Chapter 20

Prosecuting Members of Transnational Terrorist Groups under Article 25 of the Rome Statute: A Network Theory Approach to Accountability

Anna Marie Brennan*

1 Introduction

Since the aftermath of World War II the principle of individual criminal responsibility has challenged and perplexed international courts and tribunals from the International Military Tribunal (IMT) in Nuremberg to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC). Indeed, the IMT in Nuremberg held that international crimes can only be ‘committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’ The Nuremberg Principles formulated by the International Law Commission in 1946 further expanded this central tenet by noting that, ‘complicity in the commission of a crime against peace, a war crime or a crime against humanity … is a crime against international law.’ However, the application of this principle by the ad hoc international criminal tribunals in particular has led to ambiguity on its precise parameters. As noted by Badar, the development of the doctrine of joint criminal enterprise at the ICTY has been nicknamed the ‘Just Convict

* Lecturer in Law at the University of Liverpool, United Kingdom.


3 France et al. v. Goering et al. (1946) 22 IMT 203.

4 Nuremberg Principle vii.

Everyone’ doctrine because all individuals who participated in the commission of the crime were categorised as perpetrators irrespective of the degree of their participation.6 If this is the case is there an on-going requirement in the realm of international criminal justice to develop an alternative mode of responsibility to ensure that international criminal law can be applied to new types of entities? As a counterpart to Badar’s belief in the over-expansive nature of the joint criminal enterprise doctrine, one must highlight the risk that the application of an overly restrictive principle of individual criminal responsibility would limit the extent to which members of network-based transnational terrorist groups could be held accountable for terrorist attacks before the ICC. In any event, the ICC has arguably side-stepped this dilemma by developing the doctrine of co-perpetration which specifies that an individual can be held responsible for a crime if he or she made an essential contribution towards its commission.7 So would the doctrine of co-perpetration provide a more sufficient basis upon which to hold members of transnational terrorist groups accountable, or is the adoption of this mode of responsibility merely a re-labelling of the Joint Criminal Enterprise (JCE) doctrine developed by the ICTY?

Since the ICC has not yet had to examine the application of the Rome Statute to terrorist groups with a network-based organisational structure, the argument I have advanced over the course of this chapter is that due to the limited development of accountability mechanisms before the ICC the


7 Prosecutor v Lubanga, Decision on the Confirmation of Charges, Pre-Trial Chamber ICC-01/04-01/06 (29 January 2007); Prosecutor v. Germain Katanga and Mathieu Ngudjo Chui, Decision on the Confirmation of Charges, Pre-Trial Chamber, ICC-01/04-01/07 (30 September 2008), 525. C Roxin, ‘Crimes as Part of Organized Power Structures’ (translated by B Cooper) (2011) 9 JICJ 193.