IN SEARCH OF ‘JOINT CRIMINAL ENTERPRISE’ IN THE INTERNATIONAL CRIMES
(TRIBUNALS) ACT 1973

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There is a need for a resonance of the doctrine of joint criminal enterprise (hereinafter, JCE) in the International Crimes (Tribunals) Act, 1973. Thus, this paper explores whether or not the 1973 Act accommodates the provision of joint criminal enterprise. There is substantial presence of the basic and systematic forms of JCE in the criminal jurisprudence of Bangladesh. Reasons are three-fold. First, the doctrine of JCE was already a settled principle of criminal liability in the criminal jurisprudence of Bangladesh during 1971; second, this doctrine in the form of common purpose liability was in practice in the post-World War II international tribunals and national courts trying international crimes of similar nature; third, the ICT Act by its very nature, purpose and language, accommodates the principle of JCE.

Keywords: Joint criminal enterprise, International Crimes Tribunal, Bangladesh

1. INTRODUCTION

From being the ‘magic weapon’² of prosecutors to try the accused of international crimes, to the ‘darling of critics’, ‘joint criminal enterprise’

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(hereinafter, JCE) has emerged as one of the most discussed doctrines of international criminal law. The doctrine of JCE has been derived out of individual criminal responsibility, which imposes the criminal liability upon an individual within a joint enterprise that commits crime with a common criminal purpose or common criminal objective. In this regard Kai Ambos observed that, ‘the JCE doctrine serves to impute certain criminal acts or results to persons for their participation in a collective (joint) criminal enterprise’. Thus, joint criminal enterprise is a group of persons that acts towards a common objective with a common plan. This common plan may develop through ‘explicit or tacit’ agreement between the persons. Thus, in this doctrine all those, who knowingly participate in and contribute to the realization of common criminal purpose, where a pre-existing plan to commit core international crimes exists, or where there is evidence that the members of a group are acting with a common criminal purpose, may be held individually criminally responsible. In addition, this doctrine also makes criminally liable such perpetrators of crimes which were intended or committed, but were also a natural and foreseeable consequence of the common purpose or the purpose of the joint enterprise. Therefore, ‘the combined, associated or common criminal purpose of the participants in the enterprise’ is the fundamental principle of JCE.

The doctrine of JCE was raised to prominence though the ICTY Appeal Chamber decision in Prosecutor vs. Tadić. The necessity of this liability doctrine arose due to the very nature of international crimes committed during wartime. Admittedly, international crimes, i.e. war crimes, crimes against

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5 Id.
7 Id.
8 Kia Ambos, 2009, 353, op. cit.
9 International Criminal Tribunal for the Former Yugoslavia.
humanity, crimes against peace, genocide are ‘mass crimes’\textsuperscript{11} committed against ‘large masses of people, often stretched across large geographical areas’\textsuperscript{12} and they are committed in a ‘collective, widespread and systematic context’\textsuperscript{13}. In this regard the \textit{Tadić} Appeal Chamber has rightfully observed that:

\begin{quote}
[m]ost 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\textsuperscript{14}.
\end{quote}

Therefore, if only the physical perpetrators of crime are held liable as principle offender, then the critical role of other co-perpetrators, who were part of the common criminal plan, as well as the moral gravity of their behavior, would be disregarded.\textsuperscript{15} Thus this doctrine of criminal liability\textsuperscript{16} enables bringing to justice those perpetrators of international crimes, who acted at various levels of a common criminal plan and in different capacities, to achieve a final and common criminal design.\textsuperscript{17}

Moreover, wartime international crimes are committed in such an intricate context that it is often not easy to identify the personal contributions of individuals in a collective criminal enterprise.\textsuperscript{18} All participants do not act in the same manner, and instead play different roles in planning, organizing, instigating, coordinating, executing or otherwise contributing to the criminal conduct.\textsuperscript{19} Furthermore the evidence relating to each individual’s conduct may

\textsuperscript{12} \textit{Id.}
\textsuperscript{13} Kia Ambos, 2009, 355, \textit{op. cit.}
\textsuperscript{14} \textit{Prosecutor vs. Dusko Tadic}, July 15, 1999, para. 191, \textit{op. cit.}
\textsuperscript{16} \textit{JCE is not a crime but a form of criminal liability}. See, Amicus Curiae Brief on Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine, in \textit{Co-Prosecutors vs. KAING Guek Eav alias “DUCH”}, Pre-trial Chamber, Extraordinary Chambers in the Courts of Cambodia, 001/18-07-2007-ECCC/OCIJ, October 27, 2008, para. 20.
\textsuperscript{17} Giulia Bigi, 2010, 53, \textit{op. cit.}
\textsuperscript{18} \textit{Co-Prosecutors vs. KAING Guek Eav alias “DUCH”}, October 27, 2008, para. 20, \textit{op. cit.}
prove difficult if not impossible to find. Thus it would be a grave infringement of justice if the perpetrators of collective crimes go unpunished due to the non-availability of evidence surrounding individual participation. It is in this regard that the doctrine of JCE is crucial, because it is one of the most effective tools for convicting individuals of core international crimes where there is no direct evidence of the actual perpetration of the accused regarding the crime in question. Gustafson correctly notes:

[j]oint criminal enterprise doctrine can enhance the truth-telling functions of international criminal law trials by portraying, more accurately than other theories of liability, how crimes are conceived of, planned and executed in a system-criminality context.

However, a question may arise that since there are other modes of criminal liability in international criminal law, i.e. aiding-abetting, which imposes liability on other indirect actors of crimes, then the need for JCE? This query calls for a brief comparison between JCE and aiding-abetting. Aiding and abetting is different from JCE, in the sense that the former ‘requires contribution with substantial effect on the participation of the crime, whereas the latter simply requires acts to the furtherance of the common plan’.

Further, the mens rea of the former demands knowledge that the acts performed assisted in the commission of the crime, while the latter demands intent to pursue the common purpose or such intent plus foresight that crimes outside the common purpose are likely to be committed. Thus, it is evident that with the requirement of substantial contribution to the commission of crimes, aiding and abetting results in a lesser degree of culpability compared to commission through JCE. A distinction between conspiracy and JCE is also essential in order to clear the confusion between these two doctrines. Although there are similarities between these two doctrines, JCE is distinct and very different. In this respect, David Hunt affirmed:

20 Id.
23 Co-Prosecutors vs. KAING Guek Eav alias “DUCH”, October 27, 2008, para. 28, op. cit.
24 Id.
25 Id.
Conspiracy is not a mode of individual criminal responsibility for the commission of a crime. Conspiracy is itself a crime, which is complete once the agreement between the conspirators has been reached. … On the other hand, joint criminal enterprise is available as one mode of individual criminal responsibility by which a crime may be committed, but only where the agreed (or contemplated) crime has been in fact committed.27

Now, keeping in mind the abovementioned qualities of JCE, this paper would like to search for a resonance of the doctrine of JCE in the International Crimes (Tribunals) Act, 1973. The ICT Act was adopted by the Parliament of Bangladesh to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law.28 Although, this Act deals with international crimes, the tribunal(s) it constitutes is not international. It is purely a national legislation to try crimes of international nature committed within the territory of Bangladesh and thus the tribunal(s) constituted under it is also domestic.29 However, an interesting trait of this Act can be traced from the parliamentary debates on International Crimes (Tribunals) Bill in 1973, where it is stated that all the principles of international law and known norms of justice, existing till 1973, have been incorporated into it.30 Here, it is important to note that this incorporation of principles of international law, does not affect the domestic nature of the tribunal, rather after passing of the Bill, those principles became part of the Bangladeshi national law.

Thus, this paper argues that the doctrine of JCE does indeed have scope in the ICT Act. The reason behind this is three-fold: first of all, the doctrine of JCE was already a settled principle of criminal liability in the criminal jurisprudence of Bangladesh during 1971; secondly, this doctrine in the form of common purpose liability was in practice in the post-World War II international tribunals and national courts trying international crimes of similar nature; third, the ICT Act by its very nature, purpose and language, accommodates the principle of JCE. By determining the extent of the three

forms of JCE, i.e. basic, systematic and extended,\textsuperscript{31} this paper will determine which form of JCE the ICT Act accommodates.

2. **A Brief Synopsis of the Doctrine of Joint Criminal Enterprise**

In order to get a brief idea on the origins of JCE, the paper relies on the ICTY and post ICTY case laws. Although the principle of JCE originated in the post-World War II legislations and case laws under the heads of other names\textsuperscript{32}, it primarily came under scrutiny through the case of Dusko Tadić in the ICTY. As noted by the Trial Chamber in *Prosecutor vs. Radoslav Brdanin & Momir Talic*, the Appeals Chamber’s decision in *Prosecutor vs. Dusko Tadić*\textsuperscript{33} is the first contemporary recognition of the doctrine.\textsuperscript{34} Here it is worthy of noting that the phrases ‘joint criminal enterprise’ or ‘common criminal purpose’ or ‘common criminal plan’ are not explicitly mentioned in the *Statute of the International Criminal Tribunal for the Former Yugoslavia*. The Appeals Chamber defined ‘committed’\textsuperscript{35} to encompass not only those who physically participated in the commission of the crimes but also those who contributed to the crime’s commission in execution of a common criminal purpose or joint criminal enterprise.\textsuperscript{36} It came to this observation on the basis of ‘teleological interpretation’\textsuperscript{37} of Article 7(1)\textsuperscript{38}, which considered the intention to cover all those responsible for international crimes in the Former Yugoslavia.\textsuperscript{39} However, this interpretation of Tadić Appeals Chamber


\textsuperscript{32} Common criminal purpose, common criminal plan, common design or purpose, common criminal design, common purpose, common design or common concerted design.

\textsuperscript{33} *Prosecutor vs. Dusko Tadic*, July 15, 1999, para. 191, op. cit.

\textsuperscript{34} *Prosecutor vs. Radoslav Brdanin & Momir Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Trial Chamber II, International Criminal Tribunal for the Former Yugoslavia, IT-99-36/1, June 26, 2001, para. 36.

\textsuperscript{35} This word was taken from Article 7 (1) of the ICTY Statute.


\textsuperscript{37} It is a method of interpretation, which looks at the values and purpose of the legislation that are implicit in the text.

\textsuperscript{38} 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.

\textsuperscript{39} André Klip and Göran Sluiter, eds., 2005, 368, op. cit.
was subsequently affirmed in other trials of the ICTY as well as the ICTR\textsuperscript{40} and, the SCSL\textsuperscript{41}.

Antonio Cassese identified that the doctrine of JCE can take three different forms\textsuperscript{42}: basic (JCE I), systematic (JCE II) and extended (JCE III). First, the basic mode of liability arises when all participants shared the common intent to the concerned crime although only some of them may have physically perpetrated the crime.\textsuperscript{43} It is a responsibility for acts agreed upon when making the common criminal plan or purpose.\textsuperscript{44} Second, the systematic mode of liability is concerned with crimes committed by members of military or administrative units on the basis of common criminal plan or purpose, for instance crimes implemented in concentration camps or detention centers.\textsuperscript{45} And third, the extended mode of liability arises where some extra crimes have been committed beyond the common plan or purpose, but the extra criminal act was nonetheless a natural and foreseeable consequence to the perpetrator of the common plan.\textsuperscript{46} In the above three forms of JCE the standard of \textit{actus reus} or subjective element is similar: a) plurality of persons; b) the existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the statute; and c) participation of the accused in the common design.\textsuperscript{47}

This ‘plurality of persons’ does not need to be an organized group of individuals. Thus, the plurality of persons element is satisfied when the prosecution proves that the group ‘included the leaders of political bodies, the army, and the police who held power (in a given area)’ without showing that persons in these disparate groups were acting together in an organized fashion.\textsuperscript{48} Moreover, for the existence of a common plan or purpose, there is no necessity for the plan to have been arranged or formulated previously. It satisfies the requirements of subjective elements, if the plan is formulated extemporaneously.\textsuperscript{49} However, the condition of common criminal purpose is not satisfied, if alleged JCE members committed crimes for reasons of personal revenge, rather than to effectuate a criminal purpose shared with others, even

\textsuperscript{40}International Criminal Tribunal for Rwanda.
\textsuperscript{41}The Special Court of Sierra Leone.
\textsuperscript{42}Antonio Cassese, 2007, 111, \textit{op. cit.}
\textsuperscript{43}\textit{Id.}
\textsuperscript{44}\textit{Id.}
\textsuperscript{45}Kai Ambos, 2009, 160, \textit{op. cit.}
\textsuperscript{46}\textit{Id.}
\textsuperscript{49}\textit{Prosecutor vs. Dusko Tadic}, July 15, 1999, para. 227, \textit{op. cit.}
when these crimes are committed systematically. Furthermore, the ‘participation’ requirement does not indicate physical participation, rather it implies assistance in, or contribution to, the executions of the common plan or purpose. And this participation has to be voluntary. Consequent to this observation, later case laws have increased the level of participation by introducing the ‘significant’ factor to it. In a case, the Appeal Chamber of the ICTY observed that, ‘the act in furtherance must be significant’. And in order to be significant participation the accused must be, ‘a cog in the wheel of events leading up to the result which in fact occurred’.

Although, in terms of subjective elements there is no significant difference between these three forms of JCE, they vary from each other through mens rea or objective elements. For JCE I, the mens rea simply requires that the perpetrator acted with the intent to perpetrate a certain crime. Here, ‘intent to perpetrate’ implies common shared intent of the members of the enterprise. Whereas, the requisite mens rea for JCE II is two fold: a) personal knowledge of the system of ill treatment; and b) the intent to further this common concerned system of ill treatment. Here it is worthy of noting that, since JCE II involves a large number of people in an organized system, the means rea must be assessed in relation to the knowledge of a particular accused. Now, being completely distinctive in terms of mens rea, JCE III requires following of two steps to achieve its objective element. First, the accused must have the intention to participate in and contribute to the common criminal purpose; and second, the accused must also know that a crime may be perpetrated by a member of the group and willingly join or continue to participate in the enterprise knowing that the crime might occur.

52 Prosecutor vs. Miroslav Kvoka et al., Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, IT-98-30/1-T, Judgment, November 2, 2001, para. 309.
55 Id.
57 Ibid., para. 8. Due to this extended nature of JCE III in terms of mens rea, it has been a target of critics from the very beginning. However, discussion on this criticism would be reserved for another paper.
3. SEEKING THE DOCTRINE IN THE CRIMINAL JURISPRUDENCE OF BANGLADESH

To accommodate any criminal legal doctrine in a national law, before exploring it in the international criminal law, it is of prime importance to find its presence in that nation’s criminal jurisprudence. The reason behind this is a person cannot be made criminally liable for an act that was not punishable during the occurrence of that particular act, which is the underlying notion of principle of legality. This is also one of the fundamental rights under the Constitution of Bangladesh, which states that, ‘No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence …’\(^{58}\). Hence, if the criminal jurisprudence, that are applicable in Bangladesh, did not have a consistent practice of the doctrine of joint criminal enterprise, then JCE could not have been incorporated in any national laws of the country. Moreover, the doctrine of JCE also has to be recognized in the national laws of Bangladesh, so that the doctrine is ‘foreseeable and accessible to the accused’.\(^{59}\) Therefore, it is crucial to explore the doctrine of JCE in the criminal jurisprudence of Bangladesh that existed until 1971.\(^{60}\)

The criminal jurisprudence of the area surrounding Bangladesh is enshrined in the *Penal Code 1860*. And Section 34 of this *Penal Code* provides the principle of joint liability for doing a criminal act.\(^{61}\) The section asserts that, ‘When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone’. This provision does not create a separate crime; rather it merely enunciates a principle of joint liability for criminal offence.\(^{62}\) Moreover, this liability under section 34 consists of three elements: i) a criminal act has been done by several persons, ii) all the participants intended that the criminal act should be done and iii) the criminal act has been done in furtherance of common intention shared by all of the offenders.\(^{63}\)

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\(^{58}\) Article 35(1), Constitution of the Peoples’ Republic of Bangladesh, 1972.


\(^{60}\) Here the criminal jurisprudence of Bangladesh includes reported cases of *Penal Code 1860*. The year 1860 suggests that the criminal law of the Indian subcontinent was governed by the Penal Code. Therefore, whatever development JCE has undergone in this region came about through reported cases under this law.


\(^{63}\) *Id*; AIR 1965 SC 257.
Therefore what is required is a plurality of persons all having a common intention. Here common intention means, ‘a pre-arranged plan and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan’.64 The basis of common intention is prior concert or pre-arranged plan.65 Thus, when there is an intention to commit a crime that has been actually committed, each accused would be convicted if he shared that common intention. However, it does not always need to be formulated before the commencement of the crime; it may develop at the scene of the crime spontaneously.66 Nonetheless, it has to be inferred from the conduct of the accused and circumstances of the case.67

Furthermore, besides sharing common intention, the most crucial test of applicability of this principle of joint liability under section 34 is the phrase ‘in furtherance of common intention’. In the case of Mahbub Shah68 Privy Council observed that:

… [t]o convict an accused person applying section 34 of the Penal Code it must be proved that a criminal act was done in concert pursuant to the pre-arranged plan and that there should be direct evidence to prove common intention or there must be material to infer from the relevant circumstances that there was such common intention.69

Another primary element of this joint liability is, ‘all accused must participate in the act in some way or other’.70 It means that, everyone sharing the common intention has to do something to fulfill the common criminal plan. This section applies to cases where several persons both intend to do and actually do an act.71 Thus, to be held liable under this section, the accused has to participate significantly in the commission of the crime. This significant participation does not mean that the accused has to do the ultimate crime. The criminal act can be done by any one of the participants. In this regard M. Ansar Uddin Sikder opined, ‘criminal sharing, over or covert by active presence or by distant direction, making out a certain measure of jointness in

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64 AIR 1945 PC 118.
67 Id.
68 49 CWEN (PC) 678
69 Id. See Kabul vs. The State, 40 DLR 216.
70 AIR 1956 All 245.
71 AIR 1949 All 211, 1954 CrLJ 752; 1966 CrLJ 727.
the commission of the act is the essence of section 34’. Therefore, from these above discussions it becomes apparent that the rationale of joint criminal enterprise in its basic form is firmly established in the criminal jurisprudence of Bangladesh till 1971.

However, it may be questioned that since the provision of joint liability already exists in the Penal Code 1860, thus does its application becomes restricted in the International Crimes (Tribunals) Act, 1973 under Article 35 (1) of the Constitution of Bangladesh? In this regard reference can be sought from the Bangladesh vs. Sk. Hasina Wazed case where it was observed that, ‘Where no new offence on past conduct is created … Article 35(1) is not attracted merely because a new forum for trial of an existing offence is created’. Therefore, the principle of joint liability can be applicable in the ICT Act, 1973 since it exists in the criminal jurisprudence of Bangladesh and its application is not restricted by the prohibition against ex post facto law enshrined in Article 35(1) of the Constitution.

4. SEEKING THE DOCTRINE IN THE PRACTICES OF INTERNATIONAL CRIMINAL LAW TILL 1971

In order to find the legal foundations of JCE in the arena of international criminal law prevailing in 1971, it is essential to look through the post–World War II legislations and cases. According to Ciara Damgaard, ‘the origin of JCE doctrine can be found in the events surrounding the end of World War II’. Moreover, the doctrine had been given ‘customary international law’ status in the Tadić case and later on in many other cases under international ad-hoc tribunals and courts. In fact it is said that the three kinds of JCE are

72 M. Ansar Uddin Sikder, 2000, 12, op. cit.
74 Id.
76 Prosecutor vs. Dusko Tadic, July 15, 1999, para. 220, op. cit.; See also The Prosecutor v. Milan Martic, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, IT-95-11-A, October 8, 2008, para. 80-81; The Prosecutor v. Emmanuel Rukundo, Trial Chamber, International Criminal Tribunal for Rwanda, ICTR-2001-70-T, February 27, 2009, para. 23; Prosecutor v Milutinovic, Sainovic and Ojdanic, Decision on Dragoljub Ojdanic Motion Challenging Jurisdiction – Joint Criminal Enterprise, Trial Chamber, International Criminal tribunal for the Former Yugoslavia, IT-99- 37-AR72, May 21, 2003, para 26. Since then other ad-hoc tribunals, i.e. ICTR, SCSL, Special Panel for Serious Crimes of East Timor, Iraqi High Tribunal have adopted this observation with out any further examination. However, The Extraordinary Chambers in the Courts of Cambodia is in one hand affirmative
also well settled in customary international law.\textsuperscript{77} However, the customary status of this doctrine is not the concern of this paper and neither would it pursue on the much-debated topic of whether or not JCE exists in customary international law. Rather this section of this paper intends to look into the practices of international courts and tribunals that deal with similar international crimes to observe whether they have applied the doctrine of JCE or not.

The notion of JCE can be traced back from international legal instruments and international, national judicial decisions from the post-World War II period.\textsuperscript{78} The conception of this doctrine can be found in three major post-World War II instruments: The Charter of the International Military Tribunal at Nuremberg, 1945 (IMT); Control Council. Law No. 10, 1945; Charter of the International Military Tribunal for the Far East, 1946. Article 6 of the Nuremberg Charter asserts that:

\begin{quote}
[\textit{t}hose who participated in the formulation of a Common Plan or Conspiracy to commit crimes against peace, war crimes, or crimes against humanity are responsible for all acts performed by any persons in the execution of such plan.]
\end{quote}

In the same way Article II (2) of Control Council. Law No. 10 provides: ‘Any person … is deemed to have committed a crime … if he was connected with plans or enterprises involving its commission’. The Tokyo Charter also held a similar view regarding criminalization based on common plan or purpose.\textsuperscript{79} Therefore, two scopes of liabilities can be identified from these provisions: i) responsibilities for participating in a criminal plan, whether or not executed and ii) criminal liability for acts committed by any other participants in the execution of the criminal plan.\textsuperscript{80} Thus the Trial Chamber of \textit{Kupreškić}\textsuperscript{81} observed that, the four Occupying Powers around 1945 adopted similar legislative instruments to try international crimes. It reflects intentions of the great powers of the world on the law applicable to international crimes, which

\begin{flushleft}
\textsuperscript{77} Ieng Sary Case, Co-Prosecutors’ Supplementary Observations on Joint Criminal Enterprise, 002/19-09-2007-ECCC/OCIJ, December 31, 2008, para. 9.
\textsuperscript{80} Article 5, Charter of the International Military Tribunal for the Far East, 1946.
\textsuperscript{81} Prosecutor vs. KAING Guek Eav alias “DUCH”, October 27, 2008, para. 37, \textit{op. cit.}
\end{flushleft}
signifies the fact that during that time states of the world wanted to apply this notion of JCE in trials of crimes of international nature.

Now, the paper will be looking at the applications of three forms of JCE in Nuremberg, Tokyo and other national case laws through their *factual matrix and judicial dictum*. In the cases referred below, this paper will be demonstrating the basic form of JCE, where several persons share a common criminal intent and in execution of that common plan crimes are committed irrespective of the fact that not all of them were physical perpetrators of the crimes. Existence of JCE can be found in the *Almelo* case. In this case three Germans were convicted for murder of a British pilot and a Dutch civilian. In the British Military Court it was observed that:

If people were all present together at the same time, taking part in a common enterprise which was unlawful, each one in their own way assisting the common purpose of all, they were all equally guilty in law.

After some time, during 1946 the application of common purpose doctrine was again seen in the *Hoelzer* case, where Germans were convicted for executing a Canadian prisoner of war without trial. In this case the Judge Advocate observed that:

> [t]he accused knew the purpose was to kill this airman, then, as the Court is well aware, persons together taking part in a common enterprise which is unlawful, each in their own way assisting the common purpose of all, then they are all equally guilty in point of law.

From this observation, a rationale of JCE can be derived: when several person take part in a common criminal plan of an enterprise, then it is not necessary for each of them to take part in every step of the commencement of the crime, rather they may do different things to execute the ultimate purpose and still be equally liable for the crime committed. On the same year in the *Jepsen* case, the Judge Advocate of British Military Court convicted accused on the same principle of common purpose, by observing that:

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84 Ibid., pp. 35, 43.
85 Ibid., 43.
86 *Hoelzer et al.*, Canadian Military Court, Aurich, Germany, March 25 - April 6, 1946, Record of Proceedings, Vol. I.
87 Ibid., pp. 341, 347, 349.
88 Id.
If Jepsen actively associated himself with and assisted the other guards in a wholesale slaughter, the act of every one of those persons became the act of all. There, the charged act was part of the common plan and Jepsen had played a direct role.\(^9\)

The rationale derived from this case is: the common plan can be formulated at any time extemporaneously; it does not need to be formulated before commencement of the crime.

Subsequently, this doctrine of common purpose was further enforced in *Trial of Franz Schonfeld and Other*\(^9\). Moreover, in *Feurstein and Others (Ponzano case)*, the level of participation by the accused of JCE was addressed. In that case the Judge Advocate observed that:

> A person can be concerned in the commission of a criminal offence, who, without being present at the place where the offence was committed, took such a part in the preparation for this offence as to further its object; in other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means.\(^1\)

Therefore, the resulting interpretation from this observation is, to be a participant of JCE, the act of the accused has to be significant, which will help to obtain the ultimate purpose of the common plan. In the same case the requirement of ‘guilty knowledge’ for JCE I, was pointed out\(^2\), which demonstrated that when the accused of JCE takes part in a common enterprise, he must know the intended purpose of it.\(^3\) Moreover, in the *Einsatzgruppen* case\(^4\), under the *Control Council. Law No. 10*, the Prosecution submitted that the provision of common purpose under Article II (2) is consistent with ‘recognized principles common to all civilized legal system’ and the

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\(^9\) *Trial of Gustav Alred Jepsen and others*, British Military Court, Proceedings of War Crimes Trials held at Luneberg, Germany, August 13-24, 1946.

\(^9\) *Trial of Franz Schonfeld and others*, British Military Court, June 26, 1946, UNWCC, Vol. XI.


\(^9\) Ibid., pp. 239, 240.


participants of common criminal plan are all equally responsible for the crime as principal.\footnote{Ibid., pp. 369, 372.} In consideration of this argument the tribunal found the accused guilty.\footnote{Ibid., pp. 411, 578, 584.}

Now the systematic form of JCE, which will be assessed through cases on concentration or detention camps. This form of JCE requires a systematic structure where the common plan is executed at different levels of the system. In this regard the first case is Belsen case\footnote{Trial of Josef Kramer and 44 Others (The Belsen Trial), British Military Court, Luneberg, Case No. 10, September 17 – November 17, 1945, in United National War Crimes Commission, Law Reports of trials of War Criminals, Vol. II, 1947, 1.} where the requirements for JCE II were chalked out: i) knowledge by the accused that a system of ill treatment is in force and ii) he participated in the course of conduct to further the system of ill treatment.\footnote{Ibid., pp. 120-121.} Similarly in the Dachau Concentration Camp\footnote{The Trial of Martin Gottfried Weiss and thirty-nine others (The Dachau Concentration Camp Trial), General Military Government Court of the United States Zone, December 13, 1945, UNWCC, Vol. XI.} and Mauthausen Concentration Camp\footnote{Mauthausen Concentration Camp case, General Military Government Court of the U.S. Zone, Dachau, Germany, March 29 – May 13, 1946, in The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Vol. XI, 15.} cases, the Trial Chambers found the accused guilty for their participation in a system of ill treatment with knowledge of the criminality of the system and their acts in furtherance of that common plan of ill treatment.

At this instant, the paper will explore the application of JCE III in international courts and tribunals till 1971. This extended form of JCE deals with foreseeable crimes that occur in furtherance of a common criminal plan, which is outside the scope of that common plan but was a reasonable and foreseeable consequence of that plan, and the accused had nonetheless taken the risk of executing that common plan. In this regard reference can be drawn from the Essen Lynching case\footnote{Trial of Erich Heyer and Six Others, British Military Court for the Trial of War Criminals, Essen, Case No. 8, December 18-19 and 21-22, 1945, in The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Vol. I, 1947, 88.}, where seven Germans were convicted of murder of three British prisoners of war.\footnote{Ibid., pp. 88-89.} Here the Captain loudly ordered his subordinates to escort the POWs and not to do anything if the mob tried to molest them. Consequent to this instigation the mob subsequently killed them out of extreme molestation. Thus the Captain was found guilty because he knowingly took the risk that such instigation might cause the death of those POWs.\footnote{Id.} Also in Borkum Island case\footnote{Borkum Island case, See Prosecutor vs. Dusko Tadic, July 15, 1999, para 210-213, op. cit.} US Military Court convicted the
Mayor of Borkum and some German men for assaulting and killing of seven U.S. men.\textsuperscript{105}

The principles of JCE III have also been drawn from some cases under Italian Courts established after World War II for trials of war criminals.\textsuperscript{106} It is important to note that, Italy took a similar approach like Nuremberg to try their accused. In \textit{D’Ottavio and Others},\textsuperscript{107} the Italian Court of Cassation opined that:

\begin{quote}
[f]or a participant to be held liable for crimes other than the one intended, there had to be a causation nexus—which is not only objective but also psychological—between the fact committed and willed by all participants and the different fact committed by one of the participants.\textsuperscript{108}
\end{quote}

In this way, the court has upheld the main rationale of JCE III, which is: ‘cause of a cause, is also the cause of the thing caused’\textsuperscript{109}, i.e. whenever a crime outside the scope of a planned crime happens, then whoever knowingly took the risk of committing the latter crime will be responsible for the former crime, whether or not he intended to commit the crime. However, these instances of vague application of the extended version of JCE do not prove its existence in the post-World War II jurisprudence. This is because there is no indication in these cases that the prosecutor relied on the concept of common design or common purpose.\textsuperscript{110} Moreover, in international criminal jurisprudence, the extended version of JCE is a much-debated topic as it contradicts with several basic principles of justice.

Its extended nature is also a reason of fear that the theory of JCE III could be used to criminate those individuals who should not be held responsible under widely accepted limits of criminal law.\textsuperscript{111} This is because its wide limit would take it to a point where mere membership in a group or association would become a criminal activity. In this regard Professor Harmen van der Wilt has a different way of thinking. According to him, instead of moulding...

\begin{footnotesize}
\textsuperscript{105} Luke Marsh, and Micheal Ramsden, 2011, 149, \textit{op. cit.}
\textsuperscript{106} \textit{Co-Prosecutors vs. KAING Guek Eav alias “DUCH”}, 2008, para. 53, \textit{op. cit.}
\textsuperscript{108} \textit{Ibid.}, 232-233; similar approach of convicting criminals based on this extended responsibility was taken in other Italian cases. See \textit{Aratano and Others case}, \textit{Berardi case}, and \textit{Mannelli and Others case} in the Italian Court of Cassation
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} Luke Marsh and Micheal Ramsden, 2011, 149, \textit{op. cit.}
\end{footnotesize}
the legal concept of JCE III to go along with the principles of justice, we should realize some better responsibility theory to tackle state bureaucracy and large organizations that engage in international crimes.\textsuperscript{112}

Therefore, it is evident that in post-World War II era the basic and systematic JCE had strong existence, on the other hand extended form of JCE’s existence is questionable. Here it is essential to note that the ICT Act 1973 is in line with those legal instruments, which were associated with post-World War II cases, since the said Act followed the principles of Nuremberg, Yamashita and Tokyo trials. Thus, as international crimes were integrally related to all these legal instruments, there would be no harm to apply the uncontroversial notion of JCE, developed till 1971, in the ICT Act 1973.

5. **EXPLORING APPLICABILITY OF THE DOCTRINE IN THE INTERNATIONAL CRIMES (TRIBUNALS) ACT 1973**

The purpose, objective and language of the *International Crimes (Tribunals) Act*, 1973 has to be explored exhaustively to unearth the possibility of accommodating joint criminal enterprise in the Act. This Act of 1973 was an initiative of the Government of Bangladesh to prosecute heinous crimes committed during the 1971 Liberation War. It was a first of its kind, where the Parliament of Bangladesh enacted a domestic law by incorporating international crimes and norms of international justice.\textsuperscript{113} In addition to that, the principles enumerated in Nuremberg, Tokyo and Yamachita trials were also followed.\textsuperscript{114} As a result, the norms, principles and practices of those tribunals can be accommodated in the ICT Act. Moreover, the basic principle of JCE is also an established practice under the name of joint liability in the criminal jurisprudence of Bangladesh till 1971. Thus, the notion of JCE has scope in the ICT Act, because it was an established principle of criminal liability, under the criminal jurisprudence of Bangladesh, and in the international courts and tribunals dealing with crimes of similar nature during 1971.

Moreover, for the purpose of exploring the scope of JCE in this Act, the extent of criminal responsibility for individuals has to be determined. The preamble to the Act provides its scope regarding criminal accountability by enumerating that; the persons responsible for ‘genocide, war crimes, crimes against humanity, and other crimes under international law’ would be


\textsuperscript{113} Mr. Serajul Huq in Parliamentary Debates, op. cit.

\textsuperscript{114} Id.
detained, prosecuted and punished.\textsuperscript{115} Here by only mentioning ‘persons’ the scope of this Act is kept broad. Further, section 3 (1) of the ICT Act elaborates the types of persons on whom the tribunal will have jurisdiction. The section provides that:

A Tribunal shall have power to try and punish any individual or group of individuals, or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section 2.\textsuperscript{116}

Here by the phrase ‘any individual or group of individuals’ the Act gets the opportunity to try every person responsible behind committing a crime, including those who did not participate in physical perpetration of a crime. And by stating ‘any member of armed, defence or auxiliary forces’, it also suggests its jurisdiction upon those who belongs to a systematic organized group. It is important to note here that, this systematic organized group is crucial for systematic JCE.\textsuperscript{117} Thus, this provision provides for individual criminal responsibility on all those persons who are responsible in some way or other for committing a crime under this Act.

Furthermore, section 3 (1) of the Act also enumerates the level of participation of the concerned persons to be tried by the Tribunal(s), using the phrase ‘commits or has committed’. Here the paper argues that by this mentioned phrase, the ICT Act not only covers physical perpetration but also covers other types of perpetration of crimes committed in realization of common purpose or common plan. The paper finds support for this contention from reading section 3(1) along with section 3(2). This is because; ‘planning, preparation, initiation or waging of a war of aggression’ in violation of international laws is a crime;\textsuperscript{118} and the ‘attempt, abetment or conspiracy to commit any crime’ is also a crime,\textsuperscript{119} under this said Act. Thus, it is apparent from the language of section 3 (1) as well from the definition of crimes given in section 3 (2) that the phrase ‘commits or has committed’ does not only mean those individuals who are direct perpetrators of crimes but also means those who are parties to a common criminal plan and had taken substantial part in furtherance of that common intention.

\textsuperscript{115} Preamble to the International Crimes (Tribunals) Act, 1973.
\textsuperscript{116} Section 3 (1), International Crimes (Tribunals) Act, 1973.
\textsuperscript{117} This is because, for being liable under systematic JCE, the accused has to be a participant of a system of ill treatment, i.e. concentration camp or detention camp, which usually belongs under organized military or auxiliary group.
\textsuperscript{118} Section 3 (2) (b), International Crimes (Tribunals) Act, 1973.
\textsuperscript{119} Ibid., section 3 (2) (g).
This paper attained additional hold on the abovementioned submission in the purpose and object of the concerned Act. In the Parliamentary Debate on *International Crimes (Tribunals) Bill*, 1973, Mr. Serajul Huq stated that, this law ‘is for clearing the conscience of humanity at large’.\(^{120}\) He further stated that, ‘the *Summum Bonum* of this law is justice for all and at all cost’.\(^{121}\) Therefore, the purpose of this Act is to try all those responsible persons behind committing those grievous crimes, either directly or indirectly. This purpose was also upheld through the speech given by Sri Monoronjon Dhor\(^{122}\) in the Parliamentary Debate, where he stated that:

> Those who have attacked humanity, human civilization, human peace and tranquility, world peace, what we understand as our values and principles of humanity, and those who have campaigned against religious faith are enemies of human civilization and will be tried under this Act.\(^{123}\)

Therefore, from these above statements, it become clear that this Act has jurisdiction to try all those persons who participated in the commission of serious crimes under international law, irrespective of their level of participation.

Now, by referring to the Parliamentary Debates a controversy regarding the scope of the Act has been created, where it is contended that the Act was made only for the purpose of trying 195 war criminals that were prisoners of war, but not to try any citizens of Bangladesh. In order to get a clear view on the extent of the Act in concern, this controversy needs to be addressed. This paper does not contend that, the trial of 195 persons was not the concern of the Act. Rather it asserts the fact that, although the trials of those 195 persons under this Act is mentioned in the Parliamentary Debates,\(^{124}\) these trials were not the only purpose of the Act and the purpose of the Act has been kept open to try everyone including those who are citizens of Bangladesh. This was confirmed in Mr. Serajul Huq’s speech:

> We have tried to make this law not only for those 195 persons who are prisoners of war, but also for our own armed forces

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\(^{120}\) Mr. Serajul Huq in Parliamentary Debates, *op. cit.*

\(^{121}\) *Ibid.*, 2357.

\(^{122}\) The Minister of Law, Justice and Parliamentary Affairs during 1973.

\(^{123}\) Sri Monoronjon Dhor in Parliamentary Debates on *International Crimes (Tribunals)* Bill, 1973, Vol. 2, No. 37, 2359; Translated by the Author for the purpose of this paper.

\(^{124}\) Mr. Serajul Huq in Parliamentary Debates, 2356, *op. cit.*
and our own people, having regard to the principles of Geneva Convention. …

Therefore, the argument that this law is only for those 195 Pakistani prisoners of war and not for any Bangladeshi nationals is unsubstantiated. Moreover, in the Parliamentary Debates during 1973 it was called upon several times to add the types of persons specifically, on whom the tribunal(s) would have jurisdiction, in section 3 (1) of the Act. But this specification was never incorporated into the Act. Thus its limit was kept as wide as possible allowing for it try personalities beyond the 195 POWs, such as the collaborators of Pakistan Army, who were Bangladeshi nationals. This purpose can be understood form the language of the said section, which used the phrase ‘irrespective of his nationality’. These words do not exclude those who are nationals of Bangladesh, but they include those as well who are not nationals of this country. Therefore, it can be safely contended that this Act has jurisdiction over collaborators of Pakistan Army during 1971, who are nationals of Bangladesh.

Now after specifying the purpose of the Act, this paper would go back to the language of section 4. The scope of the doctrine of JCE is further supported by section 4 (1) of the ICT Act, which enunciates that, ‘When any crime as specified in section 3 is committed by several persons, each of such person is liable for that crime on the same manner as if it were done by him alone’. Thus by this provision the ICT Act asserts the principle of joint liability for committing a crime. Therefore, the principles of basic form of JCE can be safely accommodated in the ICT Act. Here it is important to note that, as systematic form of JCE is not explicitly present in the criminal jurisprudence of Bangladesh, the paper does not confirm its accommodation in the Act, because of the distinct nature of international crimes and its presence in dealing with similar crimes in post-World War II international courts and tribunals. Systematic form of JCE requires an organized system of ill treatment, which is a rare scenario in national crimes. On the other hand, this organized system of ill treatment is not at all rare in times of war, and it exists in concentration camps and detention camps.

6. CONCLUSION

This paper has showed the resonance and scope of the doctrine of joint criminal enterprise in the International Crimes (Tribunals) Act, 1973. The Act

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125 Mr. Serajul Huq in Parliamentary Debates, op. cit.
126 These kinds of detention camps were present during 1971 war, where Bangladeshi armed forces, who were injured or prisoners, were kept. Women and suspected persons were also kept in camps of enemy force.
accommodates this doctrine through its very purpose and language. In the process of searching for its scope, the paper found that the doctrine in the form of common intention liability was present before 1971 in the territory that we now call Bangladesh demonstrating the existence of JCE in the criminal jurisprudence of Bangladesh. Further, the paper showed that the notion of JCE under the heads of common purpose liability or common criminal plan or common design in its basic and systematic form was firmly practiced by the international tribunals and courts as well as some national courts trying international crimes in the post-World War II period. However, some vague applications of extended form of JCE were found in some post-World War II cases, but they did not suggest a contentious practice. Thus this paper does not advocate accommodation of extended form of JCE in the ICT Act.

As a result of these observations, this paper submits that the principle of JCE is in line with the ‘principle of legality’, because it existed at the time when the crimes were committed in 1971. This criminal liability was also foreseeable to the accused\textsuperscript{127}, since it existed in the criminal jurisprudence, which established the criminal law of Bangladesh, during 1971. Here also this paper did not find any resonance of extended JCE in the national jurisprudence of Bangladesh. Although, systematic form of JCE could not be found as well, the paper argues that this form of JCE requires the situation of war, which cannot exist in national law. But the ICT Act, 1973 has room for systematic JCE, thus the paper affirms its accommodation as well in the Act besides basic form of JCE.

The Bangladesh justice system, after a long 40 years of Independence, is on the verge of trying persons alleged to have committed core international crimes during 1971. The whole nation that wants justice for those brutal crimes is looking towards the Tribunals, and to be specific, to the Office of the Chief Prosecutor. The application of this doctrine of JCE would definitely facilitate the justice process that is going on under the ICT Act, 1973. By imposing equal liability on perpetrators of crimes who did not participate physically, but who facilitated substantially to the commission of crime, the doctrine would be applicable to all crimes committed during 1971 making it ideal to address the mass crimes committed during the war.

The International Crimes Tribunals of Bangladesh constituted under the concerned Act are purely domestic in nature. They are not bound by the international norms and standards, unless some resemblance is found between the national and international norms and practices. However, this paper is not trying to impose any international standard of criminal liability, which is alien to the criminal jurisprudence of Bangladesh; rather it has traced the existence of this doctrine in the legal system of Bangladesh. Therefore, it is the

\textsuperscript{127} Which is a pre-requisite to establish principle of legality.
prerogative of the tribunal(s), to be specific the judges of the tribunal to apply it in such way so that the doctrine of joint criminal enterprise retains its national essence.