

ANTE GOTOVINA AND THE JOINT CRIMINAL ENTERPRISE CONCEPT AT THE ICTY

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The judgment delivered by the International Criminal Tribunal for the former Yugoslavia in the case of Ante Gotovina caught the eye of the public in Croatia. From Croatian perspective, the main aim of the 1995 Operation Storm was to liberate the region of Krajina from Serbian occupation. At the same time, the Tribunal – after over three years of trial, examining 4824 exhibits and hearing 145 witnesses – qualified the course of events as ethnic cleansing and therefore, Ante Gotovina, who was the commander of the Split Military District, was sentenced to 24 years of imprisonment.

The present paper will not go into any discussion about the political or military circumstances of Operation Storm or the perceptions about the trial and the judgment itself. At the same time, the intense reaction of the Croatian public draws the attention to the fact that in such sensitive cases, it is highly significant to attach a strong, unquestionable reasoning to the judgment. From this perspective, the paper will briefly summarize concerns and criticisms with regard to the legal concept of joint criminal enterprise which the Gotovina judgment was based upon.

Keywords: ICTY, joint criminal enterprise (JCE), accomplice liability, Operation Storm, Brioni meeting.

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The reaction of the public on the judgment delivered by the International Criminal Tribunal for the former Yugoslavia (hereinafter, ICTY) in the case of Ante Gotovina was reported, as follows: “crowds who had gathered to watch the tribunal's hearing on big screens in the Croatian capital booed and hissed when the judge announced the guilty verdicts”. [...] “Prime Minister Jadranka Kosor said implicating the government in a criminal enterprise was unacceptable. She said the operation was legitimate and aimed at liberating Croatian territory from occupation.”¹

The intense reaction of the Croatian public draws the attention to the fact that in such sensitive cases, it is highly significant to attach a strong, unquestionable reasoning to the judgment. From this perspective, the paper will briefly summarize concerns and criticisms with regard to the legal concept of joint criminal enterprise (hereinafter, JCE) which the Gotovina judgment was based upon.

The Gotovina judgment and the concept of JCE

According to the judgment, the relevant joint criminal enterprise was composed of members of the Croatian political and military leadership, Franjo Tudjman, at the time President of Croatia; Gojko Šušak, the Minister of Defence; Zvonimir Červenko, the Chief of the HV Main Staff; Jure Radić, the Deputy Prime Minister and the Minister for Reconstruction and Development; and also Ante Gotovina and Mladen Markač, accused in the relevant case. The Chamber found that the main objective of the JCE was the permanent removal of the Serb civilian population from the Krajina by force or threat of force, including by deportation, forcible transfer, unlawful attacks on civilians and civilian objects, and discriminatory and restrictive measures.²

The Trial Chamber came to the findings that Ante Gotovina was the commander of the Split Military District, he attended the meeting in Brioni on July 31, 1995, where Operation Storm was planned and prepared, and he ordered the unlawful attack on civilians and civilian objects of Benkovac, Knin and Obrovac on August 4 and 5, 1995.³ The Judgment did not uphold the charges of creating and supporting discriminatory policies against the Serbs; and disseminating information intended to cause the departure of

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¹ <http://www.bbc.co.uk/news/world-europe-13092438> (July 28, 2011)

² Prosecutor v. Ante Gotovina *et al.*, Case No. IT-06-90-T, Judgment (April 15, 2011), para 2314.

³ *Ibid.* para 2323.

Serbs.⁴ At the same time, the Trial Chamber found that Gotovina received reports from his subordinates, was briefed at regular meetings and informed by international observers about the occurrence of crimes, such as firing artillery at civilians, destruction, looting and killings, but he failed to take measures to have subordinates punished for crimes committed.⁵

The Trial Chamber concluded from the foregoing findings that since Gotovina

- participated in the Brioni meeting as the commander of the Split MD,
 - he ordered the attacks on Benkovac, Knin and Obrovac,
 - he failed to make a serious effort to prevent and follow-up on crimes, and
 - this failure had an impact on the general atmosphere towards crimes in the Split MD,
- his conduct amounted to a significant contribution to the joint criminal enterprise.⁶

The Trial Chamber – having evaluated the conduct listed above and his statements at the Brioni meeting – concluded that Gotovina shared the objective of the JCE and was a member thereof. Therefore, the Chamber found him responsible in relation to

- deportation as a crime against humanity
- plunder of public and private property and
- wanton destruction as a violation of the laws or customs of war under the first form of JCE.

Furthermore, the Chamber found him guilty of

- persecution and
- murder as a crime against humanity,
- murder as a violation of the laws or customs of war,
- inhumane acts as a crime against humanity, and
- cruel treatment as a violation of the laws or customs of war under the third form of JCE.

The Chamber found him not guilty of forcible transfer as a crime against humanity.⁷

The concept of JCE from the perspective of accessory liability

The idea of the concept of joint criminal enterprise originated in post World War II cases, such as the Dachau Concentration Camp, the Belsen or the Essen Lynching case. The recent concept of JCE was established by the case law of the ICTY. It first appeared in the Tadić judgment.

The Appeals Chamber established three forms of the JCE, namely a basic, a systematic and an extended form. For each of the three forms of liability there is a need for:

- the existence of a plurality of persons whom the joint criminal enterprise is composed of without the need for a military, political or administrative structure,⁸
- the existence of a common purpose and plan, which does not need to be included in a formal agreement,⁹
- the participation of the accused in the JCE, which may take form of assistance in, or contribution to, the execution of a common purpose.¹⁰

⁴ Ibid. para 2325-2328.

⁵ Ibid. para 2363-2365.

⁶ Ibid. para 2370.

⁷ Ibid. para 2619.

⁸ Ibid., para 96.

⁹ In this regard, the case law of the ICTY is not consistent. The Judgment of the Trial Chamber delivered in the Brđjanin case set the requirement that both for JCE I and JCE II liability there is a need for mutual understanding or arrangement between the accused and the physical perpetrator to commit the specific crime.

Prosecutor v. Brđjanin, Case No. IT-99-36-T, Judgment (September 1, 2004), para 352.

This approach was overruled by the Appeals Chamber. It opined that there is no need for any agreement between the accused and the physical perpetrator to commit the particular crime, the existence of a common purpose that involves the commission of the specific crime is sufficient for JCE liability.

Prosecutor v. Brđjanin, Case No. IT-99-36-A, Appeals Judgment (April 3, 2007), para 418.

¹⁰ Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Appeals Judgment (February 28, 2005), paras 96, 99.

These objective requirements create the basis for the whole JCE concept. In the case of the extended and the most problematic form (JCE III), the additional prerequisites are the following:

- the accused intended to participate in and to contribute to the JCE,¹¹
- the possibility of the commission of the specific crime was foreseeable, the commission of the crime was a natural and foreseeable consequence of the execution of the common plan,
- the accused was aware of the fact that the crime was a natural consequence of the execution of the common plan and he/she willingly took that risk.¹²

The Appeals Chamber created the concept discussing the role of co-perpetrators and emphasizing the need for harsher sentencing in the case of those accused who in some way made it possible for the perpetrator physically to carry out the criminal act.

„Under these circumstances, 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.”¹³

This line of argument and the opinion that “the notion of common design as a form of accomplice liability is firmly established in customary international law”¹⁴ led the Chamber to an interpretation which says that participation in the JCE is included in the Statute of the Tribunal as a form of commission under Article 7 (1) of the Statute. The customary character of the concept has not been underpinned by thorough study of state practice, and the relevant provision regulates the issue of individual criminal responsibility, as follows:

“[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.”¹⁵

Clearly, the concept of JCE was not included in the Statute by its drafters. Opposed to this, the form of liability of aiding and abetting is explicitly provided for by the Statute of the ICTY. For liability under aiding and abetting, the following elements are required:

- acts committed with the purpose of assisting, encouraging or lending moral support to the commission of the specific criminal acts,
- these acts have a substantial effect on the commission of the specific criminal acts, and
- the aider/abettor is aware of the fact that he/she provided assistance for the commission of the specific criminal acts.¹⁶

The main difference between the concept of aiding/abetting and JCE is that the aider/abettor does not need to share the intent of the principal perpetrator, and proving the existence of a common plan or purpose is not needed. Consequently, JCE entails principal liability, while liability of the aider/abettor is accessory. Therefore, his or her level of criminal culpability is less than that of a participant of a JCE.¹⁷ However, if the assistance provided by the aider/abettor lasts for an extensive period or becomes more significant in maintaining the functioning of the enterprise, and from the point that the aider/abettor shares the common purpose of the JCE, he/she becomes a co-perpetrator.¹⁸

¹¹ Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment (July 15, 1999), para 228; Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Appeals Judgment (February 28, 2005), para 83; Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeals Judgment (February 25, 2004), para 101.

¹² Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Judgment (March 22, 2006), para 87.

¹³ Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment (July 15, 1999), para 192.

¹⁴ Ibid. para 220.

¹⁵ Statute of the International Criminal Tribunal for the former Yugoslavia, Art 7 (1)

¹⁶ Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment (November 29, 2002), para 71.

¹⁷ Gunel Guliyeva, ‘The Concept of Joint Criminal Enterprise and ICC Jurisdiction’, *5 Eyes on the ICC*, 2008-2009, at 59.

¹⁸ Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Judgment (November 2, 2001), para 284-285.

It is beyond doubt that accessory liability would understate the degree of criminal responsibility of those accused under the JCE doctrine. Therefore, this is clearly not the concept that could replace that of the JCE even if this latter one is not included in the Statute. However, this is not a sufficient argument to go beyond the boundaries of *lex lata*.

Criticisms concerning the concept of JCE

In the case of JCE III, the accused does not share the intent of the physical perpetrator to commit the crime which fell beyond the common purpose. The Judgment delivered by the Trial Chamber in the Krstić case illustrates well how the first form of JCE was extended in JCE III. The Chamber distinguished policy crimes, such as persecution or forcible transfer, and additional specific crimes, such as murders, rape or beatings. These latter crimes did not seem to be part of the common plan, but since they were natural and foreseeable consequences of the common purpose, the accused could be called to account for them as well.¹⁹ Accordingly, concerning these crimes only *dolus eventualis* is required.

The subject of the most serious concerns debated by academic actors and practitioners has been specific intent crimes, such as genocide. Criminal responsibility in such high-profile cases cannot be based on sole foresight.²⁰ The application of the extended JCE concept in these cases would undermine the mental element of the most serious crimes, hence would trivialize the crime. At this point again, the Appeals Chamber overruled the Trial Chamber's conclusion taken in the Brđjanin case, namely that the awareness of the accused of the risk that other members of the JCE could commit genocide is not sufficient for genocide conviction.²¹

According to Mohamed Elewa Badar, "if, one day, the Prosecution succeeds in securing a conviction for one of the 'specific purpose crimes' under the third category of joint criminal enterprise, this will alter the JCE doctrine to become a device used to 'just convict everyone'."²²

JCE III is clearly not compatible with the principle of culpability as discussed above. The principle of culpability requires that no one can be held criminally responsible for acts in which the relevant individual was not personally involved or in any other way participated in. JCE III is highly problematic in this respect.

Apart from the fact, that the extended form of JCE is debatable concerning the principles of individual responsibility and culpability, it raises serious concerns with regard to the principle of *nullum crimen sine lege* as well. The specific requirements of JCE III are not defined clearly, that leads to uncertainty as to what the law says.²³ As Judge Wolfgang Schomburg pointed out, "[i]t is again the principle of individual guilt to criminalize the *mens rea* of a person without an exhaustively and precisely described *actus reus*".²⁴

In addition, the entire concept of JCE has been criticized taking the shape of collective responsibility not complying with the fundamental principle of individual criminal liability and even counterproductive to the Tribunal's mandate of bringing peace and reconciliation to the region. Professor Harmen van der Wilt, who made a proposal for replacing the JCE concept with functional perpetrators' liability, added to this criticism the following remark:

"Rather than serving as an adequate instrument to pool the contributions and responsibilities of partners in crime, the [JCE] concept degenerates into a smokescreen that obscures the possible frail connection between the accused and the specific crimes for which they stand trial."²⁵

¹⁹ See Harmen van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations', 5 *Journal of International Criminal Justice* (2007), at 97.

Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (August 2, 2001), para 615-616.

²⁰ Mohamed Elewa Badar, 'Participation in crimes in the jurisprudence of the ICTY and ICTR', *Routledge Handbook of International Criminal Law* (eds. William A. Schabas, Nadia Bernaz). Routledge, 2011, at 256; Guliyeva, *Supra* note 17 at 56-57; Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility', 5 *Journal of International Criminal Justice* (2007), at 175.

²¹ Prosecutor v. Brđjanin, Case No. IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98 *bis* (November 28, 2003), para 57; Prosecutor v. Brđjanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal (March 19, 2004), paras 5-10.

²² Badar, *Supra* note 20 at 256-257.

²³ See Guliyeva, *Supra* note 17 at 65-66.

²⁴ Wolfgang Schomburg, 'Jurisprudence on JCE – revisiting a never ending story', available at http://www.cambodiatribunal.org/images/CTM/ctm_blog_6-1-2010.pdf (August 1, 2011) at 4.

²⁵ Harmen van der Wilt, *Supra* note 19 at 101.

Further criticism has been that the concept does not have any added value to the term “committed” as laid down in the Statute.²⁶

This latter criticism was pointed out by the Trial Chamber in the Stakić case, as follows:

“The Trial Chamber emphasizes that joint criminal enterprise is only one of several possible interpretations of the term “commission” under Article 7(1) of the Statute and that other definitions of co-perpetration must equally be taken into account. Furthermore, a direct reference to “commission” in its traditional sense should be given priority before considering responsibility under the judicial term “joint criminal enterprise”.²⁷

Although (as it has been already indicated above) the Appeals Chamber overruled this opinion of the Trial Chamber, it just demonstrates again that the views within the Tribunal have not been homogenous concerning the acceptance of the JCE concept.

This is underpinned also by the fact that a number of judges of the Tribunal made critical remarks concerning the concept in their dissenting opinions. This circle included for instance Judge Per-Johan Lindholm and Judge Wolfgang Schomburg:

“I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally. The so-called basic form of joint criminal enterprise does not, in my opinion, have any substance of its own. It is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration.”²⁸

“The Prosecution is consequently not required to plead any legal interpretation or legal theory concerning a mode of participation that does not appear in the Statute, such as joint criminal enterprise, in particular as the Appeals Chamber has held that joint criminal enterprise is to be regarded as a form of “committing”.²⁹

“In general, harmonization will lead to greater acceptance of the Tribunal’s jurisprudence by international criminal courts in the future and in national systems, which understand imputed criminal responsibility for “committing” to include co-perpetratorship...”

[...]

“Modern criminal law has come to apply the notion of indirect perpetration even where the direct and physical perpetrator is criminally responsible (“perpetrator behind the perpetrator”).³⁰

Concluding remarks

The foregoing comment of Judge Schomburg draws the attention to a highly significant issue, namely, the acceptance of the jurisprudence of the Tribunal. As the public’s reaction following the delivery of the Gotovina Judgment demonstrated, judicial decisions of international criminal judicial bodies, obviously, touch upon sensitive historical points of the affected countries. At the same time, the acceptance of their jurisprudence is an essential factor for the successful fulfillment of the mandate of international criminal courts. From this perspective, it would be harmful to uphold JCE liability and to build future judgments on legal concepts whose contours cannot be clearly indicated by the judicial chambers based on *lex lata*.

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²⁶ Schomburg, *Supra* note 24 at 8.

²⁷ Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment (31 July 2003), para 438.

²⁸ Prosecutor v. Simić, Case No. IT-95-9-T, Judgment (17 October 2003), Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, para 2.

²⁹ Prosecutor v. Simić, Case No. IT-95-9-A, Appeal Judgment (28 November 2006), Dissenting opinion of Judge Wolfgang Schomburg, para 3.

³⁰ *Ibid.* para 17-20.