Joint Criminal Enterprise at the ECCC: The Challenge of Individual Criminal Responsibility for Crimes Committed under the Khmer Rouge

by Anthony Dinh*

***Anthony Dinh is a graduate of Northwestern University School of Law. He served as an intern and then Legal Consultant to the Pre-Trial Chamber at the ECCC in 2008-2009. The views herein are strictly his own.**

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I. INTRODUCTION

The process of bringing an individual to trial for the commission of international crimes is both intuitively familiar and singularly daunting. Punishing individuals for wrongdoing is a common effort among communities and domestic criminal law familiarizes us with the practice of holding persons individually accountable for unlawful acts. In fact, punishing wrongful acts is integral to establishing a sense of justice (retributive, restorative, or otherwise). International crimes, however, represent acts of unimaginable violence that exceed expectations for criminal justice in any ordinary sense. Acts of genocide, crimes against humanity and war crimes invoke the urge for criminal punishment that domestic crimes invoke but the scale, scope, and atrociousness inherent in international crimes render them incomparable. In international criminal law, therefore, the challenge is to mete individual responsibility for acts of inconceivable violence and for which domestic practices leave us ill-equipped.

This paper examines the doctrine of joint criminal enterprise (JCE) as a means of holding individuals responsible for violations of international crimes. Under this doctrine, suspects are individually liable for the commission of crimes committed via a common criminal effort in which they contribute. JCE eliminates the need to show that the accused physically perpetrated the crime in order to hold him/her individually responsible. It allows for the assignment of liability to individuals who contribute to the execution of a criminal plan but who do not physically perpetrate the possibly millions of unlawful acts. In this sense, it provides a means of holding responsible those who potentially bear the greatest culpability for the crimes.

The present research highlights the tension between the principle of culpability and the need for international criminal law to reach those most responsible for the commission of complex international crimes. It critiques the early development of the "common purpose" doctrine in the post-WWII tribunals and examines the potential influence of JCE with regard to the crimes committed under the Khmer Rouge in Cambodia. The crimes and facts under the jurisdiction of the Extraordinary Chambers in the Courts of Cambodia (ECCC) are prototypical of the complex situation that renders it impossible for traditional theories of criminal law to mete individual criminal responsibility. In addition, considering that the framers of the court have expressed *a priori* that Cambodian society views those persons who led and organized the commission of crimes as those most culpable, this paper argues that the application of JCE at the ECCC is appropriate and should be considered in the court's adjudication of the facts.

II. THE COMMON PURPOSE DOCTRINE ESTABLISHED BY THE POST-WWII TRIBUNALS WAS AN INCOMPLETE ATTEMPT TO METE INDIVIDUAL ACCOUNTABILITY IN INTERNATIONAL CRIMINAL LAW.

Liability for participation in a collective effort to perpetrate a crime has been a tenet of domestic and international criminal jurisprudence since the post-WWII period at latest. This mode of liability appears in the charters of the post-WWII tribunals as liability for participation in a "common plan" to perpetrate a crime and is consequently known as the common purpose or common plan doctrine.[1]

[1] Charter of the International Military Tribunal, August 8, 1945; Charter of the International Military Tribunal for the Far East, January, 19, 1946; Control Council Law No. 10, December 20, 1945. Relevant articles of these statutes are attached to this document in Annex 1.

The post-WWII tribunals employed this doctrine extensively and to wide effect in punishing those who participated in the commission of crimes during WWII. In addition, they produced a considerable body of jurisprudence on the issue that, in conjunction with other international instruments at the time, firmly established the common purpose doctrine as customary international law. Despite this, the common purpose doctrine of the post-WWII tribunals remained a nebulous concept and an incomplete attempt to hold individuals responsible for the international crimes. The post-WWII incarnation of the doctrine did not indicate any clear limitations nor did the legal theories in force at that time—such as punishing individuals for membership in an organization—demanded specific refinement of the doctrine. Hence, though the common purpose doctrine existed as customary law, the post-WWII manifestation of the doctrine requires significant modification in order to be an effective tool in the continuing effort of international criminal law to hold individuals responsible for the commission of international crimes.

A. Anglo-American Origins of JCE

The jurisprudence of the post-WWII tribunals generally serves as the moment in which JCE appeared in international criminal law. However, the doctrine originates in the Anglo-American common law tradition as a form of evidence construction. Anglo-American criminal law is centered on two dominant theories of assigning responsibility—the doctrines of causation and complicity.[2] The doctrine of causation fixes blame according to the relationship between an individual's conduct and the harm resulting from that conduct. The doctrine of complicity fixes blame upon individuals according to the criminal action of another person. JCE/the common

[2] S. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 333 (1985).

purpose doctrine arose in Anglo-American common law as an extension of the doctrine of complicity. It emerged because of the inability of the causation doctrine to deal with situations in which multiple individuals are jointly responsible (and therefore jointly culpable) for the commission of a crime.[3]

Under the doctrine of causation, the joint perpetration of a crime creates several problems. First, the doctrine of causation is mooted in situations where, because of the contributions of multiple participants, it is impossible to identify the exact causal conduct that led to the criminal offence. Second, the doctrine of causation is unable to hold individuals responsible where social norms dictate that an individual who provides vital support to the commission of a crime but did not commit the *actus reus* of the crime is equally or more culpable than the person who does physically commit the *actus reus*.[4]

The doctrine of complicity, in turn, compensates for some of the failures of causation theory and provides the core principles that underscore JCE. Complicity law establishes the principle of *derivative liability* whereby a secondary party incurs liability by virtue of a violation of law by the principal party to which the secondary party contributed.[5] This principle provides a means to assign liability to an individual who contributes to the commission of a crime but who does not physically perpetrate the crime. It is an evidentiary construction whereby the law imputes a form of *mens rea* to the secondary party in order to hold that party liable for the criminal actions of the principal actor. In addition, despite the distinction between principal and

[3] E. van Sliedregt, *Joint criminal enterprise as a pathway to convicting individuals for genocide*, 5 J. Int'l Crim. Just. 184, 196-97 (2007).
[4] Kadish, *supra* note 3, at 336. See discussion on the view in causation theory of the physical perpetrator being an independent actor who "breaks the chain of causation" and prevents the theory from assigning responsibility to other individuals who contribute to the crime.
[5] Kadish, *supra* note 3, at 337.

secondary parties, derivative liability under complicity law nonetheless holds both participants equally liable just as the doctrine of JCE does.[6]

The derivative liability principle therefore provides the conceptual basis for JCE/common purpose liability.[7] Under JCE, the liability for participation in a common criminal plan is derivative; the secondary party's liability depends upon the principal actor's physical perpetration of the crime. Thus, in its original conception, JCE is an evidentiary construction that imputes a form of *mens rea* to the secondary party in order to hold that party liable for his contributions to the commission of a criminal act.

JCE supplements the doctrines of causation and complicity in two significant ways. It provides a means to address the problematic situation above where, because of the joint contributions of the participants, it is impossible to identify the exact causal conduct that led to the commission of the crime.[8] JCE does not require an exact identification of the causal contributions that lead to the offence, but "rather [leaves] them under the cover of joint enterprise or common-purpose."[9] Neither the doctrine of causation nor complicity is able to account for such a situation. In addition, JCE provides a means to hold joint participants liable for crimes they should have reasonably foreseen could result (JCE 3). Though controversial, this type of liability extends responsibility to individuals who would not be liable under the doctrines of causation and complicity but who the courts and society deem culpable.[10]

B. Two Failed Attempts: The Doctrines of Conspiracy and Membership in a Criminal Organization in International Criminal Law

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[6] Kadish, *supra* note 3, at 337.
[7] van Sliedregt, *supra* note 4, at 197.
[8] A common example is the situation in which multiple individuals shoot a victim and it is impossible to determine which bullet caused the death.
[9] van Sliedregt, *supra* note 4, at 197.
[10] Kadish, *supra* note 3, at 362; *U.S. v. Pinkerton*, 328 U.S. 640 (1940); *R. v. Swindall and Osborne.* (1846), 2 Car. & K. 230

In framing the charter of the Nuremberg tribunal, the drafters were influenced by two doctrines that were questionable at the time and have since been abandoned in important respects. The first was the doctrine of conspiracy and the second was the doctrine of criminal responsibility based on membership in a criminal organization. These doctrines represent two failed attempts at reconciling the need to establish international criminal responsibility and the inadequacy of domestic criminal law concepts to address this challenge

Conspiracy, though the drafters incorporated it into the IMT Charter, was rejected by the judges of the post-WWII tribunals. In contemporary international criminal law, the *ad hoc* tribunals have declined to incorporate this doctrine with regard to any of the core international crimes except for the crime of genocide. The doctrine of punishing individuals based on membership in a criminal organization, on the other hand, has been rejected in all respects in international criminal law. This is also true in American law from which the drafters of the IMT Charter incorporated the doctrine. Though the two doctrines were rejected, they represent specific attempts to establish individual criminal responsibility in international crimes. The architects of the IMT Charter reasoned that "[i]t will never be possible to catch and convict every Axis war criminal…under the old concepts and procedure" and instead, specifically looked to the doctrines of conspiracy and membership in a criminal organization to facilitate in order to do so.[11]

Both of these doctrines represent attempts to meet the new challenge that prosecuting individuals for international crimes entailed and both display the inadequacy that domestic concepts of criminal law present for such a challenge. The conspiracy and membership in a

[11] C. Damgaard, INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES, 132 (2008) (Quoting Colonel Murray Bernays of the U.S. War Department).

criminal organization doctrines are designed to ease the burden of producing evidence in post-war situations where witnesses and physical evidence were likely difficult to obtain. However, both proved unworkable. As a practical matter, they represent an impermissible bias toward the prosecution. As a doctrinal matter, these doctrines essentially propagated the notion of collective criminality and undermined the tribunals' fundamental goal of establishing individual criminal responsibility.

As such, the rejection of these doctrines represents the continuing efforts in international criminal law in this regard. JCE is a separate and distinct principle that was adopted by the post-WWII tribunals and that have endured through the contemporary *ad hoc* tribunals.

C. The post-WWII tribunals and the Common Purpose Doctrine

(1) The Charters of the post-WWII tribunals

The common purpose doctrine has been included in international instruments and the practices of international tribunals since the post-WWII period. The charters of the post-WWII tribunals all designate this type of liability in terms of responsibility for participating in a "common plan" to commit a crime.[12] Article 6 of the London Charter of the International Military Tribunal (IMT Charter) and article 5 of the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal Charter) provide in identical wording that:

> "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a *common plan* or conspiracy to commit any of the foregoing crimes are responsible *for all acts performed by any person in execution of such plan*."[13]

[12] London Charter of the International Military Tribunal ("IMT Charter"); Charter of the International Military Tribunal for the Far East ("IMT Charter for the Far East"); Control Council Law No. 10 ("Control Council Law").
[13] Art. 6, IMT Charter; Art. 5(c), IMT Charter for the Far East; (emphasis added)

The Royal Warrant governing the British Military Courts and the Canadian War Crimes Regulations governing the Canadian Military Courts provide in similar wording that:

> "Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime."[14]

Control Council Law No. 10 (Control Council Law), in turn, stipulates that individuals are liable for:

> "participation in a common plan or conspiracy for the accomplishment of any [crimes within the ambit of the tribunal]."

> "Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission"[15]

These charters explicitly codify the core principle of the JCE doctrine—that is, participants of the common plan are individually liable for the commission of criminal acts perpetrated by other members in pursuance of the criminal design. Moreover, these charters are multipartite agreement that represent individual state recognition of the common plan doctrine in international criminal law.

(2) The jurisprudence of the post-WWII tribunals

[14] Reg. 8(ii), Royal Warrant of 18 June 1945 ("Royal Warrant"); Reg. 10(3), War Crimes Regulations ("Canadian Regulations").
[15] Article 2 (2), Control Council Law.

The practices of the post-WWII tribunals, in turn, bear out the wide and consistent application of the common plan liability in international criminal proceedings prior to 1975. The British, American, Canadian and Tokyo tribunals all delivered multiple convictions under this form of liability. These rulings provide a substantial body of international criminal jurisprudence on the doctrine. Furthermore, a review of these cases supports the ICTY *Tadic Appeals Judgment*'s three-part categorization of the doctrine.[16]

The post-WWII jurisprudence regarding the common purpose doctrine can be divided into several categories. The first line of cases involved groups of individuals working in concert to perpetrate a crime and most often, involved the killing of victims. In the *Almelo Trial*, for example, four individuals worked together to execute two victims but where only one person pulled the trigger each time.[17] Though the others merely stood watch or dug the graves, the British Military Court convicted all four individuals for murder. The court found that the charged persons' intention to affect the result and their participation in the execution of the plan rendered them individually liable for murder. This liability persists even if not all of the charged persons personally affected the crime.[18] Similarly, the Canadian Military Court convicted several individuals in the case of *Holzer et al* of murder based on the reasoning that: "If the Court find[s] that... [the accused] knew the purpose was to kill these airmen, then…persons together taking

[16] *Prosecutor v. Tadic*, IT-94-1-A, Judgment, Appeals Chamber, paras. 195-204 (July 15, 1999) ("*Tadic Appeals Judgment"*). The present research reviewed most of the post-WWII cases cited by the *Tadic* court and some not cited. However, without physical access to the UN War Crimes Commission Law Reports, this aspect of the research was limited.
[17] *Trial of Otto Sandrock and Others*, British Military Court, United Nations War Crimes Commission, 1 Law Reports of the Trials of War Criminals 36, ("*Almelo Trial*").
[18] *Almelo Trial* at 40.

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."[19]

Of particular significance is *U.S. v. Pohl & Others* where the U.S. Military Court adjudicated charges that a complex and "gigantic enterprise" existed whereby the charged persons coordinated the deportation and killing of thousands of Jews.[20] Though critics of the common purpose doctrine claim that the post-WWII tribunals only considered situations in which small groups of people acted in concert, the U.S. Military Court's conviction of the charged persons in this case indicates that the tribunals indeed applied the doctrine to situations involving large and complex criminal plans.

These cases represent the post-WWII tribunals' most basic and commonly utilized form of the common purpose liability. The distinction of this line of cases was the shared and coordinated intent of every participant in the plan to commit the crime. It was this shared intent that rendered each participant liable for the commission of the crime although not every person physically perpetrated the criminal act. In addition, despite the numerous convictions among the British, American, Canadian and Tokyo tribunals under this form of liability, the elements of this form of common purpose liability were consistent throughout the decisions.[21] They involve: 1) the existence of a common plan to commit a crime, 2) involving a plurality of persons who all share the intent to commit the crime and 3) the participation of the charged person in the execution of the plan.

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[19] *Hoelzer et al*., Canadian Military Court, 6 April 1946, reprinted in 5 J. Int'l Crim. Just. 230. As cited by the *Tadic Appeals Judgment* at para. 137. A. Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. Int'l Crim. Just. 109 (2007).

[20] *U.S. v. Pohl et al.*, U.S. Military Court, 5 Trial of Major War Criminals 958.

[21] *See Almelo Trial* at 22, 105*; Trial of Gustav Alfred Jespen et al.*, ("Jespen"), British Military Court, 2 April 1945, reprinted in 5 J. of Intl Crim. Just. 190; *Trial of Feurstein et al.,* (*Ponzano Case*), British Military Court, 24 August 1948, reprinted in 5 J. of Intl Crim. Just. 238.

The post-WWII jurisprudence however does not define the degree of participation necessary to invoke this form of liability nor does it define any limits on the scope of the plan for which this liability can apply. Unlike the ICTY's application of JCE, the post-WWII jurisprudence does not include a requirement that the charged person's participation be significant. In addition, critical commentary on the issue has noted that the ICTY has applied JCE to plans that are wider and extend over longer periods of time than the criminal designs featured in the post-WWII cases.[22] With the U.S. Military Courts at lease, the *U.S. v. Pohl* case shows that this is not true. However, even as the criticism admits, these issues are peripheral at best. These issues concern the proper application of the doctrine and do not derogate the conceptual basis of this form of liability—that all participants in the plan are responsible despite the fact that not all of them physically perpetrated the crime.

A second line of cases in the post-WWII jurisprudence involve convictions of individuals who supported the operation of concentration camps where crimes occurred. The *Dachau Concentration Camp Trial* and the *Mauthausen Concentration Camp Case* tried by the U.S. Military Courts and the *Belsen Trial* tried by the British Military Court all featured the conviction of individuals for commission of crimes for their participation in the functioning of a system of ill-treatment.[23] In these cases, the charged persons fulfilled different roles at concentration camps and bore responsibility for the crimes perpetrated at those camps so long as they were aware of the abuses and willingly took part in the functioning of the institution.

[22] Danner and Martinez , *supra* note 1, at 112.
[23] *Trial of Martin Gottfried Weiss et al.,* U.S. Military Court, United Nations War Crimes Commission, 11 Law Reports of the Trials of War Criminals 5 ("*Dachau Concentration Camp Case*"); *Mauthausen Concentration Camp Case* , U.S. Military Court, United Nations War Crimes Commission, 11 Law Reports of the Trials of War Criminals 15 ("*Mauthausen Case*"); *Trial of Josef Kramer et al.*, British Military Court, United Nations War Crimes Commission, 2 Law Reports of the Trials of War Criminals 117 ("*Belsen Trial*").

The post-WWII jurisprudence supports this form of the common plan liability in a greater and more detailed extent than either of the other forms. In this line of cases, the tribunals' judgments lay out in detail the courts' reasoning, the elements required, and specific limitations in applying this form of liability. As the Law Report of the *Dachau* judgment states, the elements required are: "1) that there was in force…a system to ill-treat the prisoners and commit the [crimes] 2) that each accused was aware of the system, 3) that each accused, by his conduct encouraged, aided and abetted or participated in enforcing this system."[24] Moreover, the post-WWII tribunals articulated specific defenses to this form of liability. They provided that a defendant could rebut such charges by showing "that the accused's membership was of such short duration or his position of such insignificance that he could not be said to have participated in the common design."[25] In articulating this form of liability at the ICTY, the Appeals Chamber adopted these elements and limitations word for word in all material respects in its judgment in the *Tadic* case.[26]

A third line of cases from the post-WWII case law concerned situations in which individuals were convicted for crimes committed by others and for which there was no apparent evidence that a shared intent existed regarding the crime. These cases generally involved mob actions that resulted in the unlawful killing of Allied prisoners of war. In the *Essen Lynching Case*, two soldiers and several civilians were convicted for their participation in a mob action in which several prisoners were killed. Though conceding that there was no evidence that a shared intent to kill the prisoners existed (only the intent to abuse them) nor that the defendants physically caused the deaths, the prosecution argued that no such intent was necessary where every member of the crowd knew that the prisoners was doomed and that "every person in that

[24] *Dachau Concentration Camp Case* at 13.
[25] *Mauthausen Concentration Camp Case* at 15.
[26] *Tadic Appeals Judgment*, para. 228.

crowd who struck a blow is moth morally and criminally responsible for the deaths."[27] The British Military Court convicted all of the defendants for murder.

The U.S. Military Court similarly convicted several individuals in the *Borkum Island Case* for their participation in a mob action. Again, the evidence only showed a shared intent to abuse the victims but not to kill them and no proof existed that the defendants had actually killed the victims. The prosecution argued that if it were proven beyond a reasonable doubt "that each one of these accused played his part in the mob violence which led to the unlawful killing of [the victims]…each and every one of the accused was guilty of murder."[28] By this reasoning, where the defendants were in a position to know that the assault would lead to the victims' death, the defendants need not have intended the crime but merely contributed to a situation where they knew that their actions could lead to the commission of the crime. As in the *Essen Lynching Case*, this tribunal convicted the charged persons of murder and sentenced them to various terms of imprisonment or death. Moreover, these convictions were echoed in similar situations in subsequent cases of the post-WWII tribunals and in the Italian Court of Cassation.

This line of judgments establishes that, at the least, a form of criminal recklessness exists within the common plan doctrine. Though these cases provided sparsely reasoned judgments, the fact patterns and consistent stream of convictions indicate that where the defendants' are in a position to know that a crime may result from their actions and those crimes indeed occur, those defendants are liable for those results.

However, the factual situations in these cases were narrow and potentially limit the applicability of this form of recklessness. As commentary on the common purpose doctrine points out, all of the accused were physically present during the commission of the crime and

[27] *Trial of Erich Heyer et al.*, British Military Courts, 22 December 1945, United Nations War Crimes Commission, 1 Law Reports of Trials of War Criminals 88 ("*Essen Lynching Case*").
[28] *Borkum Island Case*, as cited in *Tadic Appeals Judgment*, para. 210.

none of the accused were charged with participation in a larger plan outside of the immediate mob action.[29] Such situations are not likely to capture the wide and complex situations which contemporary cases exhibit. The situations before the contemporary *ad hoc* tribunals regarding nation-wide and transnational JCEs support this contention.

Regardless, the question regarding the degree to which this form of the common purpose doctrine may be applicable is peripheral to the doctrine's central concept—that is, that a member of the common plan may be held liable for the commission of crimes outside of the plan. The post-WWII jurisprudence above supports this fundamental principle. Hence, though the post-WWII jurisprudence does not provide guidance regarding the appropriate scope of application, it establishes at the least that liability akin to a form of recklessness is applicable to some degree in conjunction with the common plan doctrine.

III. MODERN JCE REPRESENTS THE CONTINUED EFFORT TO ESTABLISH INDIVIDUAL CRIMINAL RESPONSIBILITY FOR INTERNATIONAL CRIMES.

A. The Elements and Three Modalities of JCE

The modern *ad hoc* tribunals have distinguished three modalities of JCE. These categories derive from the ICTY Appeals Chamber's interpretation of the post-WWII jurisprudence above and represent the ICTY's attempt to distinguish the different forms of the common purpose liability expressed in the post-WWII case law.

JCE 1 (basic form) applies where a group of people, sharing the same intent to commit a crime, act according to a common plan to perpetrate that crime. The distinguishing feature of this

[29] Danner and Martinez, *supra* note 1, at 112.

form is that all participants share a common intent to commit a crime.[30] In *Prosecutor v. Simic*, the ICTY Trial Chamber employed this doctrine to convict the main defendant, Simic, of persecution as a crime against humanity. The defendant and several others coordinated a plan to unlawfully detain, beat, and torture non-Serb civilians. The court held that this constituted a basic form of JCE and though there was no evidence that the defendant physically perpetrated the offences, it convicted him for the actual commission of the crimes.[31]

JCE 2 (institutional form) holds individuals liable for participation in a criminal plan that is implemented in an institutional framework such as an internment camp.[32] Individuals under JCE 2 bear responsibility so long as they know that there is a system of ill-treatment and they willingly take part in the functioning of the system.[33] Courts can infer the individual's knowledge from circumstantial factors such as the individual's position in the institution, the amount of time spent in the institution, the function that individual performed in the system, and the individual's movement throughout the camp.[34]

JCE 3 (extended form) assigns liability for crimes committed outside of the common plan. Participants are liable for the commission of the extraneous crimes when those crimes are nonetheless a foreseeable consequence of the common purpose.[35]

Despite the conceptual distinction between the three forms of JCE, the objective elements (*actus reus*) required to show a JCE are the same for all three forms. Every JCE includes: 1) the existence of a common plan, 2) involving a plurality of persons, and that 3) the charged person contributed to the execution of the common plan.[36] These elements arise from the post-WWII

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[30] *Almelo Trial* at 41.
[31] *Prosecutor v. Simic*, ICTY, Trial Chamber, Judgment, (October 17, 2003) ("*Simic Trial Judgment*").
[32] *Tadic Appeals Judgment*, para. 202.
[33] *Dachau Concentration Camp Case* at 13; *Kvocka Trial Judgment*, para. 267; Cassese*, supra* note 20*,* at 112.
[34] *Tadic Appeals Judgment*, para. 220; *Kvocka Trial Judgment*, para. 271.
[35] *Kvocka Trial Judgment*, para. 267.
[36] *Tadic Appeals Judgment*, para. 227.

jurisprudence on the common plan liability and have been widely adopted in practice of the contemporary *ad hoc* tribunals.[37] The ICTY has developed further requirements (discussed below) with regard to these elements. However, these added requirements were developed after the 1975-1979 period relevant to the ECCC. Though persuasive, it is arguable whether they are applicable to proceedings before the ECCC.

The subjective element (*mens rea*), on the other hand, varies according to the modality of JCE applied. To constitute JCE 1, the charged person must have shared the intent to perpetrate a crime committed.[38] Under JCE 2, the charged person need not share the specific intent to perpetrate the crime but only have personal knowledge of the system of ill-treatment.[39] Under JCE 3, the charged person must have shared the group's common intent but need not have shared the intent to commit the extraneous crimes that occurs in the execution of the criminal plan. However, it is necessary that i) the extraneous crimes were a foreseeable consequence of the primary enterprise and ii) the charged person willing took the risk that such extraneous crimes could result.[40]

B. Modern Limitations of JCE

Whereas the post-WWII tribunals applied a wide form of JCE with few specific limitations, the contemporary *ad hoc* tribunals have circumscribed the doctrine in several respects that make it a more workable concept in international criminal law. In particular, these changes render the doctrine more adept toward the fundamental aim of assigning individual responsibility for

[37] *Tadic Appeals Judgment*, para. 227.
[38] *Tadic Appeals Judgment*, para. 228
[39] *Tadic Appeals Judgment*, para. 228
[40] *Tadic Appeals Judgment*, para. 228

international crimes by: 1) Providing greater guidance on when liability under JCE attaches to a defendant, 2) Clarifying the meaning of "common purpose" by requiring greater connection between individuals in a JCE, and 3) Delimiting the reckless form of the common purpose doctrine (JCE 3) in a manner compatible with contemporary notions of individual culpability.

(1) Significant participation is required.

One of the few limitations expressed by the post-WWII tribunals is that the charged person's contribution to the execution of the common plan must be a significant contribution. In the *Dachau Concentration Camp Case* and the *Mauthausen Concentration Camp Case*, the Law Reports note that the tribunals maintained that charged persons could rebut such liability by showing that their participation was "of such short duration or his position of such insignificance that he could not be said to have participated in the common design."[41] This implies that there is a threshold for a charged person's level of contribution where it only then becomes significant enough to hold an individual liable.

In the JCE 2 form of liability in particular, the post-WWII tribunals expressed specific concern regarding this requirement. The judgments for the *Belsen Trial*[42], the *Dachau* case and the *Mathausen* case expressly provided that significant participation on the part of the defendant was necessary. In the *Dachau* case and *Mathausen* case, the tribunals posited two factors for measuring whether participation is significant in the situation of JCE 2 liability—the duration of the charged person's participation and the charged person's position in the camp. With regard to the other forms of JCE, the significant participation requirement garnered lesser consideration. The tribunals held individuals liable under JCE 1 and JCE 3 if they found that the charged

[41] *Dachau Concentration Camp Case* at 16.
[42] *Belsen Trial* at 120.

person's participation contributed to the execution of the criminal plan. It sufficed if the charged person was a "cog in the wheel" that made the commission of the crime possible.[43] At the lowest level, it sufficed if the charged person was merely "concerned" in the criminal activity.[44]

As such, the post-WWII jurisprudence indicates possible variation in the significant participation requirement between the forms of JCE. In any case, the decisions above do not indicate that the charged person's participation must be a *sine qua non* without which the execution of the crime can not go forward. The contemporary *ad hoc* tribunals have also asserted on multiple occasions that the charged person's participation need not be a *sine qua non*.[45]

The ICTY's initial application of JCE in Tadic did not include a requirement that a charged person's participation be significant to the execution of the criminal design.[46] However subsequent judgments of the *ad hoc* tribunals have widely and explicitly adopted this requirement.[47] In *Prosecutor v. Kvocka*, the ICTY Trial Chamber defined that "[b]y significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or without disruption."[48] It held that the court must find that the charged person's conduct reaches the "level of participation necessary for criminal liability to attach" and that furthermore, this should be done on a case by case basis.[49] The ICTY Appeals Chamber in *Prosecutor v. Brdjanin* likewise held that "not every type of conduct would amount to a significant enough contribution to the crime for this to create

[43] *Pozano Case* at 239.
[44] *Essen Lynching Case* at 88.
[45] *Kvocka Trial Judgment*, para. 296.
[46] Cassese, *supra* note 20, at 128.
[47] Indeed, Judge Cassese, who was part of the ICTY Appeals Chamber bench that ruled on the Tadic case, stated in retrospect that the Tadic court did not envision this requirement but that "this requirement seems…to be indispensible." Cassese, *supra* note 20, at 128
[48] *Kvocka Trial Judgment*, para. 309.
[49] *Kvocka Trial Judgment* paras. 287, 309.

criminal liability" under JCE.[50] Similar to the Trial Court in *Kvocka*, the *Brdjanin* Appeals Chamber also held that determining the necessary degree of participation should be done on a case by case basis.[51]

(2) The principal perpetrator must be a member of the JCE.

In the *Brdjanin* case, the Trial Court asserted an additional limitation and ruled that there must be a mutual agreement between the charged person and the physical perpetrator of the crime in order for the charged person to be liable under the doctrine of JCE. Prof. Cassese, a member of the court that issued the original *Tadic* judgment, supports this mutual agreement requirement in his writings as an independent scholar. He characterizes it as a limitation that preserves the basic premise of the doctrine of JCE—that is, a JCE exists because of the shared criminal intent of all those who take part in the common enterprise.[52]

In contrast, the ICTY Appeals Chamber in *Brdjanin* and *Stakic* and the Trial Chamber in *Krstic* all held that a member of a JCE can be held responsible for crimes committed by non-members of the enterprise.[53] The Appeals Chamber in *Brdjanin* and *Stakic* held that the significance is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, "but whether the crime in question forms part of the common purpose."[54] This approach allows the court to hold individuals liable in the situation where members of a JCE employ a person outside of the JCE to perpetrate the crime in accordance with the common plan. It necessitates finding that the crime can be imputed to a member of the JCE acting

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[50] *Brdjanin Appeals Judgment*, para. 427.
[51] *Brdjanin Appeals Judgment*, para. 430. The Brdjanin Appeals Judgment also distinguished between "significant" participation and "substantial" participation. It found that the term substantial participation indicates a higher degree of participation than the term significant participation and held that only the court need only find significant participation in order for JCE to apply.
[52] Cassese, *supra* note 20, at 119.
[53] *Brdjanin Appeals Judgment*, paras. 408-410, 413.
[54] *Brdjanin Appeals Judgment*, para. 410. Citing *Prosecutor v. Stakic*, IT-97-24-A, paras. 418-419 (March 22, 2006) ("*Stakic Appeals Judgment"*).

pursuant to the common plan. The Appeals Chamber held that a case by case review was necessary to determine this link.

(3)The charged person and the physical perpetrator cannot be too physically or structurally remote.

Related to the mutual agreement requirement above, the Trial Chamber in *Brdjanin* asserted the further limitation that the charged person and those physically committing the crimes cannot be too physically or structurally remote.[55] In the *Brdjanin* case, the defendant was the head of a council that developed and publicized a plan for the widespread exclusion of non-Serbs in his province. Though he was a civilian leader of a city far from the villages in which the crimes occurred, the defendant was charged with responsibility for the murder and forcible removal of non-Serbs committed by military and police units in villages on the outskirts of his province.[56] The Trial Chamber found that the defendants' and the perpetrators' intent may have been the same and that their plans matched. However, it held that JCE was not applicable because the two parties were too physically or structurally remote. It found insufficient evidence to link the defendant and the acts of the physical perpetrators beyond a reasonable doubt.

This limitation is consistent with the test established by the Appeals Chamber in *Brdjanin* above.[57] The Appeals Chamber rejected the Trial Chamber's assertion that a lack of mutual agreement between the defendant and the physical perpetrators was dispositive in determining the inapplicability of JCE. However the nexus requirement that the crime committed must be linked to the criminal enterprise is consistent with the jurisprudence above and is supported by the *Stakic Appeal Judgment* and the *Kristic Trial Judgment*.

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[55] *Brdjanin Trial Judgment*, para. 354.
[56] The defendant was charged with responsibility for the murder and persecution of non-Serbs committed by army and police units in villages in areas outside of the defendant's area of work and residence.
[57] *Brdjanin Appeals Judgment*, para. 410. Citing *Stakic Appeals Judgment*, paras. 418-419.

(4) JCE 3 only applies where the crime committed was reasonably foreseeable and where the defendant willingly took the risk that such crime may result.

Contemporary JCE also articulates two elements necessary for JCE 3 to apply. This clarifies the situations in which JCE 3 may apply and makes the doctrine more consistent with contemporary notions of individual culpability. The post-WWII decisions regarding this form of the common purpose doctrine are famously devoid of legal reasoning. The *Tadic* Appeals Chamber, on the other hand, reasoned in detail that this form only applies where 1) the crime committed was a foreseeable result of the execution of the common plan and 2) the defendant willingly took the risk that such crime may result.[58] In that case, the ICTY Appeals Chamber found that Tadic had participated in the common "criminal purpose to rid the Prijedor region of the non-Serb population."[59] It further found that the killing of non-Serbs in this process was a reasonably foreseeable consequence of this plan.[60] The court also found that Tadic willingly took the risk that such crimes might occur despite this risk and held him liable for the killings that resulted. Subsequent courts have similarly adopted this two-part requirement for JCE 3.[61]

Framing JCE 3 in terms of these requirements clarifies the legal bases for JCE 3 that the post-WWII jurisprudence neglected to provide. In addition, these requirements also make JCE 3 more compatible with contemporary notions of individual culpability. The notion of individual culpability demands, in particular, the existence of freely-chosen, independent action on the part of the individual in order to assign culpability. By establishing the requirements that the risk of the crime were foreseeable and that the defendant willingly accepted that risk, contemporary

[58] *Tadic Appeals Judgment*, paras. 218-220.
[59] *Tadic Appeals Judgment*, para. 232.
[60] *Tadic Appeals Judgment*, para. 232.
[61] *Stakic Appeals Judgment ,* para. 65; *Prosecutor v. Limaj,* IT-03-66-T, November 30, 2005, para. 511; *Prosecutor v. Karemera,* ICTR-98-44, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, Appeals Chamber, paras. 11-18 (April 12, 2006); *See also* Cassese, *supra* note 20, at 128-132

courts have couched JCE 3 in terms of the free choice and independent action that current notions of individual culpability demand.

IV. IT IS APPROPRIATE FOR THE ECCC TO APPLY JCE AS A MODE OF LIABILITY AND IT SHOULD DO SO IN ORDER TO REALIZE THE COURT'S CONSTITUTIVE PURPOSES.

The atrocities committed in Cambodia between 1975-1979 are paradigmatic of situations in which traditional legal rules are inadequate to deal with the crimes committed. One fifth to one third of the population (up to 2.2 million people) was murdered or died in Cambodia in those years.[62] Millions of others survived but were subject to persecution, torture, forced labor, and forcible evacuation. The scale and scope of this violence not only make it impossible to determine the causative events of the crimes but potentially implicate an unmanageable number of the population.[63] In addition, the governing Khmer Rouge operated in intense secrecy to purposefully confuse those inside and outside of the coalition alike.[64] Their regular internal purges make obtaining evidence and securing witnesses difficult.[65] Their obsessive efforts to mask the chain of command, moreover, render the application of the command responsibility doctrine especially tenuous. Furthermore, as expressed by the framers of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Cambodian public views those persons who formulated the criminal operations and who may not have perpetrated any of the crimes as the most culpable.

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[62] J. Ciorciari, *Introduction* to THE KHMER ROUGE TRIBUNAL 12 (J. Ciorciari ed., 2006).
[63] D. Scheffer, *The Extraordinary Chambers in the Courts of Cambodia, in* INTERNATIONAL CRIMINAL LAW 240 (Bassiouni ed. 2008).
[64] B. Kiernan, THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE 1975-79 313 (2002).
[65] B. Kiernan, *supra* note 65, at 320, 329.

These considerations make JCE particularly apt for addressing the challenge of trying individuals for the crimes committed during Democratic Kampuchea. In the section below, this paper argues that JCE is not only necessary for the ECCC to fully achieve its constitutive purpose but also that the framers' assumptions and designation of personal jurisdiction in the ECCC's governing laws indicate that it is only logical that JCE is applicable before the court.

The principle of legality (*nullum crimen sine lege*) demands that courts only apply laws that were binding on individuals at the time of the commission of the acts charged.[66] The principle of personal culpability (*nulla poena sine culpa*) in turn demands that courts shall not hold persons criminally responsible for acts in which they have not personally engaged or in some way participated.[67] These principles suggest that the ECCC has jurisdiction to consider only those laws that are contemplated by the court's governing laws and that existed in force between 1975-79.

Though JCE is a mode of liability and not a substantive crime, international practices indicate that JCE is subject to the same standard for legality as substantive international crimes.[68] Such form of liability must have been a legal norm in force at the time of the commission of the crime in order to apply.[69] This approach is consistent with the core protection that the principle of legality purports. The *nullum crimen sine lege* principle dictates that a legal norm not in force

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[66] *Prosecutor v. Fofana*, SCSL-04-14-T, Judgment, Trial Chamber, para. 202 (August 2, 2007) *("Fofana Trial Judgment").*
[67] *Tadic Appeals Judgment*, para. 186.
[68] *Tadic Appeals Judgment*, para. 220; *Prosecutor v. Milutinovic et al.,* IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction-Joint Criminal Enterprise, Appeals Chamber, paras. 37-39 (May 21, 2003) ("*Ojdanic Decision"*); *Prosecutor v. Karemera,* ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of J. Nzirorera, E. Karemera, A. Rwamkuba, and M. Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, Trial Chamber, para. 39 (May 11, 2004) ("*Karemera Trial Chamber Decision")*; *See* ECCC Office of the Co-Prosecutors, No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" Dated 8 August 2008, para. 49 (September 5, 2008) ("*ECCC OCP Appeal"*).
[69] *Ojdanic Decision* paras. 40-41; *ECCC OCP Appeal*, para. 49.

at the time of an act may not be used to criminalize an individual retroactively.[70] Art. 15 (1) of the International Covenant on Civil and Political Rights (ICCPR), Art. 7 of the European Convention on Human Rights (ECHR), and Art. 9 of the American Convention on Human Rights (ACHR) all reflect this central concept. They provide in nearly identical language that:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."[71]

Customary law that existed in force in either international law or domestic law at the time of commission of the crime satisfies this requirement.[72]

The initial questions in the evaluation of whether JCE is applicable in the ECCC, therefore, are:

(1) Is JCE contemplated in the governing laws of the court?

(2) Did JCE exist as part of the laws in force in the period 1975-79?[73]

A. The ECCC's governing laws

The ECCC's governing laws are silent on the doctrine of JCE. None of the governing instruments expressly mention JCE or whether the doctrine is applicable or inapplicable before the court. However, a close reading of the ECCC Law indicates that the modes of liability listed

[70] *Ojdanic Decision*, para. 37-38; K. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, sec. 7(b). R. Cryker, H. Friman, and D. Robinson, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 13 (2007).
[71] Art. 15 (1), International Covenant on Civil and Political Rights. *See* Art. 7, ECHR. *See* Art. 9, ACHR.
[72] *Ojdanic Decision*, paras. 41-42; *Tadic Appeals Judgment*, paras 220-226; *Karemera Trial Chamber Decision*, para. 41-44; G. Werle, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 33 (2005); K. Gallant, supra note 69, at sec. 7(b)
[73] *Ojdanic Decision*, paras. 9-11.

in the law are non-exhaustive. Moreover, the stated purposes of the court imply the need to look beyond the modes of liability listed in the ECCC's governing documents in order to effectuate the court's goals.

(1) Textual interpretation of the ECCC's governing instruments provides limited support for inferring that JCE is applicable at the ECCC.

Article 29 of the ECCC Law sets forth the modes of liability applicable at the ECCC. The first clause of Article 29 stipulates that:

> "Any Suspect who planned, instigated, ordered , aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime."[74]

In part, whether JCE is contemplated in the ECCC Law depends on whether the court interprets this article to be an exhaustive or non-exhaustive list. In addition, whether the court adopts a broad or a narrow interpretation of the term "committed" in particular also affects the determination of whether the framers of the court contemplated the application of JCE at the ECCC.

Textual interpretation alone, however, is inadequate to determine the applicability of JCE at the ECCC. The contemporary *ad hoc* tribunals have held that use of the term "commit" in itself includes the doctrine of JCE as a form of commission. Citing the *Tadic Appeals Judgment*, they have held as a matter of textual interpretation that the inclusion of the term in the tribunals' statutes indicates that JCE is an applicable mode of liability before the courts.[75] For several reasons, this approach is problematic.

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[74] Article 29, Law Establishing the Extraordinary Chambers in the Courts of Cambodia, amended version October 27, 2004 (ECCC Law).

[75] *Fofana Trial Judgment*, para. 208. *Prosecutor v. Milutinovic et al.*, IT-99-37-AR72, Separate Opinion of Judge Hunt on Challenge by Ojdanic to Jurisdiction-Joint Criminal Enterprise, Appeals Chamber, para. 26 (May 21, 2003)

First, jurisprudence on JCE indeed uniformly holds that the perpetration of a crime via a JCE is a form of commission. However, to assume that the use of the term "commit" necessarily includes JCE is to invert this reasoning. Such a conclusion necessitates finding that the term "commit" inherently includes liability for participation in a JCE. This contention is dubious considering that the plain meaning of the term "commit", as the *Tadic* Appeals Chamber concedes, entails the physical perpetration of a crime.[76] Absent indications to the contrary, there are no grounds for a court to infer extraneous concepts to the plain meaning of the statutory language.

Second, this line of reasoning is a misapplication of the *Tadic Appeals Judgment*. The *Tadic Appeals Judgment* found that the term "commit" was not confined to a single definition and that the term could imply multiple forms of commission. This reasoning does not lead to the conclusion that the term inherently includes the doctrine of JCE. It therefore does not support finding that JCE is implied by the mere inclusion of the term "commit" within a tribunal's statute. The *Tadic* Appeals Chamber's reasoning was indeed premised on a broad interpretation of the term. However, the chamber concluded that JCE was applicable at the court because the court can only realize its object and purposes by considering multiple forms of commission. The *Tadic Appeals Judgment,* therefore, stands for the proposition that where a court must consider multiple forms of perpetration, the term "commit" is broad enough to include other forms of commission.

The plain text of Article 29 of the ECCC Law provides no guidance on whether the drafters contemplated the application of JCE at the ECCC. Reading Article 29 in light of the unique personal jurisdiction created by the ECCC Law, however, indicates that the modes of liability listed in that article are non-exhaustive. Articles 2 of the ECCC Law and Article 1 of the

[76] *Tadic Appeals Judgment*, para. 188.

Agreement express the court's jurisdiction to prosecute only senior leaders of Democratic Kampuchea and "those most responsible" for crimes committed in Cambodia between 1975-79.[77] This limitation presumes the existence of a hierarchical organization where individuals act in different capacities and presumes the possibility that crimes were committed through the participants' common effort. In addition, by limiting prosecutions to only the senior leaders and those most responsible, these articles indicate the desire to hold these persons individually responsible for the commission of the crimes.

None of the modes of liability listed in Article 29 adequately express the form of liability envisioned above. Rather, this framework indicates that the drafters contemplated a form of liability beyond those listed in Article 29 and similar to JCE. In fact, the ECCC Law and the Agreement provide greater textual support than that found in the ICTY Statute upon which multiple decisions have inferred JCE.[78] The ECCC's governing laws defines the court's intended suspects based on the suspects' role or responsibility in a common criminal enterprise (i.e. the suspect's role as a senior leader in the collective effort or the suspect's responsibility as one of those most responsible for the commission of crimes). Even if the drafters did not contemplate the doctrine of JCE in particular but a form of commission similar to co-perpetration, the personal jurisdiction set forth in the ECCC Law indicates that the modes of liability listed Article 29 are non-exhaustive.

In addition, considering the nature of the international crimes under the jurisdiction of the ECCC, an interpretation of the term "commit" that does not include the perpetration of crimes via a collective criminal effort would render the term "commit" useless. The nature of the crimes under the jurisdiction of the court renders it impossible for a single individual to physically

[77] Arts. 1 and 2, ECCC Law; Arts. 1 and 2, Agreement between the United Nations and the Royal Government of Cambodia (Agreement).
[78] *Tadic Appeals Judgment*, para. 189; *Stakic Appeals Judgment,* para. 85.

perpetrate the crimes. Hence, an interpretation that restricts the definition of the term "commit" to only the physical perpetration of a criminal act would make the drafters' inclusion of the term useless.

(2) It is necessary for the court to employ a mode of liability such as JCE in order to fully effectuate the object and purpose of the ECCC.

Article 2 of the ECCC Law and Article 1 of the Agreement set forth the constitutive purposes of the ECCC. The ECCC Law provides:

> Article 2: "Extraordinary Chambers shall be established […] to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

The Agreement in turn provides:

> Article 1: "The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia […]"

According to these articles, the object and purposes of the ECCC are two-fold: 1) To bring to trial senior leaders of Democratic Kampuchea and those most responsible for the commission of crimes in Cambodia in the period 1975-79; and 2) To hold individuals individually responsible for the commission of any crimes to which they contributed.[79] The

[79] See the statements of Sok An, Deputy Prime Minister and Chairman of the Task Force on the Khmer Rouge Trials, and the debates of the National Assembly (Sok An Statements). Available at: http://www.cambodia.gov.kh/krt/english/index.htm

drafters' broader desire for the ECCC to enhance "the pursuit of justice and national reconciliation, stability, peace and security" further supplements these purposes.[80] These purposes correspond with the goals discussed in the National Assembly during the drafting of the ECCC Law.[81]

Even if the drafters did not expressly consider JCE in particular as a mode of liability, the limitation that the court shall only prosecute senior leaders of Democratic Kampuchea and those most responsible for crimes committed makes it only logical that JCE is applicable at the ECCC. The court's unique personal jurisdiction presumes that individuals were organized in a common enterprise and presumes the possibility that crimes were committed via that structure. By singling out only those in leadership roles to be prosecuted, the governing laws preclude the possibility of holding anyone but those persons individually responsible for the crimes committed. The public statements of officials of the Cambodian government as well as the debates in the Cambodian National Assembly express the drafters' view that the senior leaders and those with influence in the organization are culpable for any violations committed.[82] Thus, in order to fully prosecute suspects for the culpability envisioned by the drafters, the court must be able to hold responsible those who perpetrate crimes via a common criminal enterprise.

None of the modes of liability listed in Article 29 provide for this type of liability nor are any of the modes in Article 29 capable of fully expressing the culpability that this form of commission entails.[83] In contrast, the characteristics contemplated above correlate with the

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[80] Preamble, Agreement, para. 2. D. Scheffer, *supra* note 64, at 224; K. Whitley, *History of the Khmer Rouge Tribunal: Origins, Negotiations, and Establishment*, THE KHMER ROUGE TRIBUNAL 46 (J. Ciorciari ed. 2006).
[81] See the statements of Sok An in the transcripts of the debates on the ECCC Law in the Cambodian National Assembly.
[82] See the statements of Sok An, Deputy Prime Minister and Chairman of the Task Force on the Khmer Rouge Trials. Available at: http://www.cambodia.gov.kh/krt/english/index.htm
[83] *Tadic Appeals Judgment*, para. 192. Though many commentators advocate the use of the command responsibility doctrine over JCE, the complexity of the criminal operations and the Khmer Rouge's obsessive efforts to mask the chain of command exemplifies the problem that the command responsibility encounters in international crimes.

elements for the perpetration of crimes under the doctrine of JCE. JCE accounts for the perpetration of crimes through a common enterprise and recognizes that those contributing to the commission of the crime but not perpetrating the *actus reus* of the criminal act may be equally culpable or more so. This corresponds with the object and purpose of the ECCC to hold the senior leaders and those most responsible individually responsible for the commission of any crimes in which they contributed. Without the application of a form of liability such as JCE, the court cannot fully prosecute individuals for the degree of culpability that their actions potentially indicate and that is envisioned in the ECCC Law. Hence, it is only through employing a doctrine such as JCE that the court is able to effectuate the judicial purposes of the ECCC.

Moreover, the language of Articles 3-8 setting forth the substantive crimes under the jurisdiction of the court also indicates that the court must consider the different forms of perpetration through which these crimes may have been committed. Articles 3-6 provide that the court's purpose is to prosecute "*all* suspects" of genocide, crimes against humanity, and grave breaches of the Geneva Conventions and Articles 7-8 provide that the court shall prosecute "*all* suspects most responsible" for the destruction of cultural property and crimes against internationally protected persons.[84] Even if the statute limits the court's personal jurisdiction to only senior leaders and those most responsible, these suspects may have perpetrated the crimes above through the execution of a common criminal plan. Therefore, in order for the ECCC to fulfill its mandate, it is necessary for the court to be able to prosecute these suspects regardless of the form in which they may have perpetrated or participated in the perpetration of the crimes.

(3) The drafters' reliance on the statutes of the ICTY and ICTR as models for the ECCC's governing laws and the use of JCE at the ICTY and ICTR indicates that JCE is applicable before the ECCC.

[84] Arts. 3-8, ECCC Law.

The practices at the ICTY and ICTR further support interpreting the ECCC Law in a manner that favors applying JCE at the ECCC. These practices are particularly instructive considering that the framers of the ECCC looked to the statutes of the ICTY and ICTR in drafting the ECCC Law. Their reliance is evident in the near identical language of Article 7 (1) of the ICTY Statute, Article 6 (1) of the ICTR Statute, and Article 29 of the ECCC Law which set forth the applicable modes of liability. It is also evident in the near identical language of the courts' statement of purpose in Article 1 of the ICTY Statute, Article 1 of the ICTR Statute, and Article 2 of the ECCC Law. In this respect, it is especially germane that multiple chambers in both the ICTY and the ICTR have found that those articles implicitly include JCE. Considering that the ECCC adopted the same statutory language regarding modes of liability and the same broad purposes, the ICTY's and ICTR's findings indicate that JCE is indeed applicable at the ECCC.

In addition, the distinguishing feature of the ECCC in this regard—its unique personal jurisdiction—provides further support that JCE is an applicable and necessary mode of liability before the ECCC. As discussed above, the ECCC Law is distinct from the statutes of the other contemporary *ad hoc* tribunals in that it lacks the open-ended jurisdiction to try any and all individuals who may bear responsibility for the crimes listed in the statute. By restricting prosecution to only those in leadership positions, the ECCC law expresses specific consideration for the perpetration of crimes via a hierarchical criminal enterprise. The ECCC Law therefore includes greater textual support for the applicability of JCE than either the ICTY or ICTR.

Moreover, applying JCE at the ECCC also serves two policy rationales in international criminal law. It creates horizontal consistency in the interpretation of international criminal law

with regard to the other contemporary *ad hoc* tribunals and temporal consistency with regard to the interpretation of international criminal law in the post-WWII jurisprudence. Whereas the statutes of the contemporary courts relate to the language of the ECCC's governing laws, the post-WWII jurisprudence establishes the customary law applicable before the ECCC. As discussed in the sections above and below, these sources strongly indicate that JCE is an applicable mode of liability. Applying JCE at the ECCC would not only be consistent with those sources of law but would serve the important needs for consistency in international criminal law.

As such, achieving the purposes set forth in the ECCC's governing laws and those envisioned by the framers of the court is not possible if the court cannot consider multiple forms of perpetration. Namely, the court's purposes are frustrated if it cannot hold individuals responsible for the commission of crimes through participation in a common criminal enterprise. The modes of liability listed in Article 29 are inadequate for this purpose. It is therefore necessary for the court to consider forms of commission such as JCE in order to fully effectuate the object and purposes of the ECCC. As discussed below, JCE was established as international customary law prior to 1975. Hence, the application of the doctrine does not violate the principle of legality and per the ECCC Law and the Agreement, the governing documents expressly preserve the ECCC's power to seek guidance from international custom where the governing laws are inadequate.

B. JCE existed as international customary law prior to 1975-79.

(1) Criteria for determining international customary law.

Article 2 of the ECCC Law and Article 1 of the Agreement provide that international customary law is applicable at the ECCC. Therefore, where the modes of liability listed in the

ECCC Law are inadequate to affect the purposes set forth in the governing documents, looking to international customary law in force at the time is appropriate. JCE was customary in international law prior to 1975. Applying this principle at the ECCC is thus warranted under the governing instruments' inclusion of customary law and does not violate the principle of legality with regard to the time period in question.

Article 38(1)(b) of the Statute of the International Court of Justice[85] (ICJ Statute) states that international custom is "evidence of a general practice accepted as law." General commentary on international customary law interprets this standard as requiring both state practice and *opinio juris* in order for a practice to be deemed customary in international law.[86] The ICJ's standard, however, was crafted for the regulation of international law and custom between states and has been developed by the ICJ where only states are contesting parties. International criminal law, on the other hand, concerns the prosecution of individuals and there exists a body of international criminal jurisprudence and practices that are more directly relevant than state practices. In addition, this distinction between international law of states and the international criminal prosecution of individuals also limits the applicability of the *opinio juris* requirement on issues such as the applicability of JCE. This is because no situation would arise that would require a state to declare that it considers itself bound under the doctrine of JCE. At best, *opinio juris* in international criminal law would be an act of the international community that recognizes certain principles as customary in the prosecutions of international crimes.

Subsequent international criminal courts have affirmed the reasoning above. The ICTY, ICTR and SCSL have held that a consistent and steady stream of decision from international

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[85] Art. 38 (1)(b), Statute of the International Court of Justice ("ICJ Statute"). Available at: http://www.icj-cij.org/documents/

[86] *North Sea Continental Shelf*, 1969 ICJ REP. 3, February 20 1969, p. 44. A. D'amato, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 49 (1971).

criminal proceedings and international instruments upholding a practice is sufficient to establish that practice as customary international law.[87] These courts have explicitly noted the limited degree that domestic practices contribute to the determination of whether a practice is customary in international criminal law.[88] Moreover, these courts have relied on international treaties and declarations as the primary sources of *opinio juris.*[89]

This method of deemphasizing the applicability of national practices and increasing the primacy international documents and decisions in determining the customary nature of a practice, however, has been advocated since the post-WWII period. In 1950, The International Law Commission (ILC) in 1950 set forth five indicators for judging the formulation of international customary law. The ILC conducted this research pursuant to a United Nations General Assembly mandate directing it to do so,[90] and the General Assembly unanimously adopted the ILC's findings.[91] The ILC considered that the expression of a practice in the following sources constituted evidence of whether that practice was customary in international law:

(1) Texts of International Instruments

(2) Decisions of International Courts

(3) Decisions and Legislation of National Courts

(4) Diplomatic Correspondence

(5) Practice of International Organizations

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[87] *Tadic Appeals Judgment*, para. 226 (addressing the issue of JCE), *Prosecutor v. Furundzija*, IT- 95-17/1-T, Judgment, Trial Chamber paras. 168-69 (December 10, 1998) (addressing rape as a crime against humanity); *Fofana Trial Judgment*, para. 208 (adopting the Tadic court's approach to determining the customary nature of JCE).
[88] *Tadic Appeals Judgment*, para. 225. *Ojdanic Decision*, para. 41.
[89] *Tadic Appeals Judgment*, paras. 221-223, *Furundzija*, para., *Ojdanic Decision*. para. 41; *Fofana Trial Judgment*, para. 208.
[90] Art. 24, Statute of the International Law Commission.
[91] International Law Commission, *Ways and means for making the evidence of customary international law more readily available*, 2 Y.B. OF THE INTERNATIONAL LAW COMMISSION ("*ILC Report on Customary Law*").

Within this rubric, the ILC emphasized that the first two indicators—the expression of a practice in international instruments and in the decisions of international court—were the most significant in determining whether a practice constituted customary law. The ILC recognized the potential significance of the other three indicators however the Commission asserted that each of those indicators had significant limitations in determining whether a practice was customary. In particular, the ILC expressed practical and conceptual reservations on the extent to which domestic practices are helpful in determining whether a practice is customary in international law.[92]

(2) JCE satisfies the criteria for recognition as international customary law.

The common plan doctrine has been recognized in international instruments and the practice of international criminal courts since the post-WWII tribunals at latest. The consistent and cogent application of this form of liability in the proceedings of these tribunals, the recognition of the doctrine by the United Nations General Assembly prior to 1975, and the doctrine's consonance with national practices at that time satisfy the criteria above for JCE to be considered customary in international law prior to 1975.

As discussed in Section II, the case law of the post-WWII tribunals provides a considerable body of jurisprudence upholding the core principles of the doctrine of JCE. In addition, the post-WWII jurisprudence roughly supports the contemporary tribunals' three part categorization of JCE.

The line of post-WWII cases involving situations in which a group of individual worked in concert to perpetrate a crime upheld the fundamental principle that individuals can be held liable for the commission of a crime based on their participation in a collective effort to

[92] *ILC Report on Customary Law*, paras. 53-54.

perpetrate that crime. These cases represent the most numerous set of rulings regarding the common purpose doctrine and correspond to JCE 1 (basic form). The line of cases involving concentration camps correspond with JCE 2. Lastly, the line of cases involving the mob actions in which individuals were convicted for crimes committed by others outside of the common plan corresponds with JCE 3.

Though dispute rages on the degree of applicability that the post-WWII jurisprudence establishes with regard to the common purpose doctrine, the debate on degree of applicability is ultimately peripheral. Moreover, this dispute is unsubstantiated in the first and second forms of JCE. The post-WWII case law for JCE 1 shows that the courts applied that form of the doctrine in situations featuring small scale as well as nation-wide criminal plans. JCE 2 on the other hand does not invoke issues of scale of applicability and the case law for this form of the doctrine provides the most reasoned judgments. With regard to JCE 3, the issue of applicability is again peripheral at best and does not touch upon the fundamental principle of this form of JCE. The judgments in this line of cases indeed lack clear reasoning, however, the consistent and cogent set of convictions in these cases indicate that a form of recklessness existed in the common purpose doctrine.

Moreover, International Law Commission's and the United Nations General Assembly's recognition of the common purpose doctrine in 1950 provides the necessary *opinio juris* that renders the doctrine customary. In the same report in which the ILC published its rubric for judging the formation of customary international law, the Commission outlined seven principles of international law that arose from the post-WWII tribunals. Liability for participation in a common plan to perpetrate crimes was among the principles the Commission recognized as part of international law. Principle 7 of the ILC Report states:

> Principle 7: "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

The ILC used the term "complicity" however, the commentary is clear that the Commission refers to the common plan doctrine employed by the IMT tribunal. Paragraph 125 of the report states that this principle derives from article 6 of the IMT Charter which provides that persons "participating in the formulation or execution of a common plan or conspiracy to commit any of the [crimes enumerated in the charter] are responsible for all acts performed by any persons in execution of such a plan." The ILC commentary further states that this principle "was designed to establish the responsibility of persons participating in a common plan" to perpetrate crimes and that the practice of the IMT tribunal showed that the principle indeed applied to the perpetration of war crimes and crimes against humanity. In addition, like the modern formulation of JCE, the ILC recognized that the common plan doctrine was not a substantive crime but a mode of liability "designed to establish the responsibility of persons participating in a common plan."

Subsequently, the United Nations General Assembly unanimously adopted the principles of laid out by the ILC.[93] Such an act by two organs representing the international community serves as the wide expression of acceptance as law that qualifies as *opinio juris*.

Furthermore, as discussed in the *Tadic Appeals Judgment*, this form of liability was consonant with national practices.[94] Versions of the common plan doctrine were applied in the countries that operated the post-WWII tribunals. In addition, the Italian Court of Cassation applied all three forms of JCE in its post-WWII proceedings. Also, though the *Tadic* Appeals

[93] UN Resolution adopting the Nuremberg Principles, GA Res. 174, UN Doc A/180 (1948).

Chamber was concerned with a more recent time period, much of the national jurisprudence cited in the *Tadic Appeals Judgment* was established prior to 1975.[95]

As such, the consistent and cogent application of the common plan liability in the practice of the international tribunals prior to 1975, the recognition of the doctrine by the international community as international law in 1950, and the consonance of these international practices with national practices indicate that JCE was customary in international law during the period relevant to the ECCC. The contemporary ad hoc tribunals have all held that JCE was established as customary in international law. Moreover, led by Tadic, their reasoning is based on the practices of the post-WWII tribunals.

V. CONCLUSION

Practical and conceptual problems hamper the ability of international criminal law to establish individual responsibility for the mass killings, deportations, torture, and other atrocious acts that constitute international crimes. The reality is that most of these crimes are only accomplished through the coordinated efforts of multiple persons and likely to occur in chaotic situations of war, lawlessness, or social and political upheaval. It is the international tribunals' challenge to establish individual accountability for the mass atrocities that occur despite these contexts.

As discussed above, domestic courts and international courts alike have struggled with this question. Courts have tried and rejected some doctrines—i.e. conspiracy and membership in a criminal organization—as early as the post-WWII tribunals. The doctrine of JCE, however, has endured since the post-WWII trials and offers a means to address some of the central

[95] *Tadic Appeals Judgment* footnotes 284-289.

problems that international crimes present. Conceptually, it provides a basis for courts to address situations of collective perpetration of crimes. Practically, it creates a means of addressing a lack of evidence and a means of inferring mens rea in a way compatible with dominant principles of legality and individual culpability. Unlike the doctrines rejected by previous generation of international tribunals, the doctrine of JCE does not inherently cross the divide from individual responsibility to collective responsibility. The contemporary *ad hoc* tribunals have limited the scope and application of JCE without needing to alter its fundamental principles.

In terms of international criminal courts' role in providing restorative justice, JCE allows the courts to mete punishment in a way that is consistent with societal conceptions of criminal culpability. As is the case in Cambodia, society often views persons who coordinate and provide vital support to the execution of a common criminal plan as more culpable than those who physically perpetrate the *actus reus* of the crime. JCE creates the possibility that courts may adjudicate such situations.

The situation before the ECCC exemplifies the challenges above. Mass killings and the complex commission of crimes render traditional modes of liability inadequate to hold individuals fully accountable for their participation in the crimes. Though they do not state so, the governing documents and the framers envision a form of individual responsibility that calls for the application of JCE. Moreover, the fact that JCE has existed as customary international law since the post-WWII era renders it particularly apt before the ECCC. As such, JCE exists as part of international criminal law's fundamental process of establishing individual criminal responsibility for crimes that, though they defy the capacity of a single individual, are nonetheless achievable through the coordinated actions of many. This doctrine has proven to be conceptually sound so as to be able to accommodate the continued development of international

legal norms. And as the situation before the ECCC shows, situations of unimaginable violence do exist such that JCE is an appropriate and necessary tool.

ANNEX 1: EXCERPTS OF RELEVANT POST-WWII INSTRUMENTS

Charter of the International Military Tribunal, 8 August 1945.
Article 6:
Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Royal Warrant, 18 June 1945
Reg 8 (ii):
Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime.

In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court.

Control Council Law No. 10, 20 December 1945
Art. II (2):
Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

Charter for the International Military Tribunal for the Far East, 1945
Art. 5:
Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.