Determining Modes of Liability in International Criminal Law: Why the Common Purpose Doctrine is the Strongest Legal Response to Mass Atrocity Crimes

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We know that often holding those who have carried out mass atrocities accountable is at times our best tool to prevent further atrocities.¹

1 Introduction

Determining responsibility for collective criminality is one of the most contentious areas of international criminal law.² The reality of mass atrocities³ makes the task of establishing who is accountable for what especially challenging.⁴ The lack of evidence in circumstances of utter destruction, as is the case in most post-conflict societies, is one of the most paradoxical aspects of international criminal law and adds a unique challenge to international prosecutions.⁵ The evolution of this body of law has accelerated in the last few decades, regrettably as a result of a number of devastating conflicts on continents across the globe. The establishment of the ad-hoc tribunals, including the International

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¹ Samantha Power and David Pressman, "President Obama Directs New Atrocity Prevention Measures" (press release, 6 August 2011).


³ “The terms mass atrocity or mass atrocity crimes are used to refer to genocide, war crimes, ethnic cleansing and crimes against humanity.” For a full description of the etymology of this term see Gareth Evans, The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All (Brooks Institution Press, 1st ed, 2009) Ch 1.


Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”) and the Special Court for Sierra Leone (“SCSL”), amongst others, has resulted in a large volume of jurisprudence concerning modes of liability in international criminal law. Likewise, the formation of the International Criminal Court (“ICC”) has also added to this area of law, albeit through a different doctrinal approach.

The way in which the ad-hoc tribunals and the ICC have approached modes of co-perpetrator liability can be categorised into two diverging normative methodologies. The tribunals, and in particular the ICTY, have focused predominantly on the common purpose/intent theory, applied via the doctrine of joint criminal enterprise (“JCE”). The ICC, which has more limited jurisprudence due to its shorter tenure, has conversely adopted the doctrine of co-perpetration based on the control over crime theory. This article argues that, in the context of international crimes, JCE is the superior mechanism in ascribing criminal liability to perpetrators of mass atrocities. The emphasis this doctrine places on the shared intent of a collective provides a stronger response to the unique complexities of mass atrocity crimes. It enables international law to capture all those responsible for such crimes and not just the direct perpetrators. JCE is also more established in international criminal law than the control theory and is a more developed, and therefore a more useful, theory. Finally, impunity for mass atrocity crimes can no longer be accepted. Whilst some of the more notorious war criminals have been tried and prosecuted for their part in mass atrocity crimes, countless others have escaped justice; a wrong permitted in part by a prohibitively narrow construction of criminal liability in international law.

This article is comprised of three parts: the first part provides a brief summary of how the concept of criminal liability in international law has evolved from the aftermath of World War II to its current state. The second part provides a closer analysis of the ad-hoc tribunals and the ICC and considers some of the case law that has established the respective doctrines in the jurisprudence of these courts. Even the most fervent supporters of JCE cannot

6 The terms common purpose/common intent are often used interchangeably. The remainder of this paper will refer to common purpose.

7 The application of JCE as the doctrinal approach at the ICTY was established in Prosecutor v Tadić (Judgement) (ICTY Appeals Chamber IT-94-I-A, 15 July 1999) (“Tadić Appeal”).

8 The control over crime approach was established in Prosecutor v Thomas Lubanga Dyilo (Judgement) (ICC Trial Chamber I 01/04-01/06-2842, March 2012) (“Lubanga Appeal”).

9 The author in this article refers to the common purpose theory and supports its application via the doctrine of JCE. References to JCE are made on this basis.