

Lecture 2: Joint Criminal Enterprise in the ICTY Jurisprudence

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The application of the Joint Criminal Enterprise (“JCE”) by the ICTY has been a milestone in the history of international criminal justice. Although JCE was not explicitly foreseen in the ICTY Statute, the Appeals Chamber in the case of *Prosecutor v. Duško Tadić* held that a person is responsible for “committing” international crimes not only when he or she physically perpetrated them, but bears criminal responsibility as a co-perpetrator also when he or she contributed to their commission through participating in a JCE.

To reach this conclusion, the Appeals Chamber in *Tadić* relied on the object and purpose of the ICTY Statute to try all those responsible for serious violations of international humanitarian law and on the collective character of international crimes. The Appeals Chamber also set out the elements of the JCE on the basis of customary international law, looking primarily into post-World War II jurisprudence, and identified three distinct categories of JCE, the objective and subjective elements of which are set out in the following table:

Form of JCE	Objective Elements	Mental Elements
1 st / Basic	<ul style="list-style-type: none">Plurality of persons;	Shared direct intent
2 nd / Systemic	<ul style="list-style-type: none">A common plan amounting to or involving the commission of crimes; and	Personal knowledge of the system of ill-treatment and intent to further the system
3 rd / Expanded	<ul style="list-style-type: none">Participation of the accused in the common plan	The commission of crimes outside the common plan was a foreseeable consequence and the accused willingly took the risk

In subsequent cases, the elements of the JCE were further calibrated and clarified. In fact, JCE has been the most common form of criminal responsibility on the basis of which individuals have been convicted in modern international criminal justice. During the lecture, the interpretation of the objective and mental elements will be discussed in more detail through concrete examples from ICTY cases.

The lecture will also discuss the distinction of JCE from other modes of criminal responsibility, such as aiding and abetting and command responsibility, and will highlight the relevance of JCE for trying international crimes.

Lastly, the lecture will address issues about which JCE has been criticised and how the ICTY has addressed concerns relating, for example, to the compatibility of JCE with the principles of legality and of individual criminal responsibility, which require that nobody may be accountable for an act that did not constitute a crime at the time of its commission and in which he or she has not personally engaged or participated.

The majority of the international, and internationalised, criminal tribunals established after the ICTY, including the International Criminal Tribunal for Rwanda (“ICTR”), the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, and the International Residual Mechanism for Criminal Tribunals as the successor of the ICTY and the ICTR, have incorporated JCE into their jurisprudence. JCE has also been employed in some national jurisdictions trying international crimes, including in Bosnia and Herzegovina. JCE has become a consolidated concept of international criminal law, providing the legal framework of individual criminal responsibility for mass crimes and has played a very important role in fighting impunity in such cases, by confirming that individuals who share a common plan to commit a crime or to achieve their goal through the commission of a crime, and coordinate their efforts in this regard can be responsible for the commission of that crime.