysis of post-World War II case law as well as in two international treaties.<sup>2</sup> The Appeal Chamber of the ICTY also examined national legislation, but found no coherent practice among states. Thus, faced with situations where traditional domestic criminal law theories of liability proved either not coherent or inadequate, international criminal tribunals created and developed JCE to provide a conceptual framework with which to analyze crimes whose size and structure are unique to international criminal law. JCE also started to appear in other jurisdictions, such as that of the International Criminal Court (hereinafter, ICC), International Criminal Tribunal for Rwanda

---

<sup>1</sup> Prosecutor in U.S. v. Goebell et al. (the *Burkum Island* case), U.S. Army War Crimes Trials (Mar. 21, 1946). See charge Sheet, p. 1118, in U.S. National Archives Microfilm Publications, I (on file with the International Tribunal's Library).

<sup>2</sup> Except *the Rome Statute* of the International Criminal Court (ICC), the Appeals Chamber of the ICTY acknowledged JCE in *the International Convention for the Suppression of Terrorist Bombing* 1997. Article 2(3)(c) of the convention states: „[an act committed 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.”

(hereinafter, ICTR), the Special Court for Sierra Leone, the Special Panel for Serious Crimes in East Timor, and the US military commissions.<sup>3</sup>

At this point, it is important to make a distinction between the use of the concept of JCE as (i) a part of international criminal law to be applied before the international criminal tribunals<sup>4</sup> (ii) a part of national criminal law to be applied before the domestic courts<sup>5</sup> and (iii) a part of international criminal law to be applied before the domestic courts.<sup>6</sup>

This concept has acquired different labels, such as „common purpose“, „common design“ or „joint enterprise“.<sup>7</sup> Important is to distinguish JCE from both the concept of a criminal conspiracy and membership of criminal organisation.<sup>8</sup> Despite the fact that many authors consider JCE as a form of individual criminal responsibility, it should be emphasized that the jurisprudence of the ICTY repeatedly held that JCE is to be regarded as a form of commission and not as a form of accessory (or any other) liability, thereby implying that a participant in JCE should be punished as a principal perpetrator. However the sentencing

---

<sup>3</sup> The military commissions instituted by the U.S. government to try suspected terrorists include a liability theory that closely resembles the concept of a JCE, and the first indictments of Guantanamo detainees implicitly relied on this concept. For further overview of these developments, see the discussion by Danner, A., M., a Martinez, J., S.:

*Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 Cal. L. Rev. 75, 108, 2005.

<sup>4</sup> With regard to the limited scope of this paper, it will be focused only on the first example, i.e. the use of the concept of JCE as a part of international criminal law applicable before the international criminal tribunals.

<sup>5</sup> There are many notable examples of this form of criminality at the various national legal systems. Some British and US courts, influenced by common law concepts, have used the concept of „common purpose“ or „common design“. In contrast other courts, for instance Dutch, German, Italian, holding to civil law terminology, have preferred to rely upon the notion of „concurrence of persons in a crime“. For example, the law of the former Socialist Federative Republic of Yugoslavia (SFRY) in force at the time did provide for criminal liability for the foreseeable acts of others in terms strikingly similar to those used to define JCE. Article 26 of the Criminal Code of the SFRY provides that: „Anybody creating or making use of an organization, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts.“

<sup>6</sup> Various questions related to the use of this concept at the domestic level of respective states for prosecuting crimes under international law may arise. *For further consideration which goes beyond the scope of this paper*: Many cases from the ICTY are being transferred to the State Court of Bosnia and Herzegovina (Special War Crimes Chamber) Is the concept of a JCE which is justified in international criminal law equally applicable in domestic criminal law? How should the indictment using this concept be adapted?

<sup>7</sup> Some authors also point to the use of this concept in such different areas as the regulation of business delinquency (for instance the EC regulation of business cartels). See Harding, Ch.: *Forging the European Cartel Offence. The Supranational Regulation of Business Activity*, 12 European Journal of Crime, Criminal Law and Criminal Justice, 2004.

<sup>8</sup> The Appeals Chamber in *Ojdanic* case had clearly distinguished the concept of JCE from conspiracy and membership of criminal organisation. What sets JCE apart from the crime of conspiracy is the additional showing of actual activities - the *actus rea* element - in furtherance of the common purpose required for conspiracy.

practice is not always in accordance with the theory and usually the sentence may vary greatly depending on the circumstances of the case and on the manner in which the accused participated in JCE.<sup>9</sup> Cassese has well explained the essential character of JCE as follows:

*„... All participants in [such] a common criminal action are equally responsible, if they (i) participate in the action, whatever their position and the extent of their contribution, and in addition (ii) intend to engage in the common criminal action. Therefore they are all to be treated as principals, although of course the varying degree of culpability may be taken into account at the sentencing stage ... The rationale behind this legal regulation is clear ... (i) each of them is indispensable for the achievement of the final result, and on the other hand, (ii) it would be difficult to distinguish between the degree of criminal liability, except for sentencing purposes.“<sup>10</sup>*

JCE is a mode of participation in the commission of crimes, which has been largely developed by the judges and prosecutors of the ICTY. Although the concept of JCE is not explicit in the Statute of the ICTY (or the ICTR), the judges have found that it is implicitly included in the language of Article 7(1).<sup>11</sup> The Appeals Chamber of the ICTY in *Tadic* case<sup>12</sup> found that international case law demonstrated that the concept of JCE had been applied in three distinct categories of cases of collective criminality.<sup>13</sup> The Appeals Chamber of the ICTY held that, although the language of Article 7(1) of the ICTY Statute referred to „first and foremost the physical perpetration of the crime by the offender himself“, crimes within the Tribunal’s jurisdiction „might also occur through participation in the realisation of a common design or purpose.“<sup>14</sup> According to the Appeals Chamber in *Tadic* case:

*„...the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out*

<sup>9</sup> See for instance the low sentences pronounced in the *Omarska* case.

<sup>10</sup> Cassese, A.: *International Criminal Law*, New York: Oxford University Press, 2003, pp 181-183.

<sup>11</sup> „ 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.“

<sup>12</sup> *Prosecutor v. Tadic*, Case No.: IT-94-1-A, Judgement, ICTY Appeals Chamber, 15 July 1999.

<sup>13</sup> *Ibid.*, at para 195 *et seq.*

<sup>14</sup> *Ibid.*, at para 188.

*either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions.*<sup>15</sup>

The core of JCE, in other words, is the conscious and informed acceptance by each member of the JCE, through explicit or tacit agreement, that (a) the joint purpose is to be pursued by having the Statute crimes committed, and (b) these crimes are eventually committed accordingly. This is how commission of the crime materializes under Article 7(1) of the ICTY Statute. Failure to prevent or subsequently punish the crimes is a different mode of responsibility which comes under Article 7(3) of the ICTY Statute on superiors, who fail to prevent or punish crimes committed by their subordinates.<sup>16</sup>

## **II. Justification of the concept of JCE**

According to the Appeals Chamber in the *Tadic* case the broad interpretation of Article 7(1) of the Statute is:

*„warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question.”<sup>17</sup>*

---

<sup>15</sup> *Ibid.*, at para 190.

<sup>16</sup> Sassòli, M., Olson, L.: *The Judgement of the ICTY Appeals Chamber on the Merits in the Tadic case*, 839 International Review of the Red Cross, 2000.

<sup>17</sup> *Ibid.*, at para. 191. See also, *Prosecutor v. Kvočka et al*, Case No.: IT-98-30, Judgement, ICTY Appeals Chamber, 28 February 2005.

In other words, individual actors who may justifiably be seen as bearing significant moral responsibility may otherwise evade legal liability since it may be *legally* difficult to connect them personally to the end-damage.

### III. Elements of JCE

The Appeals Chamber determined that JCE may come in three different forms: basic, systematic, and extended. While they share the same *actus reus*, each form has a different *mens rea*. The agreement between the co-defendants may be inferred by their acts and the agreement does not have to be explicit.<sup>18</sup> The third *actus reus* element, „participation“, has been defined broadly to include both direct and indirect participation.<sup>19</sup> The role played by the accused must have some causal significance, but need not have been a necessary condition of the crime’s accomplishment.<sup>20</sup>

The participation does not need to involve a commission of a specific crime under the Statute, but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.<sup>21</sup> The Tribunals case law has generally laid out that contribution can be made even by omission.<sup>22</sup> There is further no requirement that the accused must have been on the crime site to be liable.<sup>23</sup>

#### III.1. General requirements of *actus reus*

- 1) plurality of persons were involved in the commission of a crime;
- 2) there was a common plan, design or purpose which amounts to or involves the commission of a crime; however there need not be a formal or informal agreement among the participants;
- 3) the accused participated in the common design involving the perpetration of the crime.

---

<sup>18</sup> *Prosecutor v. Krnojelac*, Case No.: IT-97-25-A, Judgement, ICTY Appeals Chamber, 17 September 2003, at para. 85.

<sup>19</sup> *See, e.g., Prosecutor v. Brđanin*, Case No.: IT-99-36-T, ICTY Appeals Chamber Decision on Motion for Acquittal Pursuant to Rule 98bis, 28 November 2003.

<sup>20</sup> *Ibid.*, at para 26.

<sup>21</sup> *Prosecutor v. Tadic*, Case No.: IT-94-1-A, Judgement, ICTY Appeals Chamber, 15 July 1999, at para 227.

<sup>22</sup> *Prosecutor v. Brđanin*, Case No.: IT-99-36-T, Judgement, ICTY Trial Chamber, 1 September 2004, at para 263.

<sup>23</sup> *Prosecutor v. Krnojelac*, Case No.: IT-97-25-A, Judgement, ICTY Appeals Chamber, 17 September 2003, at para 81.

### III.2. General requirements of *mens rea*

- 1) The accused had the intent to pursue the common purpose;
- 2) For crimes for which a specific intent is required, the accused must possess that intent, e.g. for crimes of persecution the accused must share the common discriminatory intent of the joint criminal enterprise;
- 3) In camp cases, an intent to further the efforts of the joint criminal enterprise may be inferred from knowledge of the crimes being perpetrated in the camp and continued participation which enables the camp's functioning;
- 4) A position of authority may be relevant evidence for establishing the accused's awareness of the system.

### III.3. Specificities of each type of JCE

- 1) **Basic JCE:** The accused had the intent to perpetrate the crime, this being the shared intent on the part of all co-perpetrators. The first category of JCE appears when all co-defendants act together according to common design, all possessing the same criminal intention to commit a crime (within the ICTY Statute) and such a crime is committed. The accused must not physically perpetrate the crime to be liable, he only needs to have voluntarily participated in one aspect of the common design and to intend the result.

#### Example

As a member of the Bosnian Serb leader, Stakić participated in the joint criminal enterprise consisting of a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control.<sup>24</sup>

- 2) **Systematic JCE:** The accused had the knowledge of the system of ill-treatment, as well as the intent to further this common concerted system of ill-treatment. The second category of JCE relates to „*systems of ill-treatment*,“ primarily concentration camps. The notion of common purpose is in JCE II applied to instances where the offences have been committed by members of a military or administrative unit. For this category, th

---

<sup>24</sup> *Prosecutor v. Stakić*, Case No.:IT-97-24, , Judgement, Appeals Chamber, 22 March 2006.

prosecution need not prove a formal or informal agreement among the participants, but must demonstrate their adherence to a system of repression.<sup>25</sup>

### Example

Kvočka participated in the operation of the camp as the functional equivalent of the deputy commander of the guard service, with some degree of authority over the guards, for approximately 17 days – in particular, he was the direct subordinate of the commander of the Police Department, tasked to carry out his orders and to supervise the conduct of the guards; he did not physically perpetrate crimes against detainees, yet was present while crimes were committed and was aware of the extreme physical and mental violence routinely inflicted upon the detainees and of the discriminatory intent, as well as of the inhumane conditions; despite such knowledge, he continued to work for at least 17 days in the camp, where he performed the tasks required of him efficiently, and without complaint.<sup>26</sup>

- 3) Extended JCE:** The accused intended 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 the crime by the group; in addition, responsibility for a crime other than the one agreed upon in the common plan will arise only if, under the circumstances of the case it was foreseeable that such crime might be perpetrated by one or other members of the group and the accused willingly took that risk. This category involves criminal acts that fall outside the common plan. In Tadic case , the Appeals chamber concluded that a person who intends to participate in a common design may be found guilty of acts outside that design if such acts are a *natural and foreseeable* consequence of effecting of that common purpose. This theory is especially helpful in cases of mob violence where it is impossible to ascertain causal links to the diverse offenders who brought on the lynching by „simply striking a blow or inciting the masses.“<sup>27</sup> The accused still needs to possess intent towards the original common criminal purpose, but in relation to the crime actually committed, the mens rea requirement is merely advertent recklessness or *dolus eventualis*.

---

<sup>25</sup> *Prosecutor v. Krnojelac*, Case No.:IT-97-25-A, Judgement, Appeals Chamber, 17 September 2003.

<sup>26</sup> *Prosecutor v Kvočka et al.*, Case No.: IT-98-30/1, Judgement, Appeals Chamber, 28 February 2005.

<sup>27</sup> *To compare at the domestic level:* many civil and common law systems - including France, Italy, England, Wales, Canada, the United States, and Australia - have circumscribed the liability of defendants for the foreseeable, but unintended, crimes of their co-perpetrators.



## Example

In *Krstić* case<sup>28</sup> the murders, rapes, beatings and abuses committed against the refugees at Potocari, although not an agreed upon objective among the members of the JCE, were found to be natural and foreseeable consequences of the JCE to forcibly remove the Muslim population out of Srebrenica, especially given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection.

## IV. Conclusion and recommendations

In sum, JCE seeks to individualize responsibility associated with the commission of crimes committed by individuals acting in groups, thereby increasing the defendant's potential exposure to criminal liability. The advantages of such a tool are obvious since the crimes under international law are mostly of a systematic, large-scale and collective character, while domestic criminal law mainly deals with less complex crimes that are normally committed by individuals who can more easily be linked to the crime. JCE focuses on whether the action *in any way* incurred criminal responsibility. The relative degree of responsibility is a matter for sentencing.

The principal controversies and doctrinal questions about the JCE concern the scope of its application, the possible size and structure of JCE. On one hand, the international criminal tribunals are faced with mass crimes whose size and complexity call for creative legal theories to enable their prosecution. Indeed, war crimes and crimes against humanity are planned, financed and instigated at the highest political and military level, by groups of people acting with strategies that are very similar to those of criminal and terrorist organizations. On the other hand, concerns regarding fairness and the need to establish legitimacy oppose allowing JCE to become a doctrine of guilt by association

Nevertheless, it would be difficult at a legislative level to be more specific in the definition of „the joint criminal enterprise“. Components of the definition may naturally give rise to

---

<sup>28</sup> *Prosecutor v Krstić*, Case No.: IT-98-33, Judgement, ICTY Appeals Chamber, 19 April 2004.

difficulty, in particular the third extended category of JCE and how the participating role may be understood. The precise parameters of an organisation and enterprise may be clearer in some kinds of case than in others. Therefore, a judicial specification of a participation relevant to the activities of the enterprise appears to be a more effective way of ensuring that the net of liability is not cast too widely. The point of concern is to ensure that in a factual sense the scope and scale of such an enterprise is kept within meaningful limits for legal purposes. In short, a criminal enterprise should not be so loose in its definition that potential members cannot be sure whether they are involved or not.<sup>29</sup>

### **Literatura:**

### **Články:**

[1] O'Rourke, A.: Joint Criminal Enterprise and Brdanin: Misguided overcorrection, Harvard International Law Journal, Vol. 47, Number 1, 2006.

[2] Powles, S.: Joint Criminal Enterprise. Criminal Liability by Prosecutorial Ingenuity and judicial Creativity?, 2 Journal of International Criminal justice , 2004.

[3] Danner, A., M., a Martinez, J., S.: Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law, 93 California Law Review 75, 2005.

[4] Fletcher, G., P.: Symposium -The Commission of Inquiry on Darfur and its Follow-up: A Critical View-Reclaiming Fundamental Principles of Criminal Law in the Darfur Case, ICJ 3.3(539), JUL/2005.

[5] Sassòli, M., Olson, L.: The Judgement of the ICTY Appeals Chamber on the Merits in the Tadic case, 839 International Review of the Red Cross, 2000.

[6] Schabas, W.: Mens Rea and the International Criminal Tribunal for the Former Yugoslavia, 37 New England Law Review, 2003.

### **Knihy:**

[1] Bassiouni, M., Ch.: Crimes against Humanity in International Criminal Law, Dordrecht: Kluwer Academic Publishers, 1992, ISBN: 0792317378.

---

<sup>29</sup> Harding, Ch.: *Forging the European Cartel Offence. The Supranational Regulation of Business Activity*, 12 European Journal of Crime, Criminal Law and Criminal Justice, 2004.

- [2] Fletcher, G., P.: Rethinking Criminal Law, New York: Oxford University Press, 2000, ISBN: 0195136950.
- [3] Cassese, A.: International Criminal Law, New York: Oxford University Press, 2003, ISBN: 0199259119.
- [4] Brownlie, I.: Principles of Public International Law, Oxford: Oxford University Press, 2003, ISBN: 9780199260713.
- [5] Boas, G., Schabas, W.: International Criminal Law Developments in the Case Law of the ICTY, Leiden: Martinus Nijhoff Publishers, 2003, ISBN: 9041119876.
- [6] Hagan, J.: Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal. Chicago: University of Chicago Press, 2003, ISBN: 0226312283.
- [7] Jones, J.W. D., Prowles, S.: International Criminal Practice, Oxford: Oxford University Press, 2003, ISBN: 0199264368.
- [8] Zappalà, S.: Human Rights in International Criminal Proceedings, Oxford: Oxford University Oxford, 2003, ISBN: 9780199258918.

**Kontaktní údaje na autora - email:**

[katerina.novotna@law.muni.cz](mailto:katerina.novotna@law.muni.cz)

