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OVERVIEW

The Journal of International Criminal Law (*JICL*) is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and publication;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law, but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;
- historical accounts that address the international, regional, and national levels; and



- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.

The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about "ecocide" is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, *e.g.*, political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, *e.g.*, the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

Prosecution of Suspects of Atrocity Crimes Committed During the Liberation War of Bangladesh Through the “Functional Participation” Theory Derived from the *Demjanjuk* Case in Munich

by Md Mustakimur Rahman*

ABSTRACT: Collecting primary evidence for investigations can be challenging due to a significant time gap between crimes and investigations, leading to lost, destroyed, or unreliable evidence. As a result, establishing guilts of individuals for primary or direct liability can be challenging, especially if they are low-level offenders, as prosecutors may need direct and primary evidence to prove *actus reus* and *mens rea*. However, having direct or primary evidence to prove secondary liability or guilt for indirectly committing crimes may not always be necessary. This is because some liabilities, such as accessories or aiding and abetting, may not be directly connected to the actual commission of crimes; thus, indirect evidence, such as documentary or expert evidence, may be sufficient to prove guilts. For example, in Germany, John Demjanjuk was convicted of remote atrocity crimes based on an identification card indicating his service status, the nature of the military operation, which included mass murder at the camp, and the daily activities of a camp guard. Imposing direct liability and proving guilt was challenging due to a lack of eyewitnesses; thus, the prosecutor applied the “functional participation” approach for jointly committed crimes. When imposing accountability, the court focused on the perpetrator’s *function* rather than their actions. The approach taken by the court implies that being functionally involved in a crime is enough to hold someone responsible, even if they were not physically present or in contact with victims. Can the approach applied in the *Demjanjuk* case, which has only been utilized in Germany so far, be employed to hold accountable those responsible for atrocity crimes committed in other regions? In Bangladesh, for example, the Pakistani Army and local Bengali perpetrators carried out a massacre in 1971. Obtaining primary evidence against many accused may be difficult as over 60 years have passed since the war’s end. Although Bangladesh has begun prosecuting local suspects, Pakistan has yet to act against its military. This research aims to see if the “functional participation” theory applies to Pakistani Army officers engaged in the 1971 massacre in Bangladesh.

KEYWORDS: Criminal Liability; Functional Participation” Theory; International Crimes Tribunal; John Demjanjuk Trial; Temporally Distant International Crime.

I. Introduction

The common perception of prosecuting decades-old atrocity crimes is that considering the significant passage of time, particularized evidence of culpability will be necessary to establish guilt beyond a reasonable doubt. Thus, such prosecutions conjure up the image of the eyewitness survivor testifying in court as to the defendant’s cruelties from decades ago or the yellowing aged document that attests to the defendant’s firing bullets or ordering deportations. But the 2009-2011 trial in Munich of John Demjanjuk, a Ukrainian who served as a guard at

* Ph.D Candidate, Faculty of Law, The Chinese University of Hong Kong (China).

the Nazi death camp of Sobibór, changed all that.¹ In 2009, Demjanjuk was investigated for crimes committed during World War II, over 70 years ago.

Due to the significant time gap between the crimes and the investigation, there were no eyewitnesses to testify against him. Consequently, the prosecutors held him liable as an accessory rather than a direct perpetrator. He was eventually convicted as an accessory to the murder of 28,060 Jews at Sobibór.² In fact, he was the first defendant convicted of distant atrocity crimes with no evidence of his being involved in the death of any specific victim. Instead, his guilt was proved based on an identification card showing his position at Sobibór death camp, the nature of the military operation, including mass killing at the camp, and the ordinary tasks of a camp guard.

In this case, as stated above, what is worth mentioning is that there was no eyewitness testimony against Demjanjuk. Instead, the testimonies were from historians³ to fathom the composition of the death camp, functions, and roles of the camp guards. Without a doubt, a judgment without eyewitness testimony stands out among other judgments. Still, it begs whether the “functional participation” theory derived from the Demjanjuk case represents a hope for prosecuting temporally atrocity international crimes (TDACs) committed elsewhere.

In the 1970s, for example, a massacre took place in Bangladesh. The massacre began in March 1971, with the launch of “Operation Searchlight”, a codename for a planned military operation carried out by the Pakistan Army to suppress the Bengali nationalist movement.⁴ The warfare lasted until 16 December 1971, but soon before the end, the Pakistani Army targeted and executed 1,000 intellectuals and professionals in Dhaka, including doctors, attorneys, and engineers.⁵ Thus, there is no doubt that the Pakistani Army is to blame for the horrific murders.

On the other hand, it is essential to note that the crimes were committed in 1971, over 60 years ago. As a result, many eyewitnesses have either passed away or are unable to provide testimony due to memory loss. Due to the lack of primary evidence, individual guilt for committing direct crimes would, thus, be difficult. As a result, one possible way to impose liability is to hold individuals accountable as accessories, similar to what was done in the case of Demjanjuk. Nonetheless, although Bangladesh has begun prosecuting local suspects since 2010,⁶ the government of Pakistan has yet to take action against its military. This paper investigates whether the “functional participation” doctrine applies to any Pakistani Army involved in the 1971 massacre in Bangladesh.

Sections II.A and II.B of this paper illustrate the “functional participation” paradigm. It contains a brief history of the concept as well as how it relates to the Rome Statute’s concept of “modes of liability”. Section II.C focuses on Demjanjuk’s trial in Munich, its verdict, and the application of the “functional participation” theory to demonstrate the paradigm’s limited

¹ Madeline Chambers, *Nazi Guard Demjanjuk Wheeled into Munich Trial*, REUTERS (Nov. 3, 2009), www.reuters.com/article/us-germany-demjanjuk-idUKTRE5AS2D920091130.

² LAWRENCE DOUGLAS, *THE RIGHT WRONG MAN: JOHN DEMJANJUK AND THE LAST GREAT NAZI WAR CRIMES TRIAL* 1 (2016).

³ *Id.*, at 107.

⁴ Suzannah Linton, *Completing the Circle: Accountability For the crimes of the 1971 Bangladesh War of Liberation*, 21(2) CRIMINAL LAW FORUM 191 (2010), at 195.

⁵ Kimtee Kundu, *The Past Has Yet to Leave the Present: Genocide in Bangladesh*, HARVARD INTERNATIONAL REVIEW (Feb. 1, 2023), <https://hir.harvard.edu/the-past-has-yet-to-leave-the-present-genocide-in-bangladesh>.

⁶ Bangladesh passed the International Crimes (Tribunals) Act in 1973 in response to the heinous crimes committed in 1971 to bring legal action against those suspected of having committed war crimes during the war in 1971 between Bangladesh (then known as East-Pakistan) and Pakistan (then known as West-Pakistan). Both in 2009 and 2013, this law was amended. The Bangladeshi government formed the “International Crimes Tribunal Bangladesh (ICT-BD)” in 2010 to bring these alleged war criminals to justice.

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application. Section II.D depicts the slaughter committed in Bangladesh in 1971. According to Nitin Pai, the atrocity committed by the Pakistani Army was divided into three parts throughout 1971: 1) Operation Searchlight; 2) Search and Destroy; and 3) Scorched Earth.⁷

In Section II.E, the author’s objective is to depict the Bangladeshi liberation war using Nitin Pai’s approach. This Section is included to distinguish between various types of crimes and the methods used by perpetrators to commit them. By making this distinction, the author will better assess whether any atrocity’s parts fall within the “functional participation” paradigm. Moreover, this Section will also briefly cover the attempt taken by the Bangladeshi government to prosecute local suspects involved in the massacre committed during the war of 1971. Section II.E will also examine the crimes committed in 1971 and their patterns. The goal is to discern if any of the Pakistani Army’s actions can be classified as falling under the “functional participation” doctrine. The paper concludes (Section III) by arguing that, while the entire liberation war would not meet the criteria of the “functional participation” paradigm, some of those who committed crimes during “operation searchlight” and “scorched earth” may qualify based on the nature and pattern of killing.

II. The Theory of “Functional Participation”

Kai Ambos categorizes participation into three distinct types: direct perpetration as an individual, co-perpetration with another, and perpetration through another person.⁸ Direct commission means that the person committed the crime without involving anyone else.⁹ The Rome Statute has moved away from the joint criminal enterprise (JCE)¹⁰ theory and introduced a new type of joint liability known as “co-perpetration” under art. 25(3)(a). Co-perpetration is now considered a distinct form of perpetration rather than being included in the concept of complicity.¹¹ When a crime is committed through another person, it means that the actual perpetrator is being used as a tool or instrument by someone else who is the mastermind or operates from behind the scenes.¹² There are additional types of participation outlined in arts. 25(3)(b)-(d). Since this paper focuses on “functional participation”, which is related to but distinct from “co-perpetration” as defined by the Rome Statute, we will not explore other types of participation.

A. Historical Overview and Domestic Practice of the “Functional Participation” Theory

⁷ Nitin Pai, *The 1971 East Pakistan Genocide – A Realist Perspective*, INTERNATIONAL CRIMES STRATEGY FORUM (2008).

⁸ Kai Ambos, *General Principles of Criminal Law in The Rome Statute*, 10(1) CRIMINAL LAW FORUM 1 (1999), at 8; art. 25(a) of the Rome Statute of the International Criminal Court.

⁹ INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY 327 (Antonio A. Cassese, Guido G. Acquaviva, Mary Fan, Alex A. Whiting eds., 2011).

¹⁰ Joint criminal enterprise (JCE) is a form of responsibility that the ad hoc tribunals have widely employed. It entails committing crimes where a group of individuals with a shared intention engage in unlawful activities that are executed either collectively or by some members of the group. See: ICTY, *The Prosecutor v. Duško Tadić*, IT-94-1, Appeals Chamber (July 15, 1999), para. 190.

¹¹ Ambos, *supra* note 8.

¹² Claus Roxin, *The Dogmatic Structure of Criminal Liability in the General Part of the Draft Israeli Penal Code*, 30(1) ISRAEL LAW REVIEW 71 (1996).

In Dutch and German law, “functional participation” and “*Organisationsherrschaft*” concepts have been developed over the time.¹³ The Dutch concept has taken hold in the field of economic crime, and it is premised on the theory that individuals who, in a functional capacity, “effectuate” crimes, rather than those who, usually as subordinates or workers, follow out instructions or orders, should be held accountable.¹⁴ The concept has been refined in Dutch criminal law through case law. The lower threshold for criminal responsibility demands that the accused accept the crimes as part of the usual flow of events, implying that they were aware that these or similar crimes had occurred.¹⁵

On the other hand, Roxin defines “*Organisationsherrschaft*” or “control over an organization” as a criminal doctrine holding a perpetrator responsible for controlling the direct perpetrator’s will.¹⁶ This doctrine defines a principal as someone who uses the power structure to commit crimes and is so immersed in it that they can instruct their subordinates. Additionally, Roxin believes that the principal’s initiative would be insignificant, and instead, the crucial factor would be the circumstances surrounding their ability to direct a subordinate section of the structure.¹⁷

In contrast, an accessory is an individual who lacks control and power and whose actions do not independently propel the structure forward.¹⁸ They are cogs of the homicide machine and can be easily replaced.¹⁹ In a system that operates like a machine, every individual’s role impacts the likelihood of committing a crime. The chain of command functions autonomously at various levels.²⁰ Moreover, according to this doctrine, not only the individuals who physically commit the crime are considered perpetrators, but also those who control or mastermind the offense, even if they are not present at the scene.²¹

Although the “functional participation” concept originated in Germany, it has influenced criminal law in other nations. The Supreme National Tribunal of Poland,²² for example, was responsible for not only direct perpetration but also moral aiding and abetting, as well as incitements.²³ Some of the defendants, notably Greiser and Höss, claimed that they had not committed any crimes and could not be held responsible for the actions of those formally reporting to them, especially given the large number of them.²⁴ However, the Tribunal

¹³ Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5(1) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 83 (2007), at 179-183; ID., *DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS: ANSÄTZE EINER DOGMATISIERUNG* (2003), at 590-594.

¹⁴ Harmen van der Wilt, *Joint Criminal Enterprise and Functional Perpetration*, in *SYSTEM CRIMINALITY IN INTERNATIONAL LAW* (Andre Nollkaemper, Harmen van der Wilt ed., 2009), at 178.

¹⁵ *Id.*

¹⁶ Gerhard Werle, Boris Burghardt, *Introductory Note*, 9(1) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 191 (2011), where Werle discussed Roxin’s explanation of crimes as part of organized power structures.

¹⁷ CLAUS ROXIN, *TÄTERSCHAFT UND TÄTHERRSCHAFT* (2017), at 248.

¹⁸ Claus Roxin, *Straftaten im Rahmen organisatorischer Machtapparate*, 110 *GOLTDAMMER’S ARCHIV FÜR STRAFRECHT* 193 (1963), at 204.

¹⁹ Igor Vuletic, “*The Organised Structure of Power*” and *Economic Crime “FIMI-Media” Case and a View from the Croatian Perspective*, 2(2) JOURNAL OF LAW AND CRIMINAL JUSTICE 133 (2014), at 137.

²⁰ Fabian Bernhart, Alexander Tanner *et al.*, *300,000 Counts of Aiding and Abetting Murder*, 21(4) *GERMAN LAW JOURNAL* 743 (2020), at 768.

²¹ Kai Ambos, *Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the ‘Most Responsible’*, in *SYSTEM CRIMINALITY IN INTERNATIONAL LAW* (André Nollkaemper, Harmen van der Wilt eds., 2009), at 142.

²² The Supreme National Tribunal of Poland was created on 22 January 1946, to deal with war crimes committed during WWII.

²³ Supreme National Tribunal of Poland, Josef Bühler, Sygn. GK 196, Judgment (July 10, 1948), para. 11, at 19-20, in Cyprian and Sawicki, 1962, at 83-85.

²⁴ Supreme National Tribunal of Poland, Rudolf Hoess, Judgment (Apr. 2, 1947), para. 58 ff.

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countered this train of thought by stating that proof of *dolus eventualis* was sufficient to ascribe a crime, implying that the offender, while not intending to commit the crime, foresaw the potential of doing so and thus accepted that it would occur.²⁵

According to the Polish Tribunal, an individual who became a member of a criminal group, where complete obedience and discipline were expected, had already assumed responsibility for carrying out the orders given by that group.²⁶ Furthermore, the moment of joining the group, not the moment of accepting the order, was essential for such people.²⁷ Moreover, the Tribunal also declared that its purpose was to recognize that modern international crimes encompass more or less numerous groupings of offenders and communities with varying degrees of direct culpability.²⁸

For example, the decision in the *Fischer* case emphasized that by joining a criminal organization with a statutory duty of cooperation, assistance, obedience, and, at the executive level, initiative, a person bore responsibility for everything the group accomplished, which translated into personal responsibility.²⁹ The Tribunal further said that if a person joined the organization willingly and fulfilled administrative tasks, they were unquestionably liable for the group’s criminal conduct, regardless of who did them.³⁰

Apart from the Polish Tribunal, the “functional participation” doctrine was indirectly applied in the trial of Eichmann. Eichmann’s lawyer, Dr. Servatius, has long claimed that his client was nothing more than a cog in the machine.³¹ He had not physically carried out the crimes. His actions appeared legitimate, and he had only followed orders. Furthermore, he could not have averted the heinous crimes if he had stood aside because others would have happily taken his position.³² The court, however, rejected the argument, stating that functional participation turns the protective shield into an offensive weapon by using someone’s function as a starting point for determining their culpability.³³ The court in Eichmann further said that the officials are critical to the system’s operation and success. The concept of functional participation sheds light on how the accused is linked to certain offenses, helping to clarify *actus reus*.³⁴

B. Nexus Between the “Functional Participation” Doctrine and Contemporary International Criminal Law

As previously mentioned, the concept of “*Organisationsherrschaft*” originated in Germany and applied only domestically. However, a comparable doctrine has also been established in ICL, although it is not identical. One example is art. 7(1) of the ICTY Statute.³⁵ Kai Ambos claims

²⁵ Supreme National Tribunal of Poland, Ludwig Fischer *et al.*, Judgment (Mar. 3, 1947), para. 38, at 42, published in TADEUSZ CYPRIAN, JERZY SAWICKI, SIEDEM WYROKÓW NAJWYŻSZEGO TRYBUNAŁU NARODOWEGO (1962), at 44.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Supreme National Tribunal of Poland, Artur Greiser, Judgment (July 9, 1946), para. 72, available at www.legal-tools.org/uploads/tx_ltpdb/Greiser_PolandSupremeNationalTribunal_Judgment_report__07-07-946__E__04.pdf.

²⁹ *Id.*

³⁰ *Id.*

³¹ HANNA ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1964), at 135-150.

³² *Id.*

³³ *Id.*, at 289.

³⁴ *Id.*

³⁵ Statute of the International Criminal Tribunal for the Former Yugoslavia (May 25, 1993).

that art. 7(1)³⁶ of the ICTY satisfies all the criteria outlined in the German philosophy of *Organisationsherrschaft*.³⁷ He argued that:

A solid legal basis in the term ‘committed’ in Article 7(1) ICTY Statute since ‘commission’ in this sense means that a person ‘participated, physically or otherwise directly or indirectly, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others’. This includes, as indirect commission, perpetration by means and is as such *Organisationsherrschaft*.³⁸

Another example is the Joint Criminal Enterprise (JCE) theory, which the ICTY Appeals Chamber introduced during the *Tadić* case.³⁹ JCE refers to co-perpetration, where individuals collaborate towards a common criminal objective and commit the crime.⁴⁰ Perpetrators who collaborate to commit a crime are responsible and should be held accountable for their actions, according to this doctrine.⁴¹

Generally, courts must follow the basic principle of criminal law: a person can only be held accountable for their actions.⁴² However, JCE is a crucial tool in assigning responsibility to those involved in criminal activity through oppressive criminal organizations or structures.⁴³ This ensures that multiple perpetrators are held accountable for participating in different ways at different times to accomplish large-scale criminal conduct.⁴⁴

There are three categories of accountabilities under the doctrine of JCE: the basic, the systematic, and the extended form of JCE.⁴⁵ The primary form of involvement is when a group organizes to carry out a crime, which is executed based on a “common design”. The accused must have consented to commit the crime with other members to meet the common design criteria.⁴⁶ The second type of JCE is the systemic form of a collaborative criminal enterprise. In this type of accountability, the prosecution does not require evidence of a formal or informal agreement among the participants but must demonstrate their compliance with a repressive system.⁴⁷ On the other hand, the third, or so-called extended version of JCE, involves criminal responsibility for crimes committed by other people beyond the purview of the common plan.⁴⁸

Three factors constitute the three objective components of this form of culpability based on a JCE: the presence of a group of people; the existence of a common plan, design, or purpose; and the accused party’s participation in the JCE through any “form of assistance in, or

³⁶ Art. 7(1) of the ICTY Statute states that “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”.

³⁷ Ambos, *Joint Criminal Enterprise and Command Responsibility*, *supra* note 13, at 182.

³⁸ *Id.*

³⁹ ICTY, *The Prosecutor v. Dusko Tadic*, IT-94-1-A, Appeals Chamber, Judgment, (July 15, 1999), paras. 185-229.

⁴⁰ *Id.*, paras. 187-188,

⁴¹ Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5(1) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 109 (2007), at 110.

⁴² According to the “culpability” principle, a person is responsible for whatever he has done in committing a crime. See Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49(3) AMERICAN JOURNAL OF COMPARATIVE LAW 455 (2001).

⁴³ GIDEON BOAS, JAMES L. BISCHOFF, NATALIE L. REID, FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW, Vol. I (2010), at 9.

⁴⁴ *Id.*

⁴⁵ ICTY, *The Prosecutor v. Milomir Stakic*, IT-97-24-A, Appeals Chamber, Judgment (Mar. 22, 2006), para. 65.

⁴⁶ ICTY, *The Prosecutor v. Multinovid*, IT-99-37- AR72, Appeals Chamber, Decision on Dragoljub Ojdani’s Motion Challenging Jurisdiction-Joint Criminal Enterprise (May 21, 2003), para. 23.

⁴⁷ ICTY, *The Prosecutor v. Kmojelac*, IT-97-25-A, Appeals Chamber, Judgment (Sept. 17, 2003), para. 96

⁴⁸ *Id.*, para 204.

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contribution to, the execution of the common purpose”.⁴⁹ While all three forms of JCE are subject to the exact objective requirements, each category has unique subjective requirements.⁵⁰ For example, the co-perpetrators must share a mutual intention to establish JCE I. In contrast, for JCE II, each perpetrator must have personal knowledge of the abusive behaviour pattern.⁵¹ For JCE III, the subjective requirement is the perpetrator’s intention.⁵²

JCE is given considerable importance in the legal rulings of ICTY, ICTR, SCSL, ECCC, and STL.⁵³ However, the ICC does not recognize the JCE doctrine, although co-perpetration, a similar common-purpose responsibility, has been included in the Rome Statute under art. 25(3)(a). Co-perpetration or joint perpetration is if person A conducts the crime jointly with person B or with a group of others, A is a joint perpetrator and responsible for the crime committed jointly.⁵⁴ Joint “multiple” and “functional” perpetrations are two analytical subcategories of joint perpetration.⁵⁵ When numerous people carry out the same criminal act in accordance with a common plan, this is known as joint multiple perpetrations. For example, two people abduct the victim, each holding a knife, and torture and stab the victim to death before disposing of the body simultaneously. In this case, the joint culprits participated in the unlawful act of torture and were directly responsible for the victim’s death.⁵⁶

When numerous people undertake distinct acts or responsibilities in the same criminal business, this is known as joint functional participation. One person, for example, kidnaps the victim, other tortures and eventually stabs the victim to death, and a third person disposes of the body according to the original plan. The two initial people committed separate crimes, but all three people were involved in the criminal operation and contributed to and caused the crimes as joint (functional) perpetrators because of the common plan.⁵⁷ When evidence is insufficient to prosecute a defendant for individual perpetration, the “functional participation” doctrine comes into play to deal with crimes committed jointly. This doctrine could be especially important in international criminal law because committing an international crime often necessitates many perpetrators.

One of the common aspects of “functional participation”, JCE, and co-perpetration doctrines is the “common plan”. However, in the “co-perpetration” doctrine, the common plan serves as the foundation for a mutual attribution of the various contributions, making each co-perpetrator accountable for the entire crime. On a more objective level, two conditions must be met: the existence of a common plan between two or more people and each co-coordinated perpetrator’s significant contribution results in the achievement of the crime’s objective

⁴⁹ Ambos, *Joint Criminal Enterprise and Command Responsibility*, *supra* note 13, at 160.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*, at 161.

⁵³ SCSL, *The Prosecutor of the Special Court v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, SCSL-2004-16-A, Appeal Chamber, Judgment (Feb. 22, 2008), paras. 72-75; SCSL, *The Prosecutor v. Sesay et al.*, SCSL-04-15-A, Appeal Chamber, Judgment (Oct. 26, 2009), paras. 474-475; ECCC, *The Prosecutor v. Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Trial Chamber, Judgment (July 26, 2010), paras. 504-517; ECCC, *The Co-Prosecutor v. Nuon Chea and Khieu Samphan*, 002/19-09-2007/ECCC/TC, Trial Chamber, Judgment, (Aug. 7, 2014), paras. 690-691; STL, *STL-11-01/I/AC/R176bis*, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Feb. 16, 2011), paras. 236-249.

⁵⁴ TERJE EINARSEN & JOSEPH RIKHOF, *A THEORY OF PUNISHABLE PARTICIPATION IN UNIVERSAL CRIMES* (2018), at 105.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

components.⁵⁸ On the subjective side, all suspects must be aware of and accept that carrying out their common plan may fulfill the objective aspects of the crime; they must be aware of the factual circumstances that allow them to manage the crime jointly.⁵⁹ According to the assertion, each co-perpetrator makes a significant contribution that ensures the material components of the crime are met. Every co-perpetrator performs a specific task that contributes to the execution of the crime.⁶⁰

In contrast, under the “functional participation” doctrine, the physical perpetrator does not need to act as a mere instrument in the hands of the person in charge; they may be a reasonably independent agent.⁶¹ To hold an employer or superior responsible for an offense committed by their subordinate, it is necessary that the offense occurred during the organization’s regular operations and that the employer or superior could have taken steps to stop their subordinate from continuing to commit the wrongful act.⁶² To be clear, the person responsible for a crime does not necessarily have to be knowingly involved. They may be unaware that their actions are against the law, or they may not have the necessary skills to carry out the crime.⁶³

In a nutshell, the “functional participation” theory is an extended form of criminal accountability that is unique and can be applied to identify individual responsibilities within the context of system criminality. Now let us talk about applying this doctrine in the case of John Demjanjuk in Munich and why it was necessary.

C. The Trial of John Demjanjuk in Munich

Finding evidence for individual convictions in many cases of decades-old crimes may be difficult, but using the “functional participation” doctrine and convicting the perpetrators for crimes committed jointly with a common purpose may be viable even without direct evidence. This is what unfolded in John Demjanjuk’s case. In Munich, there were no eyewitnesses to testify against Demjanjuk, so the prosecutor had to rely on other sources of evidence, such as documents and expert testimony. However, it is crucial to examine how the prosecutor established the case without the testimony of witnesses. The following sections delve deeper into the case to uncover the supporting details of Demjanjuk’s guilt.

⁵⁸ Thomas Weigend, *Intent, Mistake of Law, and Co-perpetration in the Lubanga Decision on Confirmation of Charges*, 6(3) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 471 (2008).

⁵⁹ *Id.*

⁶⁰ ICC, *The Prosecutor v. Bemba et al.*, ICC-01/05-01/08-3399, Trial Chamber III, Judgment (June 21, 2016), paras 68–69; ICC, *The Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2276, Appeal Chamber, Judgment (Mar. 8, 2018), paras. 782-785.

⁶¹ Ambos, *Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the ‘Most Responsible’*, *supra* note 21, at 145-166.

⁶² Harmen van der Wilt, *On Functional Perpetration in Dutch Criminal Law: Some Reflections Sparked off by the Case Against the Former Peruvian President Alberto Fujimori*, 4(11) ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 615 (2009), at 617.

⁶³ *Id.*, in the Professor Wilt’s article he discusses the well-known *Milk and Water* case; United States Supreme Court, NJ 1916, Judgment (Feb. 14, 1916), para. 681. The defendant was charged with providing contaminated milk through a third party in this case. The accused’s servant was the one who committed the crime, but he did not know that the milk was tainted because he was not given access to its ingredients. Although the Supreme Court defined the offense as “if a substance has been added”, the accused was found guilty of being involved in the crime through an intermediary. This was a scenario where he was found guilty of being participated not directly but functionally. See paras. 616-617.

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1. Background of John Demjanjuk

John Demjanjuk, a Ukrainian by birth, was captured by German forces in 1942 and kept as a prisoner of war (POW) in Ukraine.⁶⁴ Afterward, he was recruited by the Schutzstaffel (SS) and served as a guard in various concentration camps.⁶⁵ After WWII, Demjanjuk spent a few years as a displaced person in Europe’s Displaced Persons (DP) camps and then immigrated to the United States with his family in 1952.⁶⁶ Before the US Department of Justice accused him of being a war criminal, he led a happy life in the United States.⁶⁷

His US citizenship was revoked in 1981, and subsequently, in 1986, he was deported to Israel for his involvement as a camp guard known as “Ivan the Terrible”.⁶⁸ In 1987, his trial in Jerusalem began. Surprisingly, several eyewitnesses identified him in court, albeit incorrectly, after a long period of the Holocaust. The District Court of Jerusalem convicted him in 1988 based on eyewitness testimony and documentary evidence.⁶⁹ Demjanjuk then filed an appeal, claiming that the eyewitnesses at Jerusalem District Court had misidentified him and that he was not the “Ivan the Terrible”.⁷⁰ However, the Israeli Supreme Court overturned his sentence based on new evidence, and later, he was returned to the United States in 1993.⁷¹ He was, however, deported to Germany for his second trial.

2. The Trial in Munich

Demjanjuk was arrested in 2009 after landing in Germany. Instead of a principal perpetrator, he was charged as an accessory to the murder of around 28,000.⁷² Because there was no direct evidence of murder, he could not be charged as a principal perpetrator under the German Criminal Code (*Strafgesetzbuch*, StGB). Section 25(1) of the German Criminal Code states that “whoever commits an offense themselves or through another incurs a penalty as an offender”, whereas an accessory is whoever intentionally induces another to commit an unlawful act (abettor) incurs the same penalty as an offender or whoever knowingly assists another in the intentional commission of an illegal act incurs a penalty as an aider.⁷³

Furthermore, in Germany, no one is accountable for murder unless they meet the requirements of Section 211 of the German Criminal Code. Section 211(2) of the Code states that

⁶⁴ United States District Court, *United States v. Demjanjuk*, C77-923, Appeal Chamber of Ohio, Judgement (June 23, 1981), paras. 1363-64.

⁶⁵ David Cohen, *The Passage of Time, the Vagaries of Memory, and Reaching Judgment in Mass Atrocity Cases*, in *OLD EVIDENCE AND CORE INTERNATIONAL CRIMES* (Morten Bergsmo, Cheah Wui Ling eds., 2012).

⁶⁶ United States District Court, *Demjanjuk*, *supra* note 64, paras. 1363-64; DOUGLAS, *supra* note 2, at 227.

⁶⁷ The Special Master, No. 85–3435 (6th Cir.), Report on *Demjanjuk v. Petrovsky* (1993), at 27.

⁶⁸ Cohen, *supra* note 65.

⁶⁹ STEPHAN LANDSMAN, *CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES* (2005), at 160.

⁷⁰ Cohen, *supra* note 65.

⁷¹ Lawrence Douglas, *The Historian’s Trial: John Demjanjuk and the Prosecution of Atrocity*, in *THE PALGRAVE HANDBOOK OF STATE - SPONSORED HISTORY AFTER 1945* (Berber Bevernage, Nico Wouters eds., 2018), at 539.

⁷² Initially, the number was 27,900 and later the number was amended to 28,060; see DOUGLAS, *supra* note 2, at 143; *Id.*, *supra* note 71, at 539; Cohen, *supra* note 65.

⁷³ Sections 26 and 27(1) of the German Criminal Code (Translation provided by Prof. Dr Michael Bohlander), https://www.gesetze-im-internet.de/englisch_stgb/.

a murderer under this provision is someone who kills a person out of a lust to kill, to obtain sexual gratification, out of greed or otherwise base motives, perfidiously or cruelly or by means constituting a public danger or to facilitate or cover up another offence.

This section outlines that a person can be held guilty for murder as a principal perpetrator (*Täter*) if they physically kill someone with the “inner conviction”.⁷⁴

Because there was no available witness to testify against Demjanjuk, nor any evidence of specific murder was presented before the court, section 211 could not apply to him.⁷⁵ However, individuals who knowingly supported or assisted in the killing are considered accomplices to murder.⁷⁶ Although Demjanjuk was charged as an accessory, proving his guilt without definite evidence and witness testimony was challenging. In fact, no junior officer had ever been punished in Germany before Demjanjuk without direct involvement in any crime.⁷⁷

Therefore, in order to prosecute Demjanjuk, the German prosecutor had to use a novel strategy that had never been used in Germany to indict someone for crimes committed during WWII. The strategy addressed two issues: 1) prosecutors had to demonstrate a link between Demjanjuk and the massacre of 28,060 individuals at Sobibór (the only purpose of the Sobibór death camp was to kill people), and 2) Demjanjuk was aware of the atrocity.⁷⁸ To grasp the link between Demjanjuk and the 28,060 deaths, it was first necessary to determine the nature and structure of the Sobibór camp.⁷⁹ This was no easy feat, but with the assistance of documentary evidence, Dieter Pohl, a Klagenfurt professor, determined that Sobibór was a death camp with the sole objective of killing civilians.⁸⁰

Historians had to first look through the historical archives in order to assess the nature of the Sobibór death camp. Second, in 2009, prosecutors discovered documentation verifying Demjanjuk’s five-and-a-half-month stint as a guard at the Sobibór death camp in 1943.⁸¹ On the other hand, his activities throughout his tenure at Sobibór were not documented. It was challenging to say if he killed anyone directly or assisted others in killing while working in the camp. In Germany, proving guilt without exposing the specific conduct of each suspect was implausible.

Nonetheless, in the Munich case, the prosecution applied a ground-breaking strategy that transformed the entire criminal liability jurisprudence. Based on the Sobibór death camp’s understanding, the German prosecution argued that “all Sobibór guards participated in the

⁷⁴KERSTIN FREUDIGER, *THE LEGAL PROCESSING OF NAZI CRIMES* (2002), at 169.

⁷⁵ Cohen, *supra* note 65.

⁷⁶ Douglas, *supra* note 72, at 542.

⁷⁷ Benjain Schulz, *War Crime Investigations: We Don’t Pursue Nazis, We Pursue Murderers*, SPIEGEL ONLINE INTERNATIONAL (Feb. 21, 2014) at <https://www.spiegel.de/international/germany/germany-continues-investigations-into-suspected-auschwitz-helpers-a-954897.html>.

⁷⁸ Charles Hawley, ‘*Blood Must Flow*’: *Searching for the Perpetrators of a WWII Massacre*, SPIEGEL ONLINE INTERNATIONAL (Feb. 1, 2013), www.spiegel.de/international/europe/a-german-prosecutor-looks-for-those-behind-nazi-era-massacre-in-france-a-881019.

⁷⁹ Jack Ewing, Alan Cowell, *Demjanjuk Convicted for Role in Nazi Death Camp*, THE NEW YORK TIMES (May 12, 2011), www.nytimes.com/2011/05/13/world/europe/13nazi.

⁸⁰ In Demjanjuk, the court stated that: “The three extermination camps Treblinka, Belzec, Sobibor served only to one purpose; the mass murdering of the European Jewry. In this way any activity of the defendant as well as of any other camp guard was a contribution to the final purpose of the extermination camp, irrelevant if on the ramp [...], during forcing the inmates through the “Schlauch” to gas chambers, [...]; during guarding of working units, which maintained the camp in good condition”; see: David Kohout, *Statutory Limitation of Crimes under International Law: Lessons Taken from the Prosecution of Nazi Criminals in Germany after 1945 and the New Demjanjuk Case Law*, 3(1) INTERNATIONAL COMPARATIVE JURISPRUDENCE 37 (2007), at 49; Douglas, *supra* note 72, at 543.

⁸¹ *Id.*

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killing process. Demjanjuk was a Sobibór guard. Therefore, Demjanjuk participated in the killing process”.⁸² Despite the fact that Demjanjuk's identity card indicates his participation in the camp, it was insufficient to establish his guilt. His involvement in the camp was voluntary, which also needed to be confirmed by the prosecution.

Prosecutors used expert witnesses to uncover his involvement at the camp, and the expert witnesses discovered that those who received training at Trawniki were treated as employees rather than detainees.⁸³ According to Peter Black, the Trawniki camp guards had received salary and paid leave. They were provided with uniforms, weapons, and regular days off.⁸⁴ Black also identified one guard, Victor Bogomolow, who asked and received approval to be discharged from guard duty because he was unfit for the job.⁸⁵ He also revealed that around 1,000 Trawniki guards had never returned from their leaves and had avoided their guard duty. It's also worth noting that people who quit their jobs were no longer pursued.⁸⁶ Therefore, it is reasonable to articulate that Demjanjuk was not forced to work as a guard at Sobibór. Based on several records and historians' testimonies, the court concluded that Demjanjuk had served freely and could flee the camp, which he did not do.⁸⁷

Instead of eyewitnesses, the historians convinced the court that all camp guards participated in the killings because it was their job.⁸⁸ Demjanjuk was also found to have played a voluntary role in the massacre of almost 28,000 individuals at Sobibór, according to the court. Using the “functional participation” doctrine in the Munich trial was unquestionably a watershed moment in the history of international criminal law. Indeed, in the Munich trial, this theory was essential in unravelling the complexities of the Demjanjuk case.⁸⁹ He was the first defendant to be convicted of distant atrocity crimes, notwithstanding the lack of evidence connecting him to the murder of a specific victim. Instead, to establish guilt, the prosecution used evidence of Demjanjuk's identity card, nature, and the everyday tasks of the death camp.

According to Lawrence Douglas, “the Demjanjuk case marked an important departure in the way in which the German legal system approached cases dealing with “functionaries”.”⁹⁰ Indeed, it was the first time a court stated that in the case of state-sponsored violence, responsibility should not be assessed based on direct actions but rather by the perpetrator's *function*.⁹¹ This striking conclusion of the Munich court suggests that a criminal conviction can be secured only based on a perpetrator's functions, which a prosecutor can prove using documentary evidence and expert witnesses such as historians.

Demjanjuk was found guilty in 2011 and sentenced to five years in jail. However, while his appeal was pending, he died ten months after the ruling.⁹² Therefore, he remained innocent under German law due to his incomplete appeal.⁹³ Nonetheless, the “functional participation” theory has been applied in subsequent prosecutions involving WWII crimes.

⁸² *Id.*, at 544.

⁸³ Douglas, *supra* note 2, at 227.

⁸⁴ Peter Black, *Foot Soldiers of the Final Solution. The Trawniki Training Camp and Operation Reinhard*, 25(1) HOLOCAUST AND GENOCIDE STUDIES 1 (2011), at 14.

⁸⁵ *Id.*, at 1, 15.

⁸⁶ Douglas, *supra* note 2, at 227.

⁸⁷ Kohout, *supra* note 80, at 37, 49.

⁸⁸ Douglas, *supra* note 72, at 544.

⁸⁹ *Id.*

⁹⁰ Ewing & Cowell, *supra* note 79; Bronwyn Leebaw, *Justice and the Faithless: The Demand For Disobedience in International Criminal Law*, 24(2) EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 344 (2018), at 359.

⁹¹ Douglas, *supra* note 72, at 546.

⁹² MARY FULBROOK, *RECKONINGS: LEGACIES OF NAZI PERSECUTION AND THE QUEST FOR JUSTICE* (2018), at 349.

⁹³ *Id.*

3. Prosecution of Other Nazi Suspects in Post Demjanjuk

Oskar Gröning, a former SS member, was an accountant at Auschwitz camp and had worked there since 1942.⁹⁴ His document states that he willingly joined the SS and desired to work as an accountant.⁹⁵ In addition, he was in charge of the newly arrived prisoners' belongings.⁹⁶ Although there was no evidence to indicate that Gröning killed anyone or participated in the killing process, the prosecution successfully argued using the "functional participation" approach, as we saw in the Demjanjuk case.⁹⁷ For example, even though he had no direct connection to the perpetrators or victims, his presence at the dropping ramp assisted in the deaths of thousands of people, as per the argument. Following the argument, the court stated that Gröning joined voluntarily and worked as an accountant for the Nazi dictatorship, and therefore, he was responsible for mass murder.⁹⁸ The court then found him guilty of being an accessory to the murder of 300,000 Jews in 2015. The German Federal Court of Justice dismissed his appeal in 2017.⁹⁹

The Demjanjuk principle was applied in Bruno's case too. Bruno was a former SS guard who served at the Stutthof concentration camp from 1944 to 1945.¹⁰⁰ Again, there was no evidence that Bruno had killed anybody personally, but the prosecutor argued that his presence at the camp assisted others in killing the innocent.¹⁰¹ He was found guilty of aiding and abetting the murder of 5,230 prisoners.¹⁰² Similarly, Johann Rehbogen, a former SS guard, could have faced a full trial in 2018 with no connection to any specific crime, but his trial was postponed due to his unfitness.¹⁰³

4. Functional Participation Theory And its Application by the ICC

Although not directly, in a few contexts, the ICC have endorsed the German doctrine of "functional control over the act" and embraced the liability mode of co-perpetration ("*funktionelle Tatherrschaft*"). For instance, in *Lubanga*, the court concluded that co-

⁹⁴ Kohout, *supra* note 80, at 37, 49.

⁹⁵ Pavlos Andreadis-Papadimitriou, *Assistance in Mass Murder under Systems of Ill-Treatment: The Case of Oskar Gröning*, 15(1) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 157 (2017), at 161.

⁹⁶ Bernhart *et al.*, *supra* note 20, at 745; Matthias Geyer, *An SS Officer Remembers: The Bookkeeper from Auschwitz*, SPIEGEL ONLINE (May 9, 2005), [web.archive.org/web/20070302085046/http://www.spiegel.de/international/spiegel/0,1518,355188,00](http://www.spiegel.de/international/spiegel/0,1518,355188,00).

⁹⁷ Thomas Douglas, *Punishing Wrongs from the Distant Past*, 38 LAW AND PHILOSOPHY 335 (2019), at 342.

⁹⁸ Bernhart *et al.*, *supra* note 20, at 743, 745.

⁹⁹ FULBROOK, *supra* note 82, at 350.

¹⁰⁰ Samuel Osborne, *Bruno Dey: Former Nazi guard says 'misery and horror' of regime still haunt him*, THE INDEPENDENT (Oct. 22, 2019), <https://www.independent.co.uk/news/world/europe/bruno-dey-nazi-trial-concentration-camp-guard-holocaust-stutthof-a9165726.html>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Russell Hope, *Johann Rehbogen: Former SS guard, 94, on Trial over Deaths at Stutthof Concentration Camp*, SKY NEWS (Nov. 6, 2018), <https://news.sky.com/story/johann-rehbogen-former-ss-guard-94-on-trial-over-deaths-at-stutthof-concentration-camp-11546199>.

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perpetration based on shared control over the crime is rooted in the concept that two or more people can commit a crime when they work together to carry it out.¹⁰⁴

Thus, although each participant depends on the other to carry out their respective tasks, they all share total control over the crime because failing to complete one of the perpetrators’ assigned tasks could prevent the crime from being committed.¹⁰⁵ The Pre-Trial Chamber in Lubanga made it clear that individuals who “control over the commission of the offense” – that is, those who “control the will of those who carry out the objective aspects of the offense (commission of the crime through another person, or indirect perpetration)” – are perpetrators.¹⁰⁶

In *Bemba*, the court stated that,

What is required is a “normative assessment of the role of the accused person”, to determine “whether the accused had control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission, even if that essential contribution was not made at the execution stage”. The decisive consideration for determining whether an accused person must be qualified as a co-perpetrator is whether the individual contribution of the accused within the framework of the agreement was such that without it, the crime could not have been committed or would have been committed in a significantly different way.¹⁰⁷

Even in the case of *Rombhot*, the notion of co-perpetration and participation was clearly defined. In this case, the ICC claimed that it is likewise impossible to grasp the charges if the co-offenders are not identified.¹⁰⁸ The concept of co-perpetration, which is based on joint control of the crime, derives from the idea that two or more people may commit a crime more effectively when they work together to carry out the necessary tasks.¹⁰⁹

As a result, even though each participant depends on the other to commit the crime, they all share control because any of them may prevent the crime from being committed by not completing their assigned task.¹¹⁰ In *Katanga*, the Chamber concluded that the essential coordinated contribution provided by each co-perpetrator resulting in the realization of the objective aspects¹¹¹ of the crime is the objective need for co-perpetration based on joint control over the crime.¹¹² That court also stated that:

Designing the attack, supplying weapons and ammunitions, exercising the power to move the previously recruited and trained troops to the fields, and/or coordinating and monitoring the activities of those troops, may constitute contributions that must be considered essential regardless of when are they exercised (before or during the execution stage of the crime).

¹⁰⁴ ICC, The Prosecutor v. Lubanga, ICC-01/04-01/06-803, Pre-Trial Chamber I, Decision on the confirmation of charges (Jan. 29, 2007), para. 341.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, at para. 332.

¹⁰⁷ ICC, The Prosecutor v. Jean-Pierre Bemba Gombo *et al.*, ICC-01/05-01/13 a 2 a3 a4 a5, Appeal Chamber, Judgment (March 8, 2018) para. 820.

¹⁰⁸ ICC, The Prosecutor v. Alfred Rombhot Yekatom and Patrice-Edouard Ngaïssona, ICC 01/14-01/18, Trial Chamber V, Motion to Dismiss Co-Perpetration Mode of Liability (June 22, 2020), para. 33.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ The objective aspect means essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime.

¹¹² ICC, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC- 01/04-01/07, Pre-Trial Chamber I, Decision on the confirmation of charges (Oct. 14, 2008), para. 524.

According to this assertion, the prosecution is not required to produce evidence showing how the suspect acted during the execution stage. If the accused made any contributions that facilitated the crime, he might be held accountable. The description mentioned above states that, despite not doing much, the ICC occasionally emphasized the German doctrine of “control over the crime”. Although the doctrine is ineffective mainly in international criminal law, it seems there is room to apply it to the massacre in Bangladesh in 1971.

D. The Liberation War of Bangladesh and the Prosecution of the Suspects of Crimes Committed During the Liberation War

The Liberation War of Bangladesh was one of the most shocking events of the twentieth century.¹¹³ The Army’s onslaught was equally indiscriminate and vindictive elsewhere in East Pakistan.¹¹⁴ The war started on 25 March 1971, and ended on 16 December 1971. Over nine months, the Pakistani military and their Bengali accomplices slaughtered 30 million Bengalis. Additionally, it is estimated that up to 200,00 Bengali women had been raped.¹¹⁵ The Rajakar, Al Badr, Al Shams, and other local death squads collaborated with Pakistan’s occupying force to commit genocide in Bangladesh.¹¹⁶ According to Nitin Pai, this genocide has three parts: 1) operation searchlight, 2) search and destroy, and 3) scorched earth.¹¹⁷

1. The “Operation Searchlight”

Pakistan launched “Operation Searchlight”, a massive military attack on the East’s capital city of Dhaka, on 25 March 1971.¹¹⁸ This was the first onslaught on Bengali nationalism, and Dhaka University was one of the main targets.¹¹⁹ In addition, police and Bengali paramilitary headquarters, slums and squatter settlements, and Hindu-majority areas were all designated as priority targets.¹²⁰ The military started Operation Searchlight to crush Bengali nationalism. According to the Hamoodur Rahman Commission Report, “no pitched battle was fought in Dhaka on 25 March. Excessive force was used on that night. Army personnel acted under the influence of revenge and anger during the military operation”.¹²¹ Hundreds of unarmed individuals were slain in the first two days of army operations in Dhaka, including students of Dhaka University.¹²²

¹¹³ WILLEM VAN SCHENDEL, *A HISTORY OF BANGLADESH* (2009), at 161.

¹¹⁴ *Id.*, at 163.

¹¹⁵ Amir-Ul Islam, *Towards the Prosecution of Core International Crimes before the International Crimes Tribunal*, in *OLD EVIDENCE AND CORE INTERNATIONAL CRIMES 216* (Morten Bergsmo, Cheah Wui Ling eds., 2012); JEFFREY S. BACHMAN, *THE UNITED STATES AND GENOCIDE (RE)DEFINING THE RELATIONSHIP* (2017), at 98.

¹¹⁶ *Id.*

¹¹⁷ Pai, *supra* note 7.

¹¹⁸ BEN KIERNAN, *BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR* (2007), at 575.

¹¹⁹ Islam, *supra* note 115, at 220.

¹²⁰ Rounaq Jahan, *Genocide in Bangladesh* in *CENTURIES OF GENOCIDE, ESSAYS AND EYEWITNESS ACCOUNTS* (Samuel Totten, William S. Parsons eds., 2012), at 225.

¹²¹ Iqbal Husnain, *Denying the Denial: Reappraisal of ‘Genocide’ in East Pakistan*, 16(4) *ARTHA-JOURNAL OF SOCIAL SCIENCES* 1 (2017), at 14.

¹²² Jahan, *supra* note 120.

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The first attack on Bengali students began at Dhaka University’s Iqbal and Jagannath Halls, which were the dormitories of the University.¹²³ Any students who survived the bombing of these dormitories were cruelly killed down or stabbed to death with bayonets. Two hundred students and seventeen teachers were slain, tortured, or humiliated by the Pakistani military in Iqbal Hall alone. Hundreds more were killed, tortured, or humiliated by the Pakistani Army, regardless of religion or gender.¹²⁴

On 28 March, the death toll in the countryside had risen to 15,000 people.¹²⁵ During the Comilla cantonment massacre on 27-28 March, “seventeen Bengali Officers and 915 men were just slaughtered by the flip of one Officer’s fingers”, according to a post-war Pakistan government commission.¹²⁶ While the precise number of civilians killed in Operation Searchlight is unknown, Christopher Hitchens estimates that “at least ten thousand civilians were butchered in the first three days”.¹²⁷ The most deadly attacks occurred in Chittagong, Khulna, Jessore, and Santahar, ten Mymensingh villages where people were armed with guns, swords, spears, and daggers in Dinajpur. Murders of women and children, as well as kidnappings, were regular events.¹²⁸

Operation Searchlight was the first phase of the war, which was, however, lasted only approximately six weeks.¹²⁹ After the targeted elites were largely assassinated, the West Pakistani military administration, commanded by the President, turned its attention to the ordinary people who strongly supported the Awami League’s – the winning political party of Bangladesh – calls for self-determination and independence.¹³⁰ This was the second phase of the war, called “search and destroy”.

2. The “Search and Destroy”

The second phase of the battle, known as “search and destroy”, took place mainly in the countryside, with troops burning down entire towns on suspicion of supporting rebel fighters or as a deterrent.¹³¹ For both the Bengali nationalists and the Pakistani government, long-term planning was the second phase of the liberation war. During this time, the Pakistani Army largely entrenched into its own strongholds, with intermittent operations in rural areas to punish locals for sheltering freedom fighters. The troops also indulged in widespread pillage and rape of women and girls. During the second phase of the war, the Pakistani Army used systematic and organized rape as a particular weapon of war.¹³² Girls and women were also kidnapped and gang-raped in special camps administered by Army. Many of the rape victims were murdered

¹²³ ICT-BD, *The Chief Prosecutor v. Motiur Rahman Nizami*, ICT-BD 3-2011, Judgment (June 24, 2014), para. 292.

¹²⁴ ANIS AHMED, *BANGLADESH 1971: WAR CRIMES, GENOCIDE AND CRIMES AGAINST HUMANITY OPERATION SEARCH LIGHT: THE TARGETS* (2018), at 2; DAVID LOSHAK, *PAKISTAN CRISIS*. (1071), at 88-126; Simon Drings, *Eyewitness Account of Operation Searchlight*, *THE DAILY TELEGRAPH* (Mar. 31, 1971).

¹²⁵ LOSHAK, *supra* note 124.

¹²⁶ VAN SCHENDEL, *supra* note 113, at 163.

¹²⁷ CHRISTOPHER HITCHINS, *BANGLADESH: THE TRIAL OF HENRY KISSINGER* (2001), at 44.

¹²⁸ Christian Gerlach, *Crowd Violence in East Pakistan/ Bangladesh 1971–1972*, in *GENOCIDE AND MASS VIOLENCE IN ASIA: AN INTRODUCTORY READER* (Frank Jacob ed., 2019), at 25.

¹²⁹ Jahan, *supra* note 120, at 255.

¹³⁰ Philip Hensher, *The War Bangladesh Can Never Forget*, *INDEPENDENT ONLINE* (Feb. 19, 2013), www.independent.co.uk/news/world/asia/the-warbangladesh-can-never-forget-8501636.

¹³¹ Pai, *supra* note 7, at 4.

¹³² Jahan, *supra* note 120, at 255.

or committed suicide as a result of their trauma. During the genocide of 1971, it is estimated that around 200,000 girls and women were raped.¹³³

According to Schanberg, by late June 1971, the mass murders had turned less indiscriminate and more planned.¹³⁴ He claimed that missionaries in Bangladesh's remote districts reported atrocities on a near-daily basis. According to one missionary, over a thousand Hindus were slaughtered in one day in the southern district of Barisal. According to another missionary, a gathering to accomplish reconciliation was called in the northern Sylhet area. Troops arrived as a crowd gathered and shot 300 Hindus.¹³⁵ Apart from destroying entire areas where insurgent actions had occurred, killing, burning, raping, and looting took place across the country.¹³⁶ The second phase of the battle was the most extensive. When Pakistan realised they were going to lose the combat, they devised a plan to eliminate the country's intellectuals. According to the plan, Pakistan carried out the third and last phase of the war.

3. The “Scorched Earth”

The third phase, which lasted from October to 16 December, saw India and Pakistan go to war, with the Pakistan army's eastern command, led by Gen Niazi, surrendering to a joint India-Bangladesh force led by Lieutenant-General Jagjit Singh Aurora.¹³⁷ However, in the last week of the war, the Pakistani government engaged in its most violent and deliberate genocidal campaign when its defeat was nearly imminent. The Pakistani military planned to eliminate the most recognized and influential intellectuals and professionals in each city and town to deprive the future nation of its most competent leadership.¹³⁸ Between 12 and 14 December, a number of intellectuals and professionals — professors, doctors, engineers, writers, and so on — were abducted and murdered.¹³⁹ Two days before Pakistan's surrender, 800-1,000 intellectuals were killed in Dhaka.¹⁴⁰

According to multiple witnesses examined in the *Motiur Rahman Nizami* case, Al-Badr Bahini members collaborated with the Pakistani Army to exterminate the intellectuals.¹⁴¹ Furthermore, according to a report titled ‘British M.P says senior Pakistani army officers organised murder of intellectuals’ published in *The Hindustan Times*,

Ten senior Pakistani army officers were responsible for organising the recent murders of a large number of people, especially intellectuals, in Dacca, Mr. John Stonehouse, British Labour M.P, told PTI in an interview here this morning (New Delhi, December 20).¹⁴²

However, it is worth noting that Pakistani military commanders were not the only ones to blame. There were also Bengalis who aided the Pakistani administration. The Pakistani

¹³³ SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1993).

¹³⁴ Sydney H. Schanberg, *West Pakistan Pursues Subjugation of Bengalis*, *NEW YORK TIMES* (July 14, 1971).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Pai, *supra* note 7 at 4.

¹³⁸ Jahan, *supra* note 120, at 256.

¹³⁹ Sarmila Bose, *Anatomy of Violence: Analysis of Civil War in East Pakistan in 1971*, in 40(41) *ECONOMIC AND POLITICAL WEEKLY* 4463 (Oct. 8, 2005), at 4467.

¹⁴⁰ Pai, *supra* note 7 at 4; ICT-BD, *The Chief Prosecutor v. Professor Ghulam Azam*, ICT-BD 6-2011, Judgment (July 15, 2013), paras. 82, 203.

¹⁴¹ Nizami, *supra* note 123, para. 296.

¹⁴² ICT-BD, *The Chief Prosecutor v. (1) Ashrafuzzaman Khan and Naeb Ali Khan [absconded] & (2) Chowdhury Mueen Uddin [absconded]*, ICT-BD 1-2013, Judgment (Nov. 3, 2013), para. 84.

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government purposefully recruited Bengali collaborators during the second phase of the war. Many Islamist political parties and organizations opposed the Awami League, such as the Muslim League and the *Jamaat-e-Islami* (JI), which worked with the Army.¹⁴³ Peace committees were formed in various cities and towns, and *rajakars* (armed volunteers) were raised and given weaponry under their supervision to combat the freedom fighters. During the period of 12–14 December, 1971, two armed vigilante organizations – *Al-Badr* and *Al-Shams* – were trained and led the arrest and execution of the intellectuals.¹⁴⁴

4. Prosecution of the Suspects of Crimes Committed During the 1971 War

The International Crimes (Tribunals) Act 1973 was passed by the government of the newly formed nation of Bangladesh in 1973 following the war.¹⁴⁵ However, no such action was taken by any government to prosecute the suspect until 2008. In 2008, the War Crimes Fact Finding Committee released a list of 1,597 individuals deemed criminals. This list included influential ministers, parliamentarians, and political figures from two major political parties.¹⁴⁶ Eventually, in 2009, the government of Bangladesh established a tribunal under the International Crimes Tribunal (Tribunals) Act of 1973 to prosecute those suspects.¹⁴⁷ Since 2010, the Tribunal has been in operation. Although civilians and the Pakistani Army were involved in the massacre, the Bangladeshi Tribunal is prosecuting local collaborators, but the Pakistani Army.¹⁴⁸

Notably, Pakistan has not yet held its Army accountable for its actions. However, since the crimes were committed over half a century ago, it may prove challenging for the Pakistani government to gather original evidence. Nonetheless, there may still be opportunities to prosecute certain army officers as indirect perpetrators or accessories of murder under the functional participation doctrine, which does not always require direct evidence in certain situations.

E. Application of “Functional Participation” Theory in the 1971 Massacre

The accused’s role is paramount in determining guilt when dealing with system criminality in international criminal law.¹⁴⁹ It perfectly captures their contribution to the crime and sheds a clear light on the *actus reus*.¹⁵⁰ Moreover, establishing the offender’s intent is crucial in the context of a crime. Their knowledge and motives provide evidence of their *mens rea*. So, the prosecutor is obligated to prove the defendant’s guilt based on the notion of “functional participation”, which requires the presentation of numerous elements. Based on the nature of the “functional participation” approach, the theory may apply to the suspects if four

¹⁴³ Jahan, *supra* note 120, at 258.

¹⁴⁴ *Id.*

¹⁴⁵ The Parliament of Bangladesh passed the International Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973) to detain, prosecute, and punish those who are accountable for committing genocide, crimes against humanity, war crimes, and other offenses under international law.

¹⁴⁶ Zakia Afrin, *The International War Crimes (Tribunal) Act, 1973 of Bangladesh*, INDIAN YEARBOOK OF INTERNATIONAL LAW AND POLICY (2009), at 342.

¹⁴⁷ Investigation Agency, International Crimes Tribunal, Bangladesh, Public Security Division, Ministry of Home Affairs, Bangladesh, <http://ictbdinvestigation.portal.gov.bd/>.

¹⁴⁸ Afrin, *supra* note 146.

¹⁴⁹ Van der Wilt, *supra* note 62, at 619.

¹⁵⁰ *Id.*

requirements are met. They are 1) a specific crime, 2) a common plan, 3) a contribution (direct or indirect), and 4) a plurality of perpetrators. Let us evaluate these four criteria in the context of Bangladesh's Liberation War.

1. A Specific Crime

The first and most important requirement is a particular crime. It has been observed that extermination camps such as Treblinka and Sobibór had only one goal: to exterminate Jews.¹⁵¹ This goal indicates that those who worked in the camps participated in the mass murders of Jews. Similarly, several incidents may be recorded in Bangladesh's atrocities, notably the massacre at Dhaka University's Iqbal Hall during the first phase of the war, which was "operation searchlight". The Pakistani military killed two hundred students and seventeen teachers in Iqbal Hall.¹⁵² The target of Iqbal was nothing but a killing mission. Another tragedy was the extermination of intellectuals in large numbers. Nearly 1,000 intellectuals were slaughtered in Dhaka just two days before Pakistan's surrender.¹⁵³ Again, the sole purpose was to exterminate the intellectuals. Therefore, anyone involved in the process of exterminating intellectuals should be held accountable.

2. A Common Purpose or Plan

Regarding the case of Demjanjuk, Professor Dieter Pohl of Klagenfurt established that Sobibór was a death camp with the common plan of killing Jews.¹⁵⁴ The German prosecution argued that, based on the Sobibór death camp's understanding, "[a]ll Sobibór guards participated in the killing process. Demjanjuk was a Sobibór guard. Therefore, Demjanjuk participated in the killing process".¹⁵⁵ Similarly, the attack on the University of Dhaka was intended to put an end to the student movement by killing them, which they did in the Iqbal Hall. Furthermore, the assassination of intellectuals was a deliberate massacre designed to murder the most well-known and influential scholars and professionals in each city and town, depriving the future nation of its most capable leadership.¹⁵⁶ However, one could argue that no concrete evidence exists of a plan to eliminate intellectuals. In those circumstances, the perpetrators should not be prosecuted under the common plan notion. In this regard, the Bangladeshi war crimes tribunal stated that planning and carrying out unlawful conduct cannot be a physical act.¹⁵⁷ There may be no documentary evidence that such a strategy was designed.

The existence of a plan is deduced from the totality of circumstances and pertinent information. So it is irrelevant to request proof of where, when, who, and how the plan was designed.¹⁵⁸ It is reasonable to infer that such a planned pattern of collective elimination of the *intellectual class* could not have been launched and carried out without a common purpose and

¹⁵¹ Kohout, *supra* note 80, at 37.

¹⁵² Ahmed, *supra* note 124; Simon Drings, *Eyewitness Account of Operation Searchlight*, THE DAILY TELEGRAPH (Mar. 31, 1971); Loshak, *supra* note 124, at 88-126.

¹⁵³ Pai, *supra* note 7, at 4.

¹⁵⁴ Lawrence Douglas, *The Historian's Trial: John Demjanjuk and the Prosecution of Atrocity*, in THE PALGRAVE HANDBOOK OF STATE-SPONSORED HISTORY AFTER 1945 (Berber Bevernage, Nico Wouters eds., 2018), at 543.

¹⁵⁵ *Id.*, at 544.

¹⁵⁶ Jahan, *supra* note 120, at 256.

¹⁵⁷ ICT-BD, *The Chief Prosecutor v. Ashrafuzzaman Khan et al*, *supra* note, 142, para. 75.

¹⁵⁸ *Id.*

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plan.¹⁵⁹ The Tribunal also stated that the killing of selected intellectuals was a systematic and calculated “large-scale killing”, resulting from a strategy designed to undermine the Bengali nation's existence.¹⁶⁰ Moreover, according to the *Mujahidi* case, the killing of intellectuals resulted from a common plan.¹⁶¹

Nonetheless, one could claim that there is no indication that Pakistani soldiers directly killed any civilian or intellectual in the massacre of Iqbal Hall. It makes no difference whether the Pakistani armies directly killed anybody. Suppose it is possible to prove that the Pakistani militaries’ common purpose was to kill civilians. In that case, they must be held guilty, even if not as direct perpetrators but as accomplices.

3. A Group of Perpetrators

The “functional participation” theory does not apply to a single perpetrator of a single crime. It must be a serious crime involving a group of perpetrators, each playing a different role, but they all have a common aim. Responsibility for a crime committed jointly is a type of criminal responsibility that appears to be well-suited to address the criminal liability of all participants in a common criminal plan.¹⁶² This theoretical model is made up of two parts.

First, it acknowledges that parties to a crime committed jointly are responsible for each act committed by their associates within the enterprise’s limits. Second, it states that if one party acts outside the enterprise’s boundaries, the other will only be held liable if they know the activity.¹⁶³ Furthermore, if a crime is committed jointly and

where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.¹⁶⁴

According to the “functional participation” paradigm, every culprit within the group who is aware of a probable crime is accountable, even if he is not a direct perpetrator. *Demjanjuk*, for example, was a camp guard, and there was no evidence that he killed anyone. Similarly, Oskar Gröning, A former Nazi SS guard, worked as an accountant at *Auschwitz*, but no evidence indicates he killed anyone or participated in the execution process.¹⁶⁵ On the other hand, the prosecution claimed that their functions contributed to the murder of the Jews.¹⁶⁶

In Bangladesh, the Pakistani government and military formed a number of intermediary forces, such as the Razakars, the *Al-Badar*, the *Al-Shams*, the Peace Committee, and so on, primarily to work alongside the Pakistani occupation army in identifying and eliminating all those perceived to be pro-liberation, individuals belonging to minority religious groups, particularly Hindus, political groups affiliated with the Awami League and Bangalee

¹⁵⁹ *Id.*, paras. 75, 91.

¹⁶⁰ *Id.*, para. 78.

¹⁶¹ ICT-BD, *The Chief Prosecutor v. Ali Ahsan Muhammad Mujahid*, ICT-BD 4-2012, Judgment (July 17, 2013), para. 602.

¹⁶² Cassese, *supra* note 41, at 110.

¹⁶³ Beatrice Krebs, *Joint Criminal Enterprise*, 73(4) *THE MODERN LAW REVIEW* 578 (2010).

¹⁶⁴ ICTY, *The Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber, Judgment (Nov. 30, 2005), para. 510.

¹⁶⁵ Kohout, *supra* note 80, at 37, 49.

¹⁶⁶ Thomas Douglas, *Punishing Wrongs from the Distant Past*, 38(4) *LAW AND PHILOSOPHY* 335 (2019), at 342.

intellectuals, and unarmed civilian population.¹⁶⁷ These committees and groups were formed to execute the common plans of the Pakistani occupation army. Therefore, one could claim that in Bangladesh, the group(s) that took part in the Iqbal Hall assassination mission and the killing of intellectuals should be held accountable for their co-perpetration.

The court ruled that, as the leader of the *Al-Badar* group, accused Ali Ahsan Muhammad Mujahid could not escape responsibility for the deaths of intellectuals.¹⁶⁸ He was subsequently convicted of intellectuals, although there was no evidence of him directly killing any intellectual.¹⁶⁹ Thus, whether or not the culprit directly killed someone is irrelevant. His participation as a group member aided other assailants in the murder of intellectuals. Similarly, under the “functional participation” theory, Pakistani troops that belonged to a specific military group assisted in slaughtering intellectuals or Iqbal Hall may be held accountable.

4. Contribution

Although only some members of the group may physically commit the crime, the participation and contribution of the other group members are often significant in aiding the commission of the crime. Furthermore, physical involvement in commissioning the principal offense is not always required to incur guilt. The act and conduct of the accused are sufficient to constitute part of the attack if it has a substantial link to the commission of the primary crime.¹⁷⁰ Moreover, in the *Mujahidi*, the Tribunal stated that “conduct, act, behaviour and the level of influence and authority of the accused together, which have been convincingly proved, are thus qualified to be the constituent of ‘participation’ too...”.¹⁷¹

The Tribunal further stated that the moral weight of such participation is sometimes equal to, if not greater than, that of those physically carrying out the crimes.¹⁷² However, convicting someone based on the “functional participation” approach is extremely difficult. Under the common purpose notion, the prosecutor must demonstrate that the perpetrator was employed at the crime scene and contributed to the crime either directly or indirectly.¹⁷³

In the case of *Abdus Sattar*, the Bangladeshi war crimes tribunal stated that “the word ‘committed’ is not meant to exclude participants who had not themselves executed the crimes at the crime scene”.¹⁷⁴ Therefore, it is not necessary to ascertain the substantial or significant nature of an accused’s role in the crime to establish his liability as a co-perpetrator. An accused must have performed an act or omission contributing to the common criminal purpose.¹⁷⁵ For example, the prosecution demonstrated that Demjanjuk worked as a guard at a specific extermination camp and is thus liable for the camp’s operations since all of them working in the camp had a common plan. Similarly, the culprits who took part in the mass murder of Iqbal Hall or intellectuals could be held guilty for the massacre.

¹⁶⁷ Mujahid, *supra* note 161, para. 12.

¹⁶⁸ *Id.*, para. 57.

¹⁶⁹ *Id.*, para. 446.

¹⁷⁰ ICTY, *The Prosecutor v. Duško Tadić*, IT-94-1, Trial Chamber, Judgment (May 7, 1997), para. 691.

¹⁷¹ Mujahid, *supra* note 161, para. 265.

¹⁷² ICTY, *The Prosecutor v. Duško Tadić*, IT-94-1-A, Appeal Chamber, Judgment (July 15, 1999), para. 191.

¹⁷³ ICTY, *The Prosecutor v. Miroslav Kvočka et al.*, IT-98-30/1-T, Trial Chamber, Judgment (Nov. 2, 2001), para. 49.

¹⁷⁴ ICT-BD, *The Chief Prosecutor v. Md. Abdus Sattar and Tipu Sultan*, ICT-BD 5-2018, Judgment (Aug. 8, 2018), para. 373.

¹⁷⁵ ICTY, *The Prosecutor v. Miroslav Kvočka et al.*, *supra* note 173, para. 421.

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According to the reasoning, the perpetrator’s contribution assisted in completing the killing operation. It would make no difference if the offender did not directly kill any of the Iqbal Hall victims. The perpetrator might be a guard or someone who assisted other criminals in killing the victims. Under the “functional participation” approach, anybody who assisted or killed in the murder of intellectuals should be held accountable. He could have been someone who transported intellectuals from one site to another, or he could have been the one who killed them. In the *Mujahidi* case, the Bangladeshi war crimes tribunal stated that:

“concerned in the commission” refers to an indirect degree of “participation” and a person can be held concerned in the commission of an act of criminal offence by an organisation or group of individuals even if he is not found to be present at the crime site but took such a part in the preparation of such crime by his act or conduct providing abetment with intent to further its [plan of attack] object.¹⁷⁶

Although there was no proof that Mujahidi was present in the killings of intellectuals, the appellate division of the Bangladesh Supreme Court convicted Mujahidi for planning, aiding, instigating, abetting, and facilitating the massacre.¹⁷⁷

According to the preceding analysis, while not all perpetrators would be held guilty under the “functional participation” doctrine, some might be. Specifically, the murders of intellectuals and victims of Iqbal Hall since these missions were conducted comprehensively and organized.

III. Conclusion

Nuremberg did not prosecute junior officers; therefore, many junior officers who committed crimes during WWII could live their lives without fear of being tried in Germany. Despite this, it took more than 60 years to develop a new direction to pursue those other than top-level commanders engaged in the mass murder of Jews.¹⁷⁸ This new path paved by the Munich trial has established a new approach that might apply to all offenders, regardless of their rank. Indeed, this new approach has modified the definition of a war criminal from one who gives orders to one who participates in the killing process.¹⁷⁹

Without a doubt, the Demjanjuk principle solved a complex puzzle of WWII historical atrocities with the help of many Nazi documents and historians’ testimonies. Nonetheless, this is a recent development in the field of dealing with temporally distant crimes. Indeed, this paradigm’s reliability is demonstrated by applying the “functional participation” doctrine in other trials in Germany. As a result, the doctrine might be applied to other crimes committed elsewhere, i.e., the liberation war of Bangladesh.

Although Bangladesh began investigating culprits residing in the country in 2010, they are all civilians who participated in the massacre in 1971. The principal perpetrators are the Pakistani Army, who have never been tried in Pakistan or elsewhere. It may be argued that convicting low-ranking officers for their participation would be challenging due to the difficulty in handling eyewitnesses and other related evidence.

¹⁷⁶ Mujahid, *supra* note 161, para. 446.

¹⁷⁷ ICT-BD, *The Chief Prosecutor v. Ali Ahsan Muhammad Mujahid*, ICT-BD 4- 2012, Appeal Chamber, Judgment (June 1, 2015), para. 191.

¹⁷⁸ Jennifer Snyder, *A New Definition of A War Criminal: Present Day Nazi War Criminal Prosecutions*, 16(1) CHICAGO-KENT JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 163 (2016), at 177.

¹⁷⁹ *Id.*

While it is true that finding eyewitnesses after fifty years of atrocity would be challenging, Pakistan might still prosecute their Army based on documentary and historical evidence, similar to the Demjanjuk and Bruno or Oskar Gröning trials. For example, according to the preceding narrative, the “functional participation” theory may apply to defendants who committed crimes during the first and third phases of the 1971 massacre. It is not impossible to identify the Army that participated in the mass murder in Iqbal Hall. In this case, documentary evidence could be helpful. Furthermore, historians may assist in the discovery of the killing strategy of Iqbal Hall and intellectuals.

To summarize, dealing with temporally distant international crimes may be challenging but not impossible. Bangladesh, Cambodia, Senegal, and Argentina are just a few examples of countries dealing with decades-old crimes. Furthermore, the trials of John Demjanjuk, Bruno Dey, and Oskar Gröning suggest that prosecution without eyewitnesses is feasible. When there is no eyewitness to testify, the “functional participation” theory may help discover old truths, as it helped in the cases of Demjanjuk and others. Similarly, the “functional participation” approach may help address the riddle of Bangladesh’s liberation war. It may be possible to ascertain which army commanders took part in the Iqbal Hall operation and extermination of intellectuals using documentary evidence. If it is promising, then prosecution may be conceivable.