មជ្ឈមណ្ឌលឯកសារកម្ពុជា

NULLUM CRIMEN SINE LEGE, THE JURISDICTION OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA & JOINT CRIMINAL ENTERPRISE

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EXECUTIVE SUMMARY

Due to the unique temporal jurisdiction of the ECCC, the defense of *nullum crimen sine lege* will present the Court with especially important and difficult legal challenges. One body of law that the accused are sure to challenge via the defense of *nullum crimen* is that of common plan/joint criminal enterprise ("JCE") liability. A successful challenge would strip the Prosecution of a favored prosecutorial weapon, thereby limiting the modes of liability by which the accused may be held responsible for acts that he/she did not physically perpetrate. These challenges will be especially provocative because the doctrine of common plan liability dates back to the body of post-World War II ("post-WWII") jurisprudence, but laid dormant until reinvigorated (and renamed JCE liability) by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in *Prosecutor v. Tadic*.

The goal of this paper is twofold: (1) to juxtapose post-WWII common plan liability and modern JCE liability for purposes of *nullum crimen* analysis; and (2) to provide an overview of JCE jurisprudence to assist the reader in applying the doctrine to the specific scenarios likely to arise before the ECCC.

The paper is divided into four main parts. Part I discusses the defense of *nullum crimen sine lege*. Part II surveys the post-WWII common plan liability jurisprudence and attempts to distinguish those doctrinal principles clearly established under customary international law as of 1975 from those that are less well-defined. Part III analyzes common plan liability in its modern-day incarnation as joint criminal enterprise liability, and explores the fundamental elements of the doctrine as set forth in the jurisprudence of the ICTY, the ICTR, the SCSL and other recent ad-hoc tribunals. Lastly, Part IV addresses the application of *nullum crimen* to JCE including how to properly analyze such a challenge in the context of the ECCC.

Part I

The defense of *nullum crimen*, which protects an individual from conviction for acts not criminalized at the time of commission, is implicitly recognized in the Law on the Establishment of the Extraordinary Chambers ("ECCC Law"). Therefore, any legal instrument levied by the Prosecution against the accused before the ECCC must have existed as enforceable law between 17 April 1975 and 6 January 1979. In responding to a *nullum crimen* challenge, the Prosecution must prove that the law in question: (1) existed at the relevant time, in a manner providing for individual liability; in a form (2) sufficiently specific to render the imposition of criminal sanctions for the acts of the accused foreseeable; and (3) accessible to the particular accused. The law must also not violate the ban on analogy or the doctrine of *favor rei*.

The ECCC will ultimately decide what form of common plan liability existed in April of 1975 and whether this form of liability can withstand a *nullum crimen* challenge. To conduct this inquiry, the Chambers of the ECCC must analyze and contrast common plan liability as applied in Post-WWII jurisprudence and modern JCE liability, and will arrive at one of three conclusions: (1) JCE is an impermissible extrapolation of common plan liability and therefore liability under the ECCC's jurisdiction is strictly limited to common plan liability as understood in the post-WWII jurisprudence; or (2) JCE evolved from common plan liability and existed in some modified form between 1975-79; or (3) JCE is merely a clarification of common plan liability law that existed at least by the end of the post-WWII trials and thus can be applied by the ECCC in its current form.

Part II

Part II sketches both the existence of common plan liability in customary international law prior to 1975, and certain core principles regarding its scope and nature. The notion that an individual member of a common plan may be held responsible for criminal acts committed by fellow participants in execution of the plan is codified in three of the foundational legal documents from the post-war period: the London Charter of the International Military Tribunal, Control Council Law Number 10, and the Charter of the International Military Tribunal for the Far East. The cases prosecuted according to these laws as well as other cases prosecuted in military and national courts during the era unequivocally endorsed the notion that a participant in an unlawful common purpose, plan or design may be held criminally responsible for acts committed in its execution even if the accused did not physically perpetrate the acts.

The case law demonstrates that a common plan may be large or small in terms of its geographical scope. Moreover, common planning can exist in a "complete dictatorship." Therefore, high-ranking accused persons may not shield themselves from liability by claiming that they were merely pawns executing the will of one omnipotent leader.

Much of the Post-WWII jurisprudence addressing the issue of common criminality is frustrating in its failure to articulate the exact standard of law being applied. Nevertheless, certain core trends are evident. With regards to the requisite *mens rea* and contribution of the accused, one sees the various courts struggling to define this relationship in certain instances in an effort to ensure protection for the paramount criminal law principle of individual culpability. Where the offense was envisioned as part of the common plan, international and national courts almost uniformly looked to whether the accused intended to participate in the unlawful purpose or design, and whether the accused undertook specific acts in furtherance of the plan. Where the

offense was committed as part of a distinct, organized system of oppression such as a concentration camp, the inquiry shifted away from intent to whether the accused had knowledge of the system, and whether he worked to enforce that system with this knowledge.

Where the act was outside of the envisaged plan, the courts generally focused their inquiry on whether the act was "predictable" or "foreseeable" to the accused under the circumstances and to what extent the accused helped in bringing it about. However, some courts seemed more concerned with whether the accused was physically present and/or participated in the additional act in some way. Regardless, it is undeniable that in certain instances courts found criminal liability in this more extended context. Whether the principles embodied therein had crystallized into customary international law as of 1975 is less certain, particularly in light of the fact that the international tribunals from the post-war era declined to explicitly expound on the use of common plan liability in such a context.

Part III

In the intervening years between the post-WWII cases and the creation of modern international criminal tribunals, the exact state of common plan liability remained unclear. In 1998 the Appeals Chamber of the ICTY delivered its seminal Judgment in *Tadic*, wherein it coined the phrase 'joint criminal enterprise' (JCE) liability to replace 'common plan' liability. The Chamber held that JCE liability was implicitly provided for in Article 7(1) of the ICTY Statute as a method of "commission" existing under customary international law as of at least 1992. The ECCC Law confers the Tribunal with jurisdiction to bring to trial "senior leaders" and those "most responsible" who "committed" those crimes within its subject matter jurisdiction. While consistent jurisprudence at the ICTR and SCSL has held that JCE liability is

a form of "commission," `it will be for the Chambers of the ECCC to ultimately decide whether or not ECCC Law implicitly provides for JCE as a mode of commission.

The Appeals Chamber in *Tadic* outlined the basic elements of JCE liability and went on to discuss three specific "categories." All three categories share several common elements: (1) a plurality of persons, who; (2) agree to pursue a common criminal plan; (3) an act by the accused in furtherance of such plan; and (4) the ultimate commission of the charged crime.

However, each category of JCE liability has a distinct *mens rea* requirement. The first category applies to situations where the commission of the charged crime is envisioned in the common plan and requires the accused's intent to join in the plan. The second category involves a prison or concentration camp scenario and requires a showing of the accused's awareness of the system of abuse, and his intent to further this system. The third category has a dual *mens rea* requirement and applies to crimes that, while not specifically envisioned as part of the original criminal plan, are its natural and foreseeable result. The prosecution must still prove the accused's common intent to join the original criminal plan. In addition, the Prosecution must prove that the accused was aware of the likelihood of the commission of the charged crime and voluntarily assumed the risk, a *mens rea* commonly referred to as *dolus eventualis* or advertent recklessness.

JCE liability has become a fixture in international criminal jurisprudence. The doctrine provides an organized method of representing the culpability of top officials for mass atrocities. While it has been accused of being a "magic bullet" for prosecutors, the doctrine has numerous safeguards that prevent it from creating mere organizational liability. The doctrine is flexible, but when extended to mid and low-level officials of criminal organizations, becomes increasingly difficult to prove.

When applied to the DK regime, the usefulness of JCE liability becomes apparent. The doctrine could establish the individual responsibility of the senior officials of the DK regime for the unspeakable crimes committed between 1975 and 1979, while not automatically imputing liability down to mid and low-level cadre leaders who may or may not have been culpable for some or all of these crimes.

Numerous issues have arisen regarding the application of JCE, including: (1) the requisite specificity of pleading JCE liability; (2) showing the existence and nature of the original plan; (3) the requisite level of participation by the accused; (4) general issues of proof; (5) the applicability of JCE liability to large-scale criminal enterprises; (6) the exact requirements of *dolus eventualis*; (7) whether the physical perpetrator of the charged crime(s) must be a member of the JCE; (8) if not, what relationship such perpetrator must have with members of the JCE; and (9) compatibility with specific intent crimes.

The SCSL, ICTY and ICTR have all addressed challenges concerning the specificity with which JCE must be outlined in the prosecution's case in order to provide adequate notice and information for the accused to prepare a vigorous defense. Due to the nature and scale of international crimes, Courts have generally sought to strike a balance between allowing the prosecution to allege crimes generally while still protecting the accused's right to be fully and clearly informed of the charges against him.

The specific JCE categories the prosecution plans on alleging at trial must be explicitly mentioned in the indictment. However, the prosecution may allege more than one form of JCE under a single set of facts. Apart from specifically employing the language of JCE, the indictment must further describe the purpose of the JCE, the members of the JCE, and accused's role in the JCE. The Prosecution need not necessarily name every member of the JCE, but may

describe the characteristics of membership more broadly. Lastly, to ensure protection of the accused's right to a fair trial, the prosecution must clearly provide the defense with notice of the type and general nature of the evidence it will rely on at trial.

According to the Co-Prosecutor's Statement of 18 July 2007, the initial five charged persons before the ECCC are alleged to have participated in a "common criminal plan constituting a systematic and unlawful denial of basic rights of the Cambodian population and the targeted persecution of certain groups." This criminal plan resulted in the commission of "crimes against humanity, genocide, grave breaches of the Geneva Conventions, homicide, torture and religious persecution." Although it is not an indictment, the Statement is drafted as if it were, providing notice of the general crimes that will be charged and the circumstances of their commission. The Co-Prosecutors base these charges on "twenty-five distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labor and religious, political and ethnic persecution," which provides the Defense with notice of the specific factual instances on which the liability of the accused is predicated. The "purported motive of this common criminal plan was to effect a radical change of Cambodian society along ideological lines," which provides the nature and scope of the initial agreement and common intent.

The Co-Prosecutors also state that "[t]hose responsible for these crimes and policies included senior leaders of the Democratic Kampuchea regime," which identifies, without specifically naming, the members of the alleged JCE. The Statement is thus drafted with the basic information necessary to plead JCE liability according to existing jurisprudence.

Regarding the existence and nature of the original plan, the jurisprudence widely recognizes that factual circumstances rarely arise where a group of people officially form a criminal organization. As a result, the original plan may be formed extemporaneously.

Moreover, the objective of the original plan need not be inherently criminal, as long as the participants anticipate the use of illegal means in its implementation.

The Co-Prosecutors seemingly intend to rely primarily on basic JCE to impute liability to the charged persons Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith. This is reflected by the nation-wide scope of the alleged common criminal plan, which logically embraces the Democratic Kampuchea ("DK") regime's drive to reshape "Cambodian society" by undertaking unlawful acts against "the Cambodian population" and "specific groups."

To differentiate between JCE liability and mere "guilt by association," the ICTY Appeals Chamber in *Tadic* held that the accused must commit an act in furtherance of the common criminal plan to be liable. The ICTY Appeals Chamber in *Prosecutor v. Kvocka et al.* subsequently held that the act in furtherance must be at least "significant," though it need not be a but-for cause of the charged crime(s) or the result of a physical act. However, how exactly the significant requirement differs from any act that in some way furthers the JCE or a substantial act remains somewhat unclear.

As JCE liability is predicated on an examination of the totality of the circumstances, there is no single contextual factor that automatically establishes liability if proved. International courts have, however, highlighted several factors that may be especially probative. These factors include: (1) holding a "position of authority" within the JCE; (2) acts in concert by a plurality of persons; and (3) specific acts by the accused.

While the alleged JCE before the ECCC is geographically wide in scope, the burden on the Prosecution to clearly identify its members is offset by the limited personal jurisdiction of the Tribunal and the highly centralized decision-making apparatus of the DK regime. Four of the initial charged persons occupied a senior leadership role within the DK. Proving membership in

the Standing Committee of the DK Central Committee will likely be sufficient to prove membership/participation in the common criminal plan. The Co-Prosecutors must also prove that the accused intended to participate in the plan. Such intent may likely be inferred from the factual record demonstrating that the four charged persons played an integral role in the development and implementation of DK policy.

Insofar as the size and geographical scope of an alleged JCE is concerned, both the ICTR and the ICTY have held that JCE liability may apply regardless of the size or scope. In practice, the prosecution often frames JCEs as narrowly as possible. This is primarily due to the burden of identifying, with specificity, the characteristics of the JCE and the identity of its members.

The most controversial form of JCE liability is third category, also referred to as "extended" JCE. Debate largely revolves around the *mens rea* requirement of extended JCE and its application.

One of the biggest questions left unanswered by *Tadic* was whether the *actus reus* of the charged crime need be carried out by a member of the JCE. This issue primarily arises where a small group of individuals in positions of power agree to a criminal plan but largely rely on subordinates for implementation. The ICTY Appeals Chamber addressed the issue in *Prosecutor v. Brdjanin*, overturning the Trial Chamber's holding that the physical perpetrator of a substantive crime must be a member of the JCE in order for liability to attach to all members. JCE liability is thus possible when JCE members use non-members as "tools" to effectuate the common plan, as long as there is a direct link between at least one JCE member and the physical perpetrator. The implications of the *Brdjanin* holding remain hotly debated.

The Appeals Chamber in *Brdjanin* did not discuss in-depth the nature of the relationship between the physical perpetrator and one member of the JCE necessary to impute liability

throughout the JCE, stating that such a determination involves a "case-by-case" analysis. Although decided before the Appeals Chamber's Judgment in *Brdjanin*, the case of *Prosecutor v. Krajisnik* provides some guidance regarding this fact-intensive inquiry.

Another contentious issue that has arisen in JCE jurisprudence involves the interplay between the *mens rea* required for specific intent crimes such as persecution and genocide, and the *mens rea* requirements of JCE liability. The compatibility of *mens rea* requirements of JCE liability and substantive specific intent crimes differs between the three categories of JCE, complicating the issue. According to the ICTY Appeals Chamber *Kvocka et al.*, the specific intent of the accused must always be proved for specific intent crime convictions via basic or systemic JCE liability. Meanwhile, arguments against imputing liability for specific intent crimes have gained the most momentum in the context of extended JCE, which requires only proof of *dolus eventualis*, a standard that does not mesh well with the stringent *dolus specialis* of specific intent crimes. Although courts have consistently held that liability may impute for specific intent crimes through all forms of JCE liability, application of JCE liability to specific intent crimes has yet to result in a conviction via extended JCE.

Part IV

Due in large part to the temporal jurisdiction of the Chapter 7 tribunals and other recent ad-hoc tribunals, no court has sought to challenge the holding by the Appeals Chamber in *Tadic* that JCE existed under customary international law as of at least 1992. However, in *Milutinovic et al.*, the Appeals Chamber held that the use of JCE to impute liability to the accused for his participation in a criminal enterprise in 1999 did not violate the principle of *nullum crimen*. In support of its holding, the Chamber found that: (1) JCE, which is an alternate label for common

plan liability, existed as customary international law before 1999; (2) the basic tenets of JCE were specific enough to make criminal liability for the accused's acts foreseeable; and (3) these tenets existed in a form sufficiently accessible to the accused to put him on notice. The notion that JCE liability and common plan liability are two different names for one legal doctrine suggests that JCE liability existed well before 1992.

There exists no modern jurisprudence stating when modern JCE liability achieved the status of customary international law and therefore the ECCC will have to determine, as a threshold matter, what form of common plan/JCE liability existed in customary international law as of 1975. This determination will turn largely on the Court's view of how closely the *Tadic* formulation of JCE liability mirrors post-WWII jurisprudence.

If the ECCC accepts the central holdings of the *Tadic* line of JCE jurisprudence and its interpretation of post-WWII jurisprudence, it logically follows for the ECCC to hold that JCE liability existed in a form substantially similar to its modern incarnation. This is due to the fact that virtually all of the legal precedent cited by the Appeals Chamber in *Tadic* existed well before 1975. The only evidence cited in *Tadic* that was promulgated after the temporal jurisdiction of the ECCC are two multilateral treaties and a small percentage of the domestic parallel modes of liability, all of which were analyzed as subsidiary evidence of general state practice and *opinio juris*. Therefore, if the ECCC holds that JCE liability existed in some form significantly distinct from its modern version, it will be implicitly disagreeing with the ICTY, ICTR and SCSL's reading of the post-WWII jurisprudence.

Conclusion

Any reasonable form of common plan/JCE liability the ECCC adopts is likely to survive a *nullum crimen* challenge. This is because the post-WWII case law, various modes of group liability in national systems, the 1956 Cambodian Penal Code, and the egregious nature of the common plan in which the accused are charged with participating render it difficult to believe that the accused believed their actions were legal at the relevant time. At its essence, the defense of *nullum crimen* is designed to protect those acting with good-faith "ignorance of the law." Stripping the Prosecution of any mode of common plan/JCE liability would implicitly state that the accused could have reasonably thought that participating in the *formulation* and *implementation* of a plan to radically alter Cambodian society by committing heinous crimes against their own population was not criminal in 1975. Respect for the substantive justice foundation upon which the defense of *nullum crimen* is built demands that such a conclusion be rejected.

I. The Defense of *Nullum Crimen Sine Lege*

A. Introduction and ECCC Applicability

The principle of *nullum crimen sine lege* ("no crime without law") [hereinafter "*nullum crimen*"] is an affirmative defense and a fundamental tenet of international criminal law.[1] The doctrine is the international equivalent to the prohibitions against *ex post facto* ("after the fact") criminal legislation ubiquitous in domestic legal systems. The defense of *nullum crimen* protects an individual from being "convicted of acts that were not criminal within positive law at the moment they were committed."[2]

The defense of *nullum crimen* is implicitly provided for in the Law on the Establishment of Extraordinary Chambers ("ECCC Law"), which adopts Articles 14 and 15 of the International Covenant on Civil and Political Rights ("ICCPR").[3] Article 15(1) of the ICCPR states:

> [n]o 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.[4]

Article 15(2), however, ensures that Article 15(1) is not interpreted as a barrier to international criminal liability:

> [n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according ato the general principles of law recognized by the community of nations.[5]

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[1] *See generally*, BETH VAN SCHAACK & RONALD SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 825 (Foundation Press 2007). *Nullum crimen* is alternatively referred to as the doctrine of "legality."
[2] *Id. Nullum crimen* is codified in three major multilateral treaties. Rome Statute of the International Criminal Court, art. 22, *entered into force*, 1 July 2002, 2187 U.N.T.S. 90 [hereinafter "Rome Statute"]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7, *entered into force*, 3 September 1953, 213 U.N.T.S. 221 (as amended by Protocol 11) *entered into force*, 1 November 1998, E.T.S No. 155 [hereinafter "European Convention"]; International Covenant on Civil and Political Rights, art. 15, *entered into force*, 23 March 1976, 999 U.N.T.S. 171 [hereinafter "ICCPR"].
[3] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments (NS/RKM/1004/006), Chapter X, art. 33 (27 October 2004) [hereinafter "ECCC Law"].
[4] ICCPR, *supra* note 2, art. 15(1).
[5] *Id*. art. 15(2).

Thus, any legal instrument levied by the Prosecution against the accused before the ECCC must have existed as enforceable law between 17 April 1975 and 6 January 1979.

B. Policy Considerations and Basic Elements

The defense of *nullum crimen* was repeatedly invoked by the various defendants at the International Military Tribunal in Nuremburg ("IMT").[6] In addressing *nullum crimen* challenges raised, the IMT characterized the doctrine as a "general principle of justice."[7] The Tribunal held that the doctrine provided no defense to perpetrators of the crime of aggression under international law, stating that:

> [t]o assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. . . . On this view of the case alone, it would appear that the maxim has not application to the present facts.[8]

This "substantive justice" view of *nullum crimen* has gradually evolved towards a "doctrine of strict legality" due to the fact that much of international criminal law is now enshrined in case law or some type of international legal instrument. [9]

Nevertheless, the basic concept of *nullum crimen* remains distinct from domestic prohibitions against *ex post facto* criminal legislation as international law still has no set method of promulgation.[10] Whereas domestic jurisdictions, with code-based criminal laws can adopt a

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[6] VAN SCHAACK & SLYE, *supra* note 1, at 825.
[7] *Id.* at 826, *citing* Judicial Decision, International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October, 1946, 41 AM. J. INT'L L. 172, 217 (1947) [hereinafter "IMT Judgment"].
[8] *Id.*
[9] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 144 (Oxford Press 2003).
[10] An oft-quoted characterization of this special need to allow for the evolution of international law is contained in the *Justice* case, wherein one Justice observed that:

> International law is not the product of statute for the simple reason that there is yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto rule*, as known to constitutional states could be applied to a treaty, a custom, or common law decision of an international tribunal, or to the international acquiescence which follows the events. To have

bright-line legality test, international law must employ a standard.[11] In responding to a *nullum crimen* challenge the Prosecution must prove that the law in question: (1) existed at the relevant time in a manner providing for individual liability; in a form (2) sufficiently specific to render the imposition of criminal sanctions for the acts of the accused foreseeable; and (3) accessible to the particular accused.[12] Regarding the elements of specificity and accessibility, the European Court of Human Rights ("ECHR") has held:

> the scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.[13]

Additionally, the law must also not violate the ban on analogy or the doctrine of *favor rei*.[14] Each of the elements of *nullum crimen* and the related doctrines of analogy and *favor rei* will be addressed in turn.

> attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth.

Prosecutor v. Milutinovic et al., Case No. IT-99-37-AR72, Decision on Dragoljub Odjanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ¶ 39, *quoting U.S.A. v. Alstoetter et al*, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. III pp. 974-75 (text available online: http://www.mazal.org/NMT-HOME.htm) [hereinafter "the *Justice* case"]; *see also Prosecutor v. Karemara et. al.*, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemara, Andre Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, ¶ 43 (11 May 2004) (holding "that, given the specificity of international criminal law, the principle of legality does not apply to international criminal law to the same extent as it applies in certain national legal systems"); *accord*, CASSESE, *supra* note 9, at 145 ("The principle [of *nullum crimen*] is still far from being fully applicable in international law, which still includes many rules that are loose in their scope and purport.").

[11] *E.g.* CASSESE, *supra* note 9, at 142 *et seq*.

[12] *See, e.g., Case of Streletz, Kessler and Krenz v. Germany*, App. Nos. 34044/96, 35532/97 and 44801/98, Eur. Ct. H.R. Judgment, ¶ 91 (22 March 2001) (Stating that to satisfy the principle of *nullum crimen*, the proper inquiry is "whether, at the time when they were committed, the applicants' acts constituted offences defined with sufficient accessibility and foreseeability under international law."); *Milutinovic et al.*, ¶ 21. The twin inquiries of specificity and accessibility are sometimes grouped as subsets of the requirement that the law was defined with sufficient "clarity" at the relevant time. *E.g. Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Judgment, ¶ 198 (29 November 2002) (Stating that the offense must be defined "with sufficient clarity for it to have been foreseeable and accessible, taking into account the specificity of customary international law.").

[13] *Case of Groppera Radio and Others v. Switzerland*, App. No. 10890/84, Eur. Ct. H.R. Judgment, ¶ 68 (28 March 1990).

[14] CASSESE, *supra* note 9, at 147-57.

1. The Existence of the Law

The first inquiry in addressing a claim of *nullum crimen* by a defendant involves a determination of whether the legal principle being challenged existed at the relevant time.[15] Such an inquiry requires an analysis of traditional sources of international law as laid out in Article 38(1) of the Statute of the International Court of Justice ("ICJ").[16] Sources of law, especially in the form of treaties or judicial decisions, issued after the relevant time may nevertheless be relevant as indicators of the law's earlier crystallization as customary international law.[17] Furthermore, even if the challenged law has evolved since the relevant time it may still be applied in its current form if the fundamental interests of justice that *nullum crimen* protects against are still satisfied.[18]

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[15] *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E) Decision on Preliminary Motion Based on Lack of Jurisdiction, ¶ 8 (31 May 2004).

[16] Article 38 of the Statute of the ICJ sets forth the following four sources of international law:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) […] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Statute of International Court of Justice, art. 38(1), *entered into force*, 24 October 1945, 1978 Y.B.U.N. 1052 [hereinafter "ICJ Statute"].

[17] *See, e.g., Sam Hinga Norman*, ¶ 50 (Citing Protocol II to the Convention on the Rights of the Child, which was signed on 25 May 2000 and entered into force on 12 February 2002 as evidence of the customary status of the crime of child military recruitment as of 1996.); *accord Prosecutor v. Aleksovski* Case No. IT-95-14/1, Judgment, ¶ 126 (24 March 2000) ("There is nothing in [*nullum crimen*] that prohibits the interpretation of the law through decisions of a court and the reliance on those decisions in subsequent cases in appropriate circumstances."). In addition to existing as a facet of international law at the relevant time, any legal provision must be shown to provide specifically for individual criminal accountability at the relevant time. *See Vasiljevic*, ¶ 193. Thus, the illegalization of certain actions on the part of a state under international law must be shown to provide for individual criminal accountability, rather than merely condemning contravening acts by states. This determination is only tangentially related to the focus of this paper, as the body of law being analyzed under the doctrine of *nullum crimen* (common plan/JCE) is specifically a mode of criminal liability and thus by its very terms provides for individual criminal accountability. Therefore the jurisprudence on the issue will not be examined in depth. For an in-depth analysis of how to determine the existence of individual accountability, *see id.* ¶¶ 30-53 (Analyzing whether international law provided for individual criminal accountability for recruiting child soldiers as of 1996 and concluding that it did.).

[18] *See, e.g., Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgment, ¶ 67 (22 March 2006) ("The principle *nullum crimen sine lege* protects persons who reasonably believed that their conduct was *lawful* from retroactive criminalization of their conduct. It does not protect persons who knew that they were committing a crime from being convicted of that crime under a subsequent formulation.) (emphasis in original). This statement would suggest that JCE could possibly be applied under the ECCC's jurisdiction as currently formulated, regardless of whether it existed in the same form in 1975, as long as the general notion of common plan liability enshrined in the post-WWII jurisprudence was sufficiently accessible to the accused before the ECCC.

2. Specificity/Foreseeability

The Prosecution must show not only that the law existed at the relevant time, but also that such existence was in a form specific enough to make liability foreseeable to the accused when acting.[19] This examination however, "does not entail that courts are barred from refining and elaborating upon, by way of construction, *existing* rules,"[20] as illustrated by the case of *C.R. v. United Kingdom* before the ECHR. The Court in *C.R.* held that the refusal by the Courts of the United Kingdom to recognize a marital exception to the crime of rape (which had been a defense to rape allegations in the past) did not offend the principle of *nullum crimen* because these Courts: "did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife."[21]

In *S.W. v. the United Kingdom*, a companion case to *C.R.*, the European Commission of Human Rights stated that the British judiciary "did not go beyond legitimate adaptation of the ingredients of a criminal offence to reflect the social conditions of the time" and therefore did not violate the principle of *nullum crimen*.[22] Thus, the crime's elements must only be specific enough to make it roughly foreseeable to the accused that his acts are illegal; an interpretation consistently upheld.[23]

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[19] *See, e.g., Milutinovic et al.*, ¶ 37 (Stating that in order to apply any international criminal legal provision, the Tribunal must be satisfied that "the law providing for such liability was sufficiently foreseeable.").
[20] CASSESE, *supra* note 9, at 149, *citing Aleksovski*, ¶ 127 (Stating that the principle of *nullum crimen* "does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime.); *accord Milutinovic*, ¶ 37; *Groppera Radio*, ¶ 68; *Vasiljevic*, ¶ 196.
[21] *C.R. v. United Kingdom*, App. No. 20190/92, Judgment, Eur. Ct. H.R., ¶ 41 (22 November 1995).
[22] *S.W. v. United Kingdom*, App. No. 20166/92, Report, Eur. Comm. H.R., ¶ 61 (27 June 1994).
[23] *See, e.g., Cantoni v. France*, App. No. 17682/91, Judgment, Eur. Ct. H.R., ¶ 33; *Milutinovic et al.*

3. Accessibility

The Prosecution must also show that the challenged law was "sufficiently accessible at the relevant time" to the specific accused.[24] Thus, while the specificity/foreseeability inquiry focuses on whether the law clearly proscribed the acts of the accused at the time, accessibility turns on whether the accused had sufficient notice of this foreseeable prohibition against his acts.[25] This inquiry is critical because customary law is not necessarily codified and thus may be truly unavailable to certain individuals. Thus, notice to the accused must be drawn through an examination of all available legal sources that explicitly or implicitly support the legal concept at issue. These sources include "judicial decisions, international instruments and domestic legislation," which are all probative of accessibility.[26] Of particular importance is whether a domestic corollary to challenged law existed at the relevant time.[27] Finally, international courts have also resorted to relying on the "atrocious nature of the crimes charged to conclude that the perpetrator of [the acts predicating liability] must have known that he was committing a crime."[28]

C. The Rule Against Analogy

Although it is not specifically part of the body of law comprising *nullum crimen*, the rule against analogy in international law is often implicated when *nullum crimen* issues are analyzed. This is based on the practice, most notably in civil law systems, whereby courts refrain from "extend[ing] the scope and purport of a criminal code to a matter that is unregulated by law

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[24] *Milutinovic et al.*, ¶ 21.
[25] This requirement does not entail an inquiry into whether the accused was subjectively aware of the law, but only whether information outlining the basic concept of the law in question were available to him. *See* CASSESE, *supra* note 9, at 154 ("International law, like most national systems, does not require awareness of the illegality of an act for the act to be regarded as an international crime" due to the "assumption that everybody must know the law.").
[26] *Milutinovic et al.*, ¶ 41.
[27] *Id.* ¶ 40 (Noting that the Tribunal "may . . . have recourse to domestic law for the purpose of establishing that the accused could have known that the offence in question or the offence committed in the way charged in the indictment was prohibited an punishable.).
[28] *Id.* ¶ 42.

(*analogia legis*)."[29] The ban on analogy forbids the extrapolation of specific provisions of international law into the field of general applicability. For example, if a multilateral treaty illegalizes a specific type of weapon, it would violate the ban on analogy for a court to rule a similar weapon illegal because of their similarities.[30] This rule is not implicated by more general international laws, such as the ban on "inhumane treatment," which requires the use of analogy and comparison to apply.[31]

D. *Favor Rei*

The doctrine of *favor rei* simply requires international courts, when choosing between multiple, reasonable interpretations of the law, to choose the interpretation that is most favorable to the accused.[32] This doctrine can interact with that of *nullum crimen* if a court finds the existence or form of a challenged law unclear at the relevant time.

E. Conclusion

The doctrine of *nullum crimen* is one of the most powerful defenses available under international criminal law. When successfully invoked, it strips a court of jurisdiction to apply a provision of law, even if such law is firmly embedded in international law at the time of trial.

Due to the unique temporal jurisdiction of the ECCC, issues of *nullum crimen* will present the Court with especially important and difficult legal challenges. One body of law that the accused before the ECCC are sure to challenge via the defense of *nullum crimen* is that of common plan/joint criminal enterprise ("JCE") liability. These challenges will be especially provocative because the doctrine of common plan liability dates back to the body of post-World War II ("post-WWII") jurisprudence, but laid dormant until reinvigorated (and renamed JCE) by

[29] CASSESE, *supra* note 9 at 153.
[30] *Id*. at 156.
[31] *Id.*
[32] *Id*. This principle is often confused with that of *in dubio pro reo*, which requires courts to interpret ambiguous *evidence* (as opposed to law) in the manner most favorable to the accused.

the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in *Prosecutor v. Tadic*.[33]

The ECCC will ultimately decide what form of common plan liability existed in April of 1975 and how this form of liability interacts with the principle of *nullum crimen*. To conduct this inquiry, the Chambers of the ECCC must analyze and contrast common plan liability as applied in Post-WWII jurisprudence and modern JCE liability and arrive at one of three conclusions: (1) JCE is an impermissible extrapolation of common plan liability and therefore liability under the ECCC's jurisdiction is strictly limited to common plan liability as understood in the post-WWII jurisprudence; (2) JCE evolved from common plan liability and existed in some modified form between 1975-79; *or* (3) JCE is merely a clarification of common plan liability law that existed at least by the end of the post-WWII trials and thus can be applied by the ECCC in its current form.

The remainder of this paper will discuss the post-WWII jurisprudence, modern JCE jurisprudence and the application of the principle of *nullum crimen* to JCE in light of the temporal jurisdiction of the ECCC. The goal of this analysis is twofold: (1) to juxtapose post-WWII common plan liability and modern JCE liability for purposes of *nullum crimen* analysis; and (2) to provide an overview of JCE jurisprudence to assist the reader in applying the doctrine to the specific scenarios likely to arise before the ECCC.

[33] *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment (15 July 1999).

II. Post –World War II Jurisprudence and the Origins of Common Plan Liability

This section sketches both the existence of common plan liability in customary international law prior to 1975, and certain core principles regarding its scope and nature.[34] Common plan liability finds its origins in post-WWII jurisprudence. The section thus draws predominantly on international and national case law from the immediate post-WWII period while also taking note of the Israeli trial of Nazi fugitive Adolf Eichmann in 1961.

A. The General Existence of Common Plan Liability

The notion that an individual member of a common plan may be held responsible for criminal acts committed by fellow participants in execution of the plan is codified in three of the foundational legal documents from the post-war period: the London Charter of the International Military Tribunal,[35] Control Council Law Number 10,[36] and the Charter of the International Military Tribunal for the Far East[37].

1. The London Charter, Control Council Law No. 10, and the IMTFE Charter

Article 6 of the London Charter conferred the IMT with jurisdiction to try and punish persons for crimes against peace, war crimes, and crimes against humanity.[38] Article 6 explicitly outlines the modes of commission by which accused persons could be held responsible:

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[34] Customary international law is formed by the combination of (1) state practice; and (2) *opinio juris*. *See* ICJ Statute, art. 38. For a discussion of *opinio juris*, *see Nicaragua v. United States*, (Merits), I.C.J. Reports 1986, ¶ 14.
[35] Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, art. 6, *concluded* and *entered into force*, 8 August 1945, 82 U.N.T.S. 279 [hereinafter "London Charter"].
[36] Control Council Law No. 10, in *Official Gazette of the Control Council for Germany* (1946), vol. 3, at 50.
[37] Charter of the International Military Tribunal for the Far East, art. 5 [hereinafter "IMTFE Charter"], *reprinted in* SENATE COMMITTEE ON FOREIGN RELATIONS & DEPARTMENT OF STATE, A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1941-49 (U.S. Gov. Printing Office 1950).
[38] London Charter, *supra* note 35, art. 6. Persons were punishable for acting as individuals or as members of organizations. *Id.* However, there is no provision in the London Charter requiring that punishment be "dependent on

> [l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit [crimes against peace, war crimes, and/or crimes against humanity] are responsible for all acts performed by any persons in execution of such plan.[39]

The plain language of the provision, which was drafted with the "Anglo-Saxon concept of 'conspiracy'" in mind,[40] thus supports the principle that a participant in a common plan may be held criminally responsible for an act committed in execution of that plan. The provision is silent regarding any *mens rea* requirement for the physical perpetrator and whether he must be a party to the plan, but it seems to cast a wide net by suggesting that the acts of "any persons" could be attributable to the accused if undertaken in "execution of [the] plan."[41]

While the London Charter set forth the legal framework for the IMT, Control Council Law No. 10 authorized the four occupying authorities in Germany to prosecute suspected war criminals within their respective zone of occupation.[42] However, because the law sought to build a "uniform legal basis in Germany" to prosecute war criminals, Article I of the Law explicitly incorporated both the Moscow Declaration and the London Charter as "integral parts of [the] law."[43]

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culpability." Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. INT'L CRIM. JUST. 38, 44 (2004).

[39] London Charter, *supra* note 35, art. 6. In its judgment, the Tribunal explained that "these words do not add a new and separate crime to those already listed. The words are designed to establish responsibility of persons participating in a common plan." IMT Judgement: The Law as to Common Plan or Conspiracy.

[40] Harman van der Wilt, *Guilt by Association: Joint Criminal Enterprise on Trial*, 5 J. INT'L CRIM. JUST. 91, 93 (2007).

[41] London Charter, *supra* note 35, art. 6.

[42] Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, January 1946, World War II File, Bontecou Papers, Harry S. Truman Presidential Museum & Library, photo. reprint, http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1946-01-00&documentid=19-3&studycollectionid=&pagenumber=1 [hereinafter "Control Council Law No. 10"]. The Law was issued by the Allied Control Council on 20 December 1945. According to Article 3, Paragraph 3 of Control Council Law No. 10, all persons wanted for trial by an International Military Tribunal could not be tried without the consent of the Committee of Chief Prosecutors.

[43] *Id.* preamble, art. 1. The military proceedings envisioned under Control Council Law No. 10 were thus explicitly authorized by an international agreement between the Allied occupying powers, and each Zone Commander operated within a framework established under Control Council Law No. 10. (*e.g.*, Art. III(3) which states that persons wanted for trial by an IMT could not be tried without the consent of the Committee of Chief Prosecutors.) [43]

Under Article II(2)(d) of the Law, criminal liability extended to any person found to have committed a crime if he "was connected with plans or enterprises involving its commission."[44] The language of the Law intended that a person "connected" to a criminal plan had "committed" the charged crime even if he was not the physical perpetrator.[45]

Unlike The London Charter, which sets forth the modes of liability for substantive crimes in a distinct paragraph in Article 6, the Charter of the IMTFE incorporated a version of common plan liability into the specific provisions for crimes against peace and crimes against humanity.[46] The substantive definition of crimes against peace prohibits "participation in a common plan or conspiracy for the accomplishment" of any aspect of planning or waging any war of aggression.[47] The definition of crimes against humanity mirrors the exact language on common plan liability set forth in Article 6 of the London Charter and quoted *supra*.[48]

However, each Zone Commander exercised expansive discretion under the arrangement, which included the authority to determine the tribunal forum and rules of procedure. *See* art. III(2).

[44] *Id.* art. II(2). Article II criminalized Crimes against Peace, War Crimes, Crimes against Humanity, and Membership in categories of a criminal group of organization declared criminal by the IMT.

[45] *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, Judgment, ¶ 395 (3 April 2007) *citing* Control Council Law No. 10, *supra* note 42, art. II(2). In discussing this provision within the context of Article II(2), the Nuremberg Military Tribunal ("NMT") in the *Einsatzgruppen* case remarked: "In line with recognized principles common to all civilized legal systems, paragraph 2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt […] These provisions embody no harsh or novel principles of criminal responsibility […]."

[46] IMTFE Charter, *supra* note 37. Article 5 confers the Tribunal with subject matter jurisdiction to prosecute crimes against peace, conventional war crimes, and crimes against humanity. *Id.* art. 5. In contrast to the IMT, which derived its legitimacy from an international agreement, the IMTFE was established by a decree issued by Allied Supreme Commander General Douglas MacArthur. The Eleven judges who presided over the IMTFE were from Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, and the United States. PETER H. MAGUIRE, LAW AND WAR: AN AMERICAN STORY, 132 (Columbia University Press 2000).

[47] IMTFE Charter, art. 5 *supra* note 37.

[48] "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." *Id.*

B. The Scope and Nature of Common Plan Liability

1. Cautious Beginnings: the IMT and Common Plan Liability

In addressing the individual criminal responsibility of the accused for crimes against humanity,[49] the International Military Tribunal in *U.S., et al. v. Hermann Wilhelm Goering, et al.* adopted a conservative view of liability by requiring proof that an accused directly participated in a crime.[50] Nevertheless, the IMT did convict many of the defendants for crimes that they did not physically perpetrate but for which they shared individual responsibility because of their participation in a common plan that encompassed the particular crime(s).[51] This suggests that, in certain instances where liability could not be established based upon superior responsibility or direct orders, the Tribunal relied on a theory of common plan liability to convict.[52]

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[49] The introduction of "Crimes Against Humanity" as a separate substantive offense was envisioned by the legal architects of the IMT as a way to charge the Germans for crimes committed against Jews and other civilians that were not prohibited by the laws of war. *See, e.g.*, MAGUIRE, *supra* note 46; TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (Knopf 1992). Whether or not the charge violated the principle of *nullum crimen* is outside the parameters of this paper.

[50] *U.S., et al. v. Hermann Wilhelm Goering, et al.*, International Military Tribunal [hereinafter "IMT Judgement"]. Eighteen of the twenty-four accused were charged with developing and executing a "common plan or conspiracy" that involved the murder and persecution of anyone considered "hostile to the Nazi party" and/or "opposed to the common plan alleged in Count One." Nuremberg Trial Proceedings Vol. 1, Indictment: Count Four. Consistent with the modes of commission set forth in Article 6 of the Charter, the crimes were allegedly committed by the accused and "by other persons for whose acts the defendants [were] responsible" as such persons acted "in execution of a common plan or conspiracy" in which the accused "participated as leaders, organizers, instigators, and accomplices." *Id.*

[51] For instance, Goering was found guilty on all four counts, including Crimes against Humanity for the persecution of the Jews. While Goering affirmatively sought to persecute the Jews within Germany and in the occupied territories, primary responsibility for the extermination of the Jews was "in Himmler's hands." IMT Judgement: Goering. Nevertheless, Goering was "far from disinterested or inactive" in this process, and issued a 31 July 1941 decree directing Himmler and Heydrich to bring "about a complete solution of the Jewish question in the German sphere of influence in Europe." IMT Judgement: Goering. While the Judgement does not explicitly state as such, the logical implication is that Goering knew of the common plan involving the Final Solution *and* shared the intent of Hitler, Himmler, Heydrich and other participants to exterminate the Jews. This shared intent combined with Goering's participation in devising "the oppressive programme against the Jews and other races, at home and abroad" suggests that he shared responsibility for crimes against humanity beyond that of just persecution. IMT Judgement: Goering. However, since the Tribunal appears to discuss his responsibility in the context of the persecution of the Jews, one can only speculate as to the full extent of Crimes Against Humanity for which Goering was criminally responsible.

[52] Various commentators maintain that the IMT and the IMTFE prosecutions relied heavily on conspiracy liability and participation in a criminal organization, whereas the doctrine of common plan liability is more readily discernible from other post-World War II jurisprudence such as the Control Council Law No. 10 cases and national military proceedings. *See, e.g.* Allison Martson Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75

2. Application in Post-WWII Jurisprudence

The ICTY Appeals Chamber in *Tadic* relied heavily upon the jurisprudence of less prominent post-WWII military proceedings in expounding the modern contours of common criminal plan doctrine (also referred to by that court as "JCE").[53] The most commonly cited among these include cases from U.S. military courts, British military courts, and Canadian military courts.[54]

There were also post-WWII trials held in other countries in which domestic courts analyzed criminal responsibility for violations of international law in which multiple individuals participated with varying degrees of involvement. The Appeals Chamber in *Tadic* characterized these cases, especially those in the Italian and German national Courts, as relying on "the notion of co-perpetration" rather than common purpose or common design.[55]

Unfortunately, the record of this set of post-WWII cases is limited and the courts often did not clearly set forth the applicable law in determining the criminal responsibility of the accused.[56] The Appeals Chamber in *Tadic* thus placed considerable emphasis on analogy and

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(2005). The major drawback of this analytical dichotomy is that it fails to sufficiently account for key principles of common plan liability utilized in the IMT and IMTFE jurisprudence. Certainly, the historical record is unclear if and how the tribunals distinguished between a conspiracy and a common plan or if the two terms were understood as interchangeable. While conspiracy is not defined in the Charter, the IMT did find that "the [charged] conspiracy must be clearly outlined in its criminal purpose…[and] must not be too far removed from the time of decision and of action." Any analysis must therefore determine whether a "concrete plan" existed, and identify the participants in that plan. IMT Judgment at p. 43. However, understanding how the IMT and the IMTFE approached the question of individual criminal responsibility where the accused intentionally acted in execution of a broader criminal arrangement is still informative to any analysis of common plan liability under customary international law.

[53] *See Tadic*, Case No. IT-94-1-A; *see also* Danner & Martinez, *supra* note 52, at 110.

[54] Contemporary analysis is devoid of any reference to jurisprudence from either the French or Soviet zones of occupied post-war Germany.

[55] *Tadic*, Case No. IT-94-1-A, ¶ 201. Co-perpetration entails that all of the accused participate in the same criminal conduct and share the same *mens rea*. *See also* CASSESE, *supra* note 9, at 181.

[56] It has been maintained that the limited record of certain judgments from this set of cases raises fundamental questions about the specific law applied to the facts of the case and the "ultimate legal conclusions" of the military judges on questions of criminal liability based on participation in a common plan. Danner & Martinez, *supra* note 52, at 111.

contextualization in drawing out the major legal principles concerning common plan liability from these cases.[57]

The Trials of War Criminals before the Nuremberg Military Tribunals (hereinafter "NMT") also employed common plan liability in certain instances.[58] Lastly, Israel's prosecution of Adolf Eichmann in 1961 is worth noting because of its unique status as one of the only instances in the period between the post-war cases and the beginning of the ECCC's temporal jurisdiction in which an accused faced prosecution for grave international crimes based in part on a theory akin to common plan liability.[59]

This section examines the application of common plan liability as seen in the case law relied upon by the Appeals Chamber in *Tadic* and in various other cases not addressed by that Chamber.

i. The Scope of the Plan

The post-World War II jurisprudence recognizes that, even where large-scale and widespread crimes have been committed, the Prosecution may not simply rely on a sweeping common plan to impute liability to high-level perpetrators and must still satisfy its high burden of proof regarding the commission of the crime(s).

In *U.S., et al. v. Hermann Wilhelm Goering, et al.*, the Prosecution sought to define a common plan of sufficient specificity to hold senior Nazi leaders responsible for crimes

[57] Due to the practical difficulties associated with obtaining the cases relied upon by *Tadic* and the fact that no modern tribunal has departed from the Chamber's central legal findings on the issue, this section relies entirely on *Tadic* for the relevant facts and law discussed in those cases.

[58] The NMT were comprised of a series of twelve trials conducted by the United States between October 1946 and May of 1949. The judges and prosecutors of these proceedings were exclusively American. These prosecutions focused on members of Nazi Germany's military, political, and economic leadership not tried before the IMT. The Appeals Chamber in *Tadic* does cite the *Einsatzgruppen* case. *Tadic*, Case No. IT-94-1-A, ¶ 200. However, this is the only NMT case it cites in addressing "common criminal purpose" under customary international law.

[59] The trial occurred in a national legal system according to domestic law codifying crimes recognized under international law. While the case is insufficient, by itself, to reflect either customary international law or general principles of law regarding the doctrine as they existed in 1961, it nevertheless serves as a useful indicator for how nations perceived the state of common plan liability under international law at that time.

committed but flexible enough to account for large-scale criminal acts prompted by the execution of the plan's basic objectives.[60] The Tribunal rejected this formulation, concluding that the evidence established the existence of multiple, "separate" plans rather than one all-encompassing conspiracy.[61] However, because the evidence established beyond any doubt "the common planning to prepare and wage war by certain of the defendants," the Tribunal did not see fit to examine the exact nature of the plans.[62]

The fact that the IMT rejected the "all-encompassing" plan formulation does not mean that a single, wide-reaching common plan is never appropriate. At the IMTFE, twenty-three of the twenty-five accused were found guilty on Count One of the indictment,[63] which charged the accused with participating as "leaders, organizers, instigators, or accomplices in the formulation and execution of a common plan or conspiracy … [to] wage wars of aggression, and war or wars in violation of international law."[64] The alleged object of the common plan was for Japan to "secure the military, naval, political and economic domination" of East Asia, the Pacific and Indian Oceans, and all surrounding countries and islands therein.[65] In reaching its conclusion, the IMTFE first determined whether a conspiracy to pursue the alleged criminal object had been

[60] According to the indictment, the "common plan or conspiracy embraced the commission of Crimes against Peace." *IMT Indictment*. In the course of planning and executing the wars of aggression, the common plan evolved to include war crimes and then eventually "Crimes against Humanity, within both Germany and the occupied territories." *IMT indictment*.
[61] IMT Judgment p. 43. The IMT considered "only the common plan to prepare, initiate, and wage aggressive war" under Count One, opting to disregard the charges in the indictment that the defendants conspired to commit war crimes and crimes against humanity. *Id.* at 44.
[62] *Id.* at 43.
[63] *Id.* at 48. The conviction rate on Count One stands in contrast to the Tribunal's decision to dismiss thirty of the other forty-five counts alleged in the indictment. However, this is partially due to the IMTFE's determination that it was "unnecessary to deal with Counts 2 and 3, which charge the formulation or execution of conspiracies with objects more limited" than that proved in Count One, or with Count 4, which charged a more specific version of Count 1. IMTFE Judgment, Chapter IX, Findings on Counts of the Indictment, p. 1143.
[64] Jacob A. Ramer, *Hate by Association: Joint Criminal Enterprise Liability for Persecution*, 7 J. INT'L Crim. L. 31 (2007) *citing* ARNOLD C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (Harper-Collins 1987).
[65] IMTFE Judgment, Chapter IX, Findings on Counts of the Indictment, at 1137.

proved to exist.[66] The evidence demonstrated the existence of "far-reaching plans for waging wars of aggression," upon which the Tribunal found that "the prolonged and intricate preparation" undertaken to realize these plans could only be the consequence of "many leaders acting in pursuance of a common plan for the achievement of a common object."[67]

Moreover, the Appeals Chamber for the International Criminal Tribunal for Rwanda ("ICTR") in *Rwamakuba v. Prosecutor* relied in part on the large-scale criminal plan found to exist in the *Justice* case[68] in rejecting the argument that JCE liability can only be applied in small-scale cases.[69] The *Justice* case concerned the responsibility of Nazi judges, prosecutors and other officials accused of "judicial murder and other atrocities" committed in Germany and throughout the occupied territories.[70] The prosecution charged the German officials with participating in a governmental plan and program for the persecution and extermination of Jews and Poles by "destroying law and justice in Germany, and then utilizing the emptied forms of legal process for persecution, enslavement and extermination on a large scale."[71]

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[66] *Id.*

[67] *Id.* at pp. 1141-1142. The IMTFE thus concluded that both a conspiracy to wage a war of aggression and the actual waging of a war of aggression constituted "grave crimes" under customary international law. The conspiracy "threatens the security of the people's of the world" while the execution of the conspiracy inevitably produces large-scale "death and suffering." *Id.*

[68] The *Justice* case. The *Justice* case was one of twelve trials conducted by the United States between October 1946 and May of 1949, and known as the Trials of War Criminals before the NMT. These prosecutions, which involved exclusively American judges and prosecutors, focused on members of Nazi Germany's military, political, and economic leadership not tried before the IMT.

[69] *Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ¶ 25 (22 October 2004) *citing* the *Justice* case; *accord*, *Tadic*, IT-99-1-A, ¶ 387.

[70] The accused included Lautz, Chief Public Prosecutor of the People's Court; Rothaug, former Chief Justice of the Special Court in Nuremberg; and others charged with responsibility for "the murder, torture, illegal imprisonment, and ill-treatment of thousands of Germans and nationals of occupied territories." *Justice* Case: Indictment, ¶ 23. Of the sixteen accused, nine were officials in the Reich Ministry of Justice, while the others were members of the People's Courts and the Special Courts. *Justice* Case: Indictment.

[71] The *Justice* Case, Prosecutor's Opening Statement, Vol. III, at 32 (Available at: http://www.mazal.org/archive/nmt/03/NMT03-T0032.htm).

The District Court of Israel in *State of Israel v. Eichmann* also relied upon a wide-reaching plan in analyzing the individual criminal responsibility of Eichmann.[72] Among the various charges against Eichmann was Crimes against the Jewish People, a domestic offense prohibiting acts of genocide against the Jewish people.[73] The Court found that the killing of Jews with the specific intent to destroy the Jewish people, in whole or in part, formed the basis of the plan known as "the Final Solution of the Jewish Question."[74]

ii. Common Plan Liability Applies Even in a "Complete Dictatorship"

One issue that the IMT addressed that is likely to be raised by defendants before the ECCC is whether common planning can exist "where there is complete dictatorship."[75] The ECCC defendants may claim that they were simply acting under the direction of Pol Pot. The IMT rejected the World War II corollary of this defense as "unsound," reasoning that "[a] plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them."[76] Since the execution of such a plan depends on the cooperation of key

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[72] *State of Israel v. Eichmann*, Judgment of the District Court of Israel (Available at: http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/judgment). Eichmann was tried and convicted in the District Court of Israel on 15 charges including crimes against the Jewish people, crimes against humanity, and war crimes. On appeal, Israel's Supreme Court upheld the District Court's judgment in its entirety. *Adolf Eichmann v. the Attorney General of Israel*, Judgment on Appeal to the Supreme Court of Israel (12 December 1961) (Available at: http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/appeal/appeal-session-07.01.html).

[73] *State of Israel v. Eichmann, Legal Analysis of the Findings in the Light of the Indictment, supra* note 71. The District Court addressed only the first four counts charged for Crimes against the Jewish People as set forth in the Nazi and Nazi Collaborators (Punishment) Law: (1) killing Jews; (2) causing serious bodily or mental harm to Jews; (3) placing Jews in living conditions calculated to bring about their physical destruction; and (4) devising measure intended to prevent births among Jews. All of these acts amount to a crime against the Jewish People only if committed with intent to destroy the Jewish People, in whole or in part. As the court notes in paragraph 190 of the decision, the drafters of the Law relied on the 1948 Convention for the Prevention of the Crime of Genocide. *Id.* ¶. 182.

[74] *Id*. (According to the Court, this plan began in mid-1941 when Hitler ordered the general extermination of the Jews.).

[75] IMT Judgement: The Law as to Common Plan or Conspiracy, at 43.

[76] *Id*.

officials, responsibility attaches to these participants when, aware of their leader's aims, they become parties to the plan.[77]

iii. The Requisite *Mens Rea* and Level of Contribution of the Accused

The following case-by-case analysis is organized chronologically to provide the reader with an overview of how courts interpreted the *mens rea* and *actus reus* elements for crimes attributed via common plan liability. The cases demonstrate certain core trends even as the courts struggle to articulate the exact standard to be applied in confronting collective criminality committed under frequently complex factual circumstances.

To impute criminal responsibility where the offense was envisioned as part of the common plan, the early jurisprudence generally required that the accused intend to participate in the plan with an awareness of its criminal purpose or design, and that the accused take specific acts in furtherance of the plan. In the case of crimes against prisoners, the inquiry shifted away from intent to whether the accused had knowledge of the system of repression, and whether he or she worked to enforce that system. Where the act was outside of the envisaged plan, the courts generally focused their inquiry on whether the act was "predictable" or "foreseeable" to the accused under the circumstances and to what extent the accused helped in bringing it about.

a. *Georg Otto Sandrock et. al.* (the *Almelo Trial*)

According to the *Tadic* Appeals Chamber, a British Military Court in *Georg Otto Sandrock et al*. (also known as the *Almelo Trial*) convicted three Germans under the doctrine of "common enterprise" for the murder of a British POW and the Dutch civilian harboring him. [78] In undertaking the killing, one of the Germans did the shooting, another gave the order, and a third

[77] *Id.*
[78] *Id. citing Trial of Otto Sandrock and three others*, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland on 24th-26th November, 1945, UNWCC, vol. 1, p. 35 [hereinafter "The *Almelo* Trial"].

remained by the car to ensure that nobody came near the area.[79] Thus, while each of the accused played a different role in the actual commission of the crime, each shared the intent to achieve the unlawful common purpose of murder and took affirmative measures towards this end.[80]

b. The *Belsen* and *Dachau Concentration Camp* Cases

The next cases involving common plan liability were the *Belsen* case[81] followed shortly thereafter by the *Dachau Concentration Camp* case.[82] These cases involved war crimes perpetrated by members of military or administrative units 'acting in pursuance of a common design to violate the law and usages of war' by killing or mistreating prisoners in concentration camps.[83] Due largely to the broader, systemic context in which the individual criminal acts were committed, the courts adopted the approach that all those participating in the common design were guilty of all of the crimes perpetrated therein while acknowledging distinctions in the "nature and extent of the participation."[84]

Since the accused in both *Belsen* and *Dachau* were camp officials, their responsibility flowed from their knowledge of and active participation in the "general system of cruelties and murders of the inmates."[85] Not surprisingly, knowledge of the system and level of contribution were directly related to an accused's position within the camp hierarchy.[86] Thus, in contrast to

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[79] *Id.*
[80] *Id.*
[81] *Id.* at ¶ 202 *citing Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17th September-17th November, 1945, UNWCC, vol. II, p. 1 [hereinafter "*Kramer et al.*"].
[82] *Id.* at ¶ 202 *citing Trial of Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau, Germany, 15th November - 13th December, 1945, UNWCC, vol. XI, p. 5 [hereinafter "*Weiss et al.*"].
[83] *Tadic*, (AC) *supra* note 33, ¶ 202, fn. 250 quoting *Dachau Concentration Camp* case, UNWCC, vol. XI, p. 14 [hereinafter "*Dachau*"].
[84] *Id.*
[85] *Id. quoting Dachau, supra* note 83 at 14. The intent to participate in the common design can often be inferred from the accused's position of authority within the camp hierarchy.
[86] *Id.* For example, the Judge Advocate in *Belsen* reminded the court that "when they considered the question of guilt and responsibility, the strongest case must surely be against Kramer, and then down the list of accused *according to the positions they held.*" *Id.* ¶ 203, fn. 252 *citing Belsen* case, UNWCC, vol. II, p. 121 [hereinafter "*Belsen* Case"].

the *Almelo* case, where proving shared intent was determinative in order to impute principal liability to another participant in the plan, the courts in *Belsen* and *Dachau* focused on whether the accused had knowledge of the criminal system. If such knowledge was established and the accused actively worked to enforce the system, then all crimes committed in execution of the common design were imputable.

c. The *Essen Lynching* Case (*Essen West* Case)

In the *Essen Lynching* case (also known as the *Essen West* case) a British military court tried two German servicemen and five German civilians accused of committing war crimes in connection with the killing of three British POWs by a German mob.[87] Among the accused was Captain Heyer, who ordered a German soldier to transport the three POWs to a Luftwaffe unit. According to the facts set forth in *Tadic*, Captain Heyer then directed the escort to abstain from protecting the POWs against German civilians that may "molest the prisoners" and also said that the POWs "ought to be shot, or would be shot."[88] He issued this order within clear earshot of an agitated crowd of townspeople such that both the crowd and the escort were aware of the ill-treatment that would transpire.[89] As the POWs were marched through the streets of Essen, the growing crowd began assaulting them.[90] One of the POWs was shot and wounded by an unknown German corporal.[91] Shortly thereafter, the POWs were thrown from a bridge and each died from some combination of the fall, shots fired from the bridge, or additional beatings by the crowd.[92]

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[87] *Tadic*, Case No. IT-94-1-A, ¶¶ 207-209 *citing Essen Lynching (aka Essen West) Trial of Erich Heyer and six others*, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945, UNWCC, vol. 1, p. 88 [hereinafter "*Essen Lynching Case*"].
[88] *Id.* ¶ 207.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*

The court was thus forced to assess criminal liability for the deaths of the POWs under nebulous circumstances in which many people played some role.[93] The prosecution advocated that if, in response to the incitement to harm the POWs, an accused person "voluntarily took aggressive action" against the POWs, then that person shared both moral and criminal responsibility for their deaths.[94] Ultimately, the court convicted Heyer, the soldier escort, and three civilians.[95] Since each of the accused was "concerned in the killing," the Appeals Chamber in *Tadic* inferred that the military court based its murder convictions on the notion that the killing of the POWs was a foreseeable consequence of assaulting or "implicitly incit[ing]" murder.[96] The factual circumstances of his involvement were such that, as the commanding officer authorizing the ill-treatment of the POWs in close proximity to a hostile mob, Heyer should have anticipated that the POWs might be killed. It is also worth noting that Heyer was physically removed from the scene of the crime he was convicted of committing.

d. Kurt Goebell et. al. (*Borkum Island* case)

Fewer than three months after the *Essen West* decision, a U.S. military court in *Kurt Goebell et. al.* (also known as the *Borkum Island* case)[97] addressed similar factual circumstances

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[93] The Prosecution maintained that the appropriate standard for criminal liability was whether "*each and everyone of the accused…was concerned in the killing* of these unidentified airmen in circumstances which the British law would have amounted to either murder or manslaughter." *Id.* ¶ 207.

[94] *Id.* ¶ 208 *citing* Transcript in Public Record Office, London, WO 235/58, p. 66.

[95] No judge advocate was appointed in Heyer's case and the *Tadic* court thus assumes that the court accepted the prosecution's theory in his case. The soldier escort breached his duty to prevent the POWs from being molested, and was sentenced to 5 years. Three civilians were convicted of murder because they each actively participated in the ill-treatment leading to the deaths of the POWs. *Tadic*, Case No. IT-94-1-A, ¶ 208. One of the accused civilians, Sambol, was acquitted "because the blows he was alleged to have inflicted were neither particularly severe nor proximate to the airman's death (comprising one of the earliest to be inflicted). *Id.* fn. 259 *citing* UNWCC, vol. 1, p. 91.

[96] *Tadic*, Case No. IT-94-1-A, ¶ 208. The *Tadic* Court's reliance on the *Essen Lynching Case* to support the existence of JCE Category 3 liability has been criticized on multiple fronts. The Court relied on the United Nations War Crimes Commission (UNWCC) for its analysis, and the UNWCC does not address the legal basis of the Court's conviction of the accused. Critics also contest that the record fails to demonstrate "that the prosecutor explicitly relied on the concept of common design, common purpose, or common plan." Danner & Martinez, *supra* note 52, at 111.

[97] *Tadic*, Case No. IT-94-1-A, ¶¶ 209-213 *citing Kurt Goebell et al*, UNWCC, vol. 1, at 91 [hereinafter "*Goebell et al.*"].

involving seven American POWs who were escorted through the streets of Borkum and subjected to mob beatings before being executed by German soldiers.[98] Multiple senior officers, some privates, the town mayor, policemen, a civilian and the head of the Reich Labor Corps were each charged with the war crimes of "willfully, deliberately and wrongfully encourag[ing], aid[ing], abet[ing] and participat[ing]" in the assaults upon and killings of the POWs.[99]

Where a mob has successfully achieved the purpose sought through its common design, the military prosecutor emphasized that the need to extend liability to the "true instigators" demanded that "*[n]o distinction [be] drawn between the one who, by his acts, caused the victims to be subjected to the pleasure of the mob or the one who incited the mob, or the ones who dealt the fatal blows.*"[100] One thus sees advancement of the notion whereby the accused acted as "cogs in the wheel of common design," according to which the criminal offense was the result of all of the cogs working together.[101] According to this reasoning, if it were proved that each of the accused "played *his part*" in the violence resulting in the killings of the POWs, then each should be guilty of murder.[102]

The *Borkum Island* court convicted certain of the accused for both murder and assault, while others were only found guilty of assault.[103] The Appeals Chamber in *Tadic* thus reasoned

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[98] *Id.* at ¶ 210 *citing Kurt Goebell et. al. supra* note 97 at 91. The POWs were first beaten by members of the Reich's Labor Corps at the behest of a German officer. They were then beaten by civilians on the street. Later yet, the mayor of Borkum urged the mob to "to kill them 'like dogs.'" The mob beatings continued, with the encouragement and participation of the soldier escorts. Eventually, all of the POWs were shot to death by the soldiers near the city hall. *Id.*

[99] *Id.* at ¶ 210 *citing Goebell et. al.*, UNWCC, vol. 1, at 91.

[100] *Id.* at ¶ 210 citing Charge Sheet, in U.S. Nat'l Archives Microfilm Publication, at 1186.

[101] *Id.*

[102] The Tadic court notes that this theory of common purpose "presupposes that all the participants in the common purpose shared the same criminal intent…to commit murder." *Id.*, ¶ 211.

[103] The accused Akkerman, Krolikovski, Schmitz, Wentzel, Seiler and Goebbels were convicted on both the killing and the assault charges. All were sentenced to death, except for Krolikovski who was given life imprisonment. The accused Pointner, Witzke, Geyer, Albrecht, Weber, Rommel, Mammenga and Heinemann were convicted only of assault and received prison sentences ranging between 2 and 25 years. *Id.* at notes 268 and 269. Such a conviction inherently rejected the Prosecutor's implicit assertion that, by playing his part, each of the accused was guilty of murder. After all, if the accused was found to have voluntarily participated in the common design to mistreat the

that all of these accused intended to participate in a common design entailing the criminal assault of the POWs. However, those convicted of murder in the absence of any "evidence that they had actually killed the prisoners . . . were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault."[104] Unfortunately, the Appeals Chamber in *Tadic* does not provide any additional detail about the individual role and contribution of each of the accused.

The *Essen West* and *Borkum Island* cases are thus unique in that they suggest that criminal responsibility for acts not explicitly envisaged by a common criminal plan may nevertheless be imputed to another member of that plan where the crime was *foreseeable* or *predictable* to the accused and where the accused took deliberate measures to assist in the common plan.[105]

e. Hoelzer et al. Case

In April 1946, the Judge Advocate in a Canadian military court in the *Hoelzer et al.* case employed the phrase "common enterprise" to describe the course of conduct pursued by three Germans who transported a Canadian POW to a certain area for the known purpose of killing him.[106] Even at this relatively early juncture, one sees courts utilizing an array of terminology to refer to the same basic concept of collective criminal conduct.

f. *Trial of Franz Schonfeld and others*

The Judge Advocate in the *Trial of Franz Schonfeld and others* offered a clear summary of the operation of the law where the charged act was outside of the common purpose:

POWs, and murder was a consequence of this common design, then the accused should share responsibility for the charged offense equally with the physical perpetrator(s).

[104] *Id.* ¶ 213. This ability to foresee such an outcome was presumably based upon the accused's official position, role or conduct**.** *Id.*

[105] *See Id.* ¶¶ 205-213.

[106] *Id.* ¶ 197 *citing Hoelzer et al*., Canadian Military Court, Aurich, Germany, Record of Proceedings 25 March – 6 April 1946, vol. 1, at 341, 347, 349 [hereinafter "*Hoelzer et al.*"].

> If several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present […] provided that the death was caused by a member of the party in the course of his endeavors to effect the common object of the assembly.[107]

Aspects of this formulation warrant additional discussion. First, the court appears to have required the physical presence of the accused in order to impute liability for the murder under the circumstances. Second, the charged act was committed during the "effectuation" of the common purpose and not incidental to it. Third, it is not clear what the requisite mental state of the accused must be and whether the court implicitly applied a foreseeability standard tantamount to that in the *Essen West* and *Borkum Island* cases.

g. The *Ferrida* Judgment

In the *Ferrida* Judgement of 25 July 1946, the Italian Court of Cassation found the accused not guilty of murder and thus protected from prosecution under the amnesty for Nazi collaborators where the accused participated in a "mop-up" operation in which partisans were killed but the accused only participated "in his capacity as a nurse."[108] The outcome suggests that the court distinguished between mere presence at the scene of a crime and active participation therein.

h. *Bonatie et al.*

In *Bonatie et al.*, the Court of Cassation upheld a conviction for murder where the crime was "not envisaged by the group concerned."[109] In imputing liability to the accused, the Court

[107] *Id.* citing *Trial of Franz Schonfeld and others*, British Military Court, Essen, June 11th-26th, 1946, UNWCC, vol. XI, at 68 (summing up of the Judge Advocate) [hereinafter "*Schonfeld and others*"].
[108] *Id.* ¶ 217 *citing Ferrida* Judgement in *Archivio penale*, 1947, Part II, p. 88. This case and all other Italian Court of Cassation cases except *Mannelli* (*infra.* at 31) concerned war crimes committed either by civilians or by forces loyal to the "Republica Sociale Italiana ("RSI"). The crimes alleged occurred between 1943 and 1945 and targeted POWs, Italian partisans or soldiers in the Italian Army fighting against Germany and the RSI. *Tadic*, Case No. IT-94-1-A, ¶ 214.
[109] *Id.* ¶ 217 *citing* handwritten text of the (unpublished) Judgement of 5 July 1946, p. 19.

stressed that the more serious crime was nevertheless "a consequence, albeit indirect, of his participation."[110] The Appeals Chamber in *Tadic* did not address the mental state of the accused with regards to his "indirect" role. The relationship between the *mens rea* and contribution of the accused is thus unclear in this instance.

i. *Jepsen and Others*

In the case of *Jepsen and Others*, Jepsen was one of several accused charged with the deaths of concentration camp prisoners who were en route to a different concentration camp. [111] According to the *Tadic* Appeals Chamber, the Judge Advocate did not object to the following submission by the Prosecutor articulating Jepsen's criminal responsibility:

> if Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act.[112]

However, in contrast to the court in *Bonatie*, the court in *Jepsen* was imputing liability to the accused for killings that were part of the common plan and in which the accused played a direct role.

i. *Tossani* Case

In the *Tossani* case, the Court of Cassation examined an accused's guilt for 'an unforeseen' murder but reached an opposite conclusion from that of the court in *Bonatie et al.*[113] In concluding that the amnesty for Nazi collaborators applied, the court found that the accused did not actively participate in the operation in which a German soldier killed a partisan, the accused was unarmed, and the killing was "an exceptional and unforeseen ("*imprevisto*")

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[110] *Id.*
[111] *Id.* ¶ 198 *citing Trial of Gustav Alred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany* (13-23 August, 1946), judgment of 24 August 1946 [hereinafter "*Jepsen and others*"].
[112] *Id.* ¶ 241.
[113] *Tadic*, Case No. IT-94-1-A, ¶ 217 *citing Tossani* Judgement of 12 September 1946, Court of Cassation, in *Archivio penale*, 1947, Part II, pp. 88-89 [hereinafter "*Tossani*"].

event."[114] It thus appears that the accused lacked both the requisite *mens rea* and level of contribution (*actus reus*) to be held responsible.

j. *D'Ottavio et al.*

In *D'Ottavio et al.*, the Court of Cassation upheld a lower court's conviction for "illegal restraint" and "manslaughter" where the accused were members of a group of armed civilians seeking to detain concentration camp escapees and one of the escapees was shot and subsequently died.[115] Such an imputation of liability was warranted by the "material" and "causal nexus" between the shared intent of the group and the act committed by the individual member of the group.[116] By relying on armed weapons to unlawfully restrain the escapees, it was "predictable" that one member of the group might shoot one of the escapees in pursuing "the common purpose of capturing them."[117] Similar to the *Essen West* and *Borkum Island* cases, the court's determination appears to have been largely determined by whether the crime was "predictable" or "foreseeable" in the context of pursuing the common purpose. While the facts of the case are not entirely clear, the accused in *D'Ottavio et al.* played a more active role in furthering the common purpose than the accused in either *Ferrida* or *Tossani*, who contributed little more than their physical presence.

k. The *Justice* Case

Since the NMT in the *Justice* Case determined that it lacked jurisdiction to try and convict any of the accused upon a charge of conspiracy as a separate and substantive offense,

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[114] *Id*.
[115] *Id*. ¶ 215 *citing* handwritten text of the (unpublished) Judgement, p. 6.
[116] *Id.* The Court considered the "concurrence of interdependent causes" as integral in delineating accountability regardless of whether the participant was the direct or indirect cause of the offense. The court refers to this "canon" as "*causa causae est causa causatte.*" *Id.*
[117] *Tadic*, Case No. IT-94-1-A, ¶ 215 *citing* handwritten text of the (unpublished) Judgement, pp. 6-7 (unofficial translation) (emphasis added).

conspiracy or common plan served solely as a mode of liability.[118] In its discussion of racial persecution as a crime against humanity, the Tribunal emphasized that the acts of the accused "be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and State" to persecute and exterminate Jews and Poles.[119] The burden thus fell on the prosecution to prove: (1) "the existence of the great pattern or plan of racial persecution and extermination;" and (2) "specific conduct of the accused in furtherance of the plan."[120] Criminal liability attached to all parties who acted to further a shared criminal purpose regardless of who actually served as the physical perpetrator.[121]

The Tribunal emphatically rejected the claim that the accused lacked knowledge of the Final Solution in light of the overwhelming evidence of the atrocities committed by the Gestapo and in concentration camps.[122] The evidence conclusively proved that each of the accused had a "general knowledge of the broad outlines" of the common plan.[123] The court thus turned to whether the accused consciously participated in the plan or took a consenting part therein.[124]

Acknowledging the absolute power of Hitler to "enact, enforce and adjudicate law," and the absolute supremacy of such law in the Reich, the Tribunal considered the accused judges as falling within two categories.[125] The first category included those judges who sought to retain

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[118] *See* The *Justice* Case, *supra* note 10, at 956. ("Count one of the indictment, in addition to the separate charge of conspiracy, also alleged unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. We, therefore, cannot properly strike the whole of count one from the indictment, but, in so far as count one charges the commission of the alleged crime of conspiracy as a separate substantive offense, distinct from any war crime or crime against humanity, the Tribunal will disregard that charge.)
[119] *Id*. at 1063.
[120] *Id.* (*referring* to these two elements to be proved as the "material facts" under this mode of analysis.).
[121] *Id*. (describing such an approach as "but an application of general concepts of criminal law.").
[122] "They listened to the radio. They received and sent directives. They heard and delivered lectures. This Tribunal is not so gullible as to believe these defendants so stupid that they did not know what was going on. One man can keep a secret, two men may, but thousands never." *Id.* at 1081.
[123] *Id.*
[124] *Id*.
[125] *Id.*

some degree of judicial independence, impartiality, and moderation in administering the law.[126] The second category consisted of those judges "who with fanatical zeal enforced the will of the party."[127] This distinction reflected an inquiry by the Tribunal into the subjective *mens rea* of the accused to participate in the common plan. Assuming that the accused's knowledge of the criminal purpose of the plan was proved, the "zeal" with which he exercised his duties was strongly probative of his intent to participate in the plan.

For example, the accused Lautz displayed this "zeal" and knowingly participated in the criminal plan of racial discrimination "by means of the perversion of the law of high treason."[128] He was accordingly convicted of war crimes and crimes against humanity.[129] Similarly, the Tribunal found the accused Rothaug guilty of crimes against humanity as he knew of the national plan and "gave himself utterly to its accomplishment" by applying the sinister and discriminatory laws against the Poles and Jews in this context.[130] In contrast, the court found the accused Cuhorst not guilty for persecution as a crime against humanity in part because he fell into the first category by virtue of the fact that his own party court determined that he did not "conform to what the State and Party demanded of a judge."[131] This distinction demonstrates that the NMT affirmatively sought to avoid the imposition of guilt solely predicated upon association.

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[126] The decisions of these judges often had little impact on the fate of the accused they tried and resulted in threats, criticism or even removal of the judge from office by party officials. *Id.*

[127] This group experienced minimal interference or adverse treatment in the exercise of their duties. *Id.*

[128] *Id.* at p. 1121. For instance, Lautz authorized the indictments for Poles who had been detained while attempting to flee from Germany and enter Switzerland. *Id.*, *see also Brdjanin*, Case No. IT-99-36-A, ¶ 398, quoting the *Justice* Case.

[129] The Tribunal "cited a few cases which are typical of the activities of the Prosecution before the People's Court in innumerable cases. […] [The evidence] establish[ed] that the defendant Lautz was criminally implicated in enforcing the law against Poles and Jews which were deemed to be part of the established governmental plan for the extermination of those races. He was an accessory to, and took a consenting part in, the crime of genocide." *Id.* at 1128.

[130] *Id.* at 956.

[131] *Id.* Cuhorst was found not guilty on all four counts. However, with regards to the crimes against humanity count, potentially critical records of the cases tried by Cuhorst were lost when the Palace of Justice in Stuttgart were lost to fire. *Id.* at 1157-1158.

l. *The United States of America v. Otto Ohlenfort et al.* (the *Einsatzgruppen* Case)

In addressing the criminal responsibility of certain accused, the NMT in *The United States of America v. Otto Ohlenfort et al.* (the "*Einsatzgruppen*" Case) [132] explained that:

> Even though these men were not in command, they cannot escape the fact that *they were members of Einsatz units whose express mission, well known to all the members, was to carry out a large-scale program of murder*. Any member who assisted in enabling these units to function, knowing what was afoot, is guilty of the crimes committed by the unit.[133]

Therefore, where an accused voluntarily participated in the Einsatzgruppen's common criminal purpose, and possessed the intent to engage in the criminal program of mass murder, he shared individual responsibility for the crimes committed.

m. *Ponzano* Case

The *Ponzano* case built on common purpose jurisprudence by addressing the contribution of the accused in terms of causation. The Judge Advocate explained that an accused could share responsibility for an offense via "an indirect degree of participation" where he was a "cog in the wheel of events leading up to the result which in fact occurred."[134] The accused could further the criminal object "by a variety of means."[135] Consequently, the participation of the accused need not be the "*sine qua non"* of the charged offense.[136] However, the accused must have knowledge "that when he did take part in [the criminal enterprise] he knew the intended purpose

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[132] *The United States of America v. Otto Ohlenfort et al.*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office, Washington, 1951, vol. IV [hereinafter "*Ohlenfort et al.*"]. The twenty-four accused, all officers in the *Einsatzgruppen*, were charged with war crimes, crimes against humanity, and membership in a criminal organization for the mass murder of over one million people as the mobile extermination units moved throughout the eastern European front. The *Einsatzgruppen* Case: Amended Indictment.
[133] *Id.*
[134] *Id.* at ¶ 199 *quoting Trial of Feurstein and others*, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), Judgement of 24 August 1948, summing up of the Judge Advocate, p. 7 [hereinafter "*Feurstein and others*"].
[135] *Id.*
[136] *Tadic*, IT-94-1-A, ¶ 199.

of it."[137] The more relaxed causation standard was thus held in check by the *mens rea* requirement that the accused be aware of the criminal purpose in which he is participating.

n. *Mannelli* Judgment

The Court of Cassation in the *Mannelli* Judgement also explored this causal nexus requirement in the context of civilian criminal activity, requiring that:

> [f]or there to be a relationship of material causality between the crime willed by one of the participants and the different crime committed by another, *it is necessary that the latter crime should constitute the logical and predictable development of the former (il logico e prevedible sviluppo del primo)*. Instead, where there exists full independence between the two crimes, one may find, depending upon the specific circumstances, a merely incidental relationship (*un rapporto di mera occasionalita*), but not a causal relationship.[138]

The notion of predictability is emphasized again. It is not sufficient that there be an "incidental" relationship between the two crimes but rather that the crime not envisaged flow naturally from the pursuit of the criminal purpose sought.

o. *Aratano et al.*

Another Court of Cassation case, *Aratano et al.* involved an appeal by members of a fascist militia convicted of the murder of partisans during a firefight.[139] The militia originally intended to arrest certain partisans but, in an attempt to intimidate them, a member of the militia fired shots into the air thereby precipitating the fatal exchange. In finding that the trial court erred by extending liability to each member of the militia, the Court stressed that some members lacked the intent to kill the partisans.[140] To impute liability for murder perpetrated during "a mopping operation" executed by a group of people, "it was necessary to establish that, in

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[137] *Id*. at note 243 *quoting Feurstein and others*, at 8; *See also Tadic*, Case No. IT-94-1-A, ¶ 199.
[137] *Id.*
[138] *Tadic*, Case No. IT-94-1-A, *citing Giustizia penale*, 1950, Part II, cols. 696-697.
[139] *Tadic*, Case No. IT-94-1-A, ¶ 216, *citing* handwritten text of the (unpublished) Judgement, pp. 13-14. Neither a common plan nor criminal means can be readily discerned from the facts as set forth in *Tadic*. The judgment only mentions that "the crime committed was more serious than that intended." *Id.*, ¶ 216.
[140] The court describes the murder as a clearly "unintended event (*evento non voluto*)." *Id.*

participating in this operation, a voluntary activity also concerning homicide had been brought into being."[141] The Court in this case appeared more concerned with whether the accused took measures to voluntarily participate in the charged crime rather than analyzing whether the crime was a "predictable" consequence of the common purpose.

p. *Israel v. Eichmann*

In addressing Eichmann's liability for genocide, the Attorney General in *Israel v. Eichmann* argued that the plan for the Final Solution constituted "a criminal conspiracy" encompassing the myriad of criminal acts connected with the extermination of the Jews within areas of Nazi Germany's influence.[142] Since Eichmann participated in the criminal conspiracy, he "must be held liable *ipso facto* for all of the offences committed to bring about its implementation" regardless of the nature, geographic location, and Eichmann's "active participation" in the criminal activities.[143]

While the court's precise reasoning is unclear, it rejected the Attorney General's argument while simultaneously endorsing his "general approach" that crimes committed in execution of the Final Solution should be analyzed as "one single whole, and the Accused's criminal responsibility is to be decided upon accordingly."[144] By analyzing the criminal acts in

[141] *Id. quoting* handwritten text of the (unpublished) Judgement, at 13-14.
[142] *Eichmann*, ¶ 187.
[143] *Id.*
[144] *Id.* ¶ 190. The Court's reluctance to accept the Attorney General's legal reasoning for Eichmann's individual criminal responsibility for all offenses committed in the implementation of the Final Solution appears to stem from the belief that " 'mere knowledge is not, of itself, enough; there must be something further.' " *Id.* ¶ 189 *citing the case of Bullock* (1955) 1 All E.R. 15, the Court of Appeals in England. Thus, to hold a member of a common plan liable for an offense physically committed by another member of that plan requires "an additional ground of responsibility" beyond mere consent. *Id.* ¶¶ 189 and 190.

the context of one larger, comprehensive plan, the Court seemingly constructed an expansive framework to impute individual criminal responsibility to the accused.[145]

Both the criminal intent behind the plan and the *actus reus* of its execution were such that members of the plan "accomplished it jointly at all times and in all places."[146] Liability was thus imputed as follows:

> [e]veryone who acted in the extermination of the Jews, knowing about the plan for the Final Solution and its advancement, is to be regarded as an accomplice in the annihilation of the millions who were exterminated during the years 1941-1945, irrespective of the fact of whether his actions spread over the entire front of the extermination, or over only one or more sectors of that front. His responsibility is that of a "principal offender" who perpetrated the entire crime in co-operation with the others.[147]

At least one commentator has analyzed this holding as establishing complicity to commit genocide rather than as genocide through common criminal liability.[148] Regardless of taxonomy, the Court recognized the importance of the "accomplice" to the achievement of the plan by elevating his responsibility to that of a "principal offender."[149]

The Court's mode of analysis for determining Eichmann's individual criminal responsibility closely resembled that applied by courts discussed *infra* that also addressed responsibility for crimes envisioned by the common plan. The Court considered the Accused's

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[145] The Court determined that such an inquiry should be premised *not* on the law of criminal conspiracy but by virtue of the fact that the Final Solution is a crime against a group of people and not "upon a person as an individual." *Id.*, ¶ 191.

[146] *Id.* ¶ 193. The criminal intent of the main conspirators and perpetrators was "continuous and embraced all activities" until the "general and total" physical extermination of the Jews was completed. *Id.* ¶ 192. The "complicated apparatus" devised to implement the plan combined with an awareness by the plan's higher-ranking members of its existence and functioning fueled an extermination campaign that was "one single comprehensive act, which cannot be divided into acts or operations carried out by various people at various times and in different places." *Id.*

[147] *Id.* ¶ 194.

[148] WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 286 (Cambridge University Press 2000). (Schabas relies in part on the statement by the court that, in sending a letter intended to discourage the emigration of Jews in August 1941, Eichmann engaged in "an act of aiding" in the extermination of the Jews.

[149] The Court notes the inverse relationship between one's proximity to the physical act(s) and one's responsibility for the act(s): "in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command…" *Eichmann*, ¶ 198.

awareness of the plan, his voluntary participation in the plan, and his intent to further the plan.[150] The evidence clearly demonstrated that Eichmann was made aware of the extermination plan in June 1941; he actively furthered the plan via his central role as Referent for Jewish Affairs in the RuSHA as early as August 1941;[151] and he possessed the requisite intent (here, specific intent because the goal was genocide) to further the criminal plan as evidenced by "the very breadth of the scope of his activities [...]" undertaken to achieve the biological extermination the Jewish people.[152] Eichmann thus shared individual responsibility for the "general crime" of the Final Solution, which encompassed acts constituting the crime "in which he took an active part in his own sector and the acts committed by his accomplices to the crime in other sectors on the same front."[153]

C. Conclusion

The existence of common plan liability is well-grounded in the post-WWII case law. The IMT Charter, the IMTFE Charter, and Control Council Law No. 10 all explicitly recognized participation in a "common plan" as mode of liability. The cases prosecuted according to these laws, as well as other cases prosecuted in military and national courts during the era unequivocally endorsed the notion that a participant in an unlawful common purpose/plan/design may be held criminally responsible for acts committed in its execution even if the accused did not physically perpetrate the acts.

The case law demonstrates that a common plan may be large or small in terms of its geographical scope. Moreover, common planning can exist in a "complete dictatorship."

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[150] Full awareness of the scope of the plan's operations was not necessary. Indeed, the court notes that many of the principal perpetrators may have possessed only compartmentalized knowledge. *Id.* ¶ 193.
[151] *Id.* ¶ 182. From the moment Eichmann learned of the order for total extermination, he zealously "co-ordinated and directed [his activities] towards the target of the Final Solution." *Id.*
[152] *Id.*
[153] *Id.* ¶ 197.

Therefore, high-ranking accused persons may not shield themselves from liability by claiming that they were merely pawns executing the will of an omnipotent leader.

With regards to the requisite *mens rea* and contribution of the accused, one sees the various courts struggling to define this relationship in certain instances in an effort to ensure protection for the paramount criminal law principle of individual culpability. Where the offense was envisioned as part of the common plan, international and national courts almost uniformly looked to whether the accused intended to participate in the unlawful purpose or design, and whether the accused undertook specific acts in furtherance of the plan. Where the offense was committed as part of a distinct, organized system of oppression such as a concentration camp, the inquiry shifted away from intent to whether the accused had knowledge of the system of oppression, and whether he worked to enforce that system.

The jurisprudence is ultimately the least clear where the act was outside of the envisaged plan.[154] In general, the courts required some relationship between the envisaged crime and the additional crime. One thus sees the courts grappling with whether the crime was a "foreseeable" or "predictable" consequence of pursuing the common purpose to the particular accused. In addition, the requisite contribution of the accused (or *actus reus*) is uncertain. Courts typically required that the accused act to further the common purpose, but some seemed more concerned with whether the accused was physically present and/or participated in the additional act in some way. Regardless, it is undeniable that in certain instances courts sought to extend liability where

[154] Critics of the more controversial or extended forms of modern-day JCE jurisprudence challenge as "dubious" the *Tadic* Appeals Chamber's reliance on the POW mistreatment cases as examples of common plan liability, particularly for this notion of extending liability for a crime not envisaged in the common plan that was nevertheless "foreseeable." These critics point to generalized flaws in this approach:

> In all of these cases, POWs are killed by small groups of people, many of whom are ultimately convicted of murder, although neither their mental state nor exact contribution to the ultimate death of the prisoners is clear from the facts of the case. In each of the cases cited in *Tadic*, all of the defendants were present or in the immediate vicinity of the murders, and none of the defendants was charged with participation in some larger plan outside of the unlawful treatment of the prisoners involved. Danner & Martinez, *supra* note 52, at 111.

the criminal act was outside of the envisaged common plan. Whether the principles embodied therein had crystallized into customary international law as of 1975 is less certain, particularly in light of the fact that the international tribunals from the post-war era declined to explicitly expound on the use of common plan liability in such a context. However, due to the massive scale of the atrocities committed, the inherently political nature of the international trials, and the abundance of evidence against the particular accused, there was ultimately little need for these courts to delve into liability for unplanned crimes or to discuss the boundaries for common plan liability in any depth.

III. Joint Criminal Enterprise: Modern Common Criminal Plan Liability

A. Introduction

In the intervening years between the post-WWII cases and the creation of modern international criminal tribunals, the exact state of common plan liability remained unclear. This confusion remained until 1998, when the Appeals Chamber of the ICTY delivered its Judgment in *Tadic,* discussing common plan liability and coining the term JCE.[155] The Chamber in *Tadic* characterized general common criminal plan liability as standing for the proposition that:

> [w]hoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions.[156]

The Chamber noted that JCE liability is concordant with the object and purpose of the ICTY Statute and is also "warranted by the very nature of many international crimes which are committed in wartime situations."[157]

Although the ICTY Statute did not specifically mention JCE or common plan liability, the Chamber held that JCE liability was implicitly provided for in Article 7(1) as a method of "commission" existing under customary international law as of at least 1992.[158] The Special Court of Sierra Leone ("SCSL") and ICTR have both followed the lead of the ICTY in this regard, reading JCE liability into their respective statutes as a mode of commission.[159] The ECCC Law confers the Tribunal with jurisdiction to bring to trial "senior leaders" and those "most responsible" who "committed," *inter alia*, genocide, crimes against humanity, grave

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[155] *Tadic*, Case No. IT-94-1-A, ¶ 226. Furthermore, subsequent ICTY jurisprudence has stated that JCE and "common purpose" doctrine liability are one and the same concept, but that the term JCE is preferred. *See, e.g., Milutinovic et al.*, ¶ 36.
[156] *Tadic*, Case No. IT-94-1-A, ¶ 226.
[157] *Id.* ¶ 191.
[158] *Id.* ¶ 190.
[159] *See, e.g., Karemara et. al.*, ¶ 32 ("Given the authoritative jurisprudence of the Appeals Chambers on this matter, the Chamber is satisfied that its jurisdiction on joint criminal enterprise liability is implied in Article 6 (1) of the Statute on the basis of customary international law, consequently there is no need to reconsider this matter.").

breaches of the 1949 Geneva Conventions, destruction of cultural property during armed conflict or crimes against international protected persons.[160] Although consistent jurisprudence has held that JCE is a form of "commission," it will be for the Chambers of the ECCC to ultimately decide whether or not ECCC Law implicitly provides for JCE as a mode of commission.

B. *Tadic* and Modern, Three Category JCE

The Appeals Chamber in *Tadic* outlined the basic elements of JCE liability and went on to discuss three specific "categories" of JCE. All three categories share several common elements: (1) a plurality of persons, who; (2) agree to pursue a common criminal plan; (3) an act by the accused in furtherance of such plan; and (4) the ultimate commission of the charged crime.[161]

The Chamber divided JCE liability into three related categories, each with a distinct *mens rea* requirement.[162] The first, "basic" category of JCE applies to situations where the commission of the charged crime is envisioned in the common plan and requires the accused's intent to join in the plan.[163] The second, "systemic" category of JCE involves a prison or concentration camp scenario and requires a showing of the accused's "personal knowledge of the system of ill-treatment," along with the intent to further this "common concerted system."[164] The third, "extended" category of JCE has a dual *mens rea* requirement and applies to crimes

[160] ECCC Law, *supra* note 3, arts. 2, 4–8, 29.
[161] *Tadic*, Case No. IT-94-1-A, ¶ 227.
[162] *Id.* ¶ 228.
[163] *Id.* ("This intent requirement is typically satisfied simultaneously with proof of the initial agreement between members of the JCE."). Courts have distinguished between the "intent" of the accused to join the plan and his "motive" for forming this intent. Often a JCE member is aware of the illegal nature of the enterprise which he is joining, yet has no subjective desire for the enterprise to succeed. While "intent" to join the JCE is required, the accused's motive for doing so is "immaterial for the purposes of assessing the accused's . . . criminal responsibility." *Prosecutor v. Kvocka et al.* Case No. IT-98-30/1-A, Judgment, ¶ 105 (28 February 2005) (internal citation omitted); *see also Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶ 100 (17 September 2003) ("shared criminal intent does not require the co-perpetrator's personal satisfaction or enthusiasm or his personal initiative in contributing to the joint enterprise").
[164] *Id.* (This knowledge can be proved via either "express testimony" or inference drawn from the defendant's "position of authority.").

that, while not specifically envisioned as part of the original criminal plan, are its natural and foreseeable result.[165] For extended JCE, the prosecution must initially prove the accused's common intent to join the original criminal plan just as in basic JCE.[166] The Prosecution must also prove that the accused was aware of the likelihood of the commission of the charged crime and "willingly took that risk," amounting to a *mens rea* of *dolus eventualis* ("advertent recklessness").[167]

C. Subsequent JCE Jurisprudence

No international court has departed from the central holding of *Tadic*. However, numerous issues have arisen regarding the application of JCE, including: (1) the requisite specificity when pleading JCE; (2) showing the existence and nature of the original plan; (3) the requisite level of participation by the accused; (4) general issues of proof; (5) the applicability of JCE to large-scale criminal enterprises; (6) the exact requirements of "*dolus eventualis*"; (7) whether the physical perpetrator of the charged crime(s) must be a member of the JCE; (8) if not, what relationship such perpetrator must have with members of the JCE; and (9) compatibility with specific intent crimes. Each of these issues will be addressed in turn.

1. The Form and Specificity of the Indictment

i. General Policy Considerations and Background

There have been numerous challenges to the pleading of JCE at the SCSL, ICTY and ICTR.[168] These challenges have focused on the specificity with which JCE must be outlined in the prosecution's case in order to provide adequate notice and information for the accused to

[165] *Tadic*, Case No. IT-94-1-A, ¶ 228.
[166] *Id.*
[167] *Id.*
[168] *E.g. Prosecutor v. Alex Tamba Brima et al.* Case No. SCSL-2004-16-A, Judgment (22 February 2008); *Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-R50, Decision on Defence Motion on Defects in the Form of the Indictment (27 September 2006); *Prosecutor v. Kvocka et al.* Case No. IT-98-30-1, Decision on Defence Preliminary Motions on the Form of the Indictment (12 April 1999).

prepare a vigorous defense.[169] Generally, courts have recognized that international crimes cannot be alleged as specifically as domestic crimes because of their nature and scale.[170] To allow the prosecution to allege crimes generally while protecting the accused's right to be fully informed, the ICTY Appeals Chamber has held that the indictment must contain "enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence [*sic*]."[171]

ii. Specific Pleading Requirements

After JCE became well-established in ICTY jurisprudence, the Appeals Chamber subsequently held that the specific JCE categories the prosecution plans on alleging at trial must be explicitly mentioned in the indictment.[172] However, the prosecution may allege more than one form of JCE under a single set of facts.[173] Apart from specifically employing the language of JCE, the indictment must further describe "the purpose of the enterprise, the identity of the co-participants, and the nature of the accused's participation in the enterprise."[174] The prosecution need not necessarily name every member of the JCE, but may describe the characteristics of membership more broadly.[175]

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[169] For a discussion of the general requirements of allegations made by the prosecution, *see Nchamihigo*, ¶. 3.

[170] *See, e.g., Kvocka et al.*, Case No. IT-98-30/1-A, ¶ 17, where the Chamber notes:

> The massive scale of the crimes with which the International Tribunal has to deal makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes – at any rate, the degree of specificity may not be as high as that called for in domestic jurisdictions. However, there may be cases in which more specific information can be provided as to the time, the place, the identity of victims and the means by which the crime was perpetrated; in those cases, the Prosecution should be required to provide such information.

[171] *Prosecutor v. Kupreskic et al.* Case No. IT-95-16, Judgment, ¶ 88 (23 October 2001).

[172] *Kvocka et al.*, Case No. IT-98-30/1-A, ¶ 42.

[173] *E.g. Nchamihigo,*¶ 14. Note, as a practical matter the prosecution often pleads basic and extended JCE liability alternatively.

[174] *Id. citing Prosecutor v. Stanisic,* Case No. IT-03-69-PT, Decision on Defence Preliminary Motions, (14 November 2003); *Prosecutor v. Mejakic*, Case No. IT-02-65-PT, Decision on Dusko Knezevic's Preliminary Motion on the Form of the Indictment, (4 April 2003).

[175] *See, e.g., Nchamihigo,* ¶ 21, where the Trial Chamber held that the members of the JCE could be simply described as members of the *Interahamw*e, rather than by name, stating that:

The specificity of these descriptions turns on the degree of notice required for the accused to receive a fair trial, predicated on a vigorous defense of his interests.[176] If the form of the indictment does not give the accused "sufficient notice of the legal and factual reasons for the charges against him," then "no conviction may result" because the accused's right to a fair trial is compromised.[177] Furthermore, the factual averments made by the prosecution require no proof of their validity as there exists a "clear distinction drawn between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved," which need not be included by the prosecution at the pleading stage.[178] Thus, the prosecution must clearly provide the defense with notice of the type(s) of JCE it will rely on and the type and general nature of the evidence it will rely on at trial.

iii. Likely Indictment Issues Involving JCE at the ECCC

According to the Co-Prosecutor's Statement of 18 July 2007, the initial 5 charged persons are alleged to have participated in a "common criminal plan constituting a systematic and unlawful denial of basic rights of the Cambodian population and the targeted persecution of certain groups."[179] This criminal plan resulted, according to the Statement, in the commission of "crimes against humanity, genocide, grave breaches of the Geneva Conventions, homicide, torture and religious persecution."[180] Although it is not an indictment, the Statement is drafted as if it were, providing notice of the general crimes that will be charged and the circumstances of

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> Where the Prosecution knows the names of the *Interahamwe* who committed the particular acts, they should be provided. If it is impossible to provide more specific information due to the large number of *Interahamwe* involved or other reason, this should be clearly indicated in the Indictment.

[176] *E.g. id.*
[177] *Kvocka et al.*, Case No. IT-98-30/1-A, ¶ 33.
[178] *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, ¶ 12 (24 February 1999).
[179] Statement of the Co-Prosecutors, Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Prosecutors, at 3 (18 July 2007), http://www.eccc.gov.kh/english/cabinet/courtDoc/18/Statement_of_Co-Prosecutors_18-July-2007_.pdf [hereinafter "Statement of the Co-Prosecutors"].
[180] *Id.* at 4.

their commission. The Co-Prosecutors base these charges on "twenty-five distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labor and religious, political and ethnic persecution," which provides the defense with notice of the specific factual instances on which the liability of the accused is predicated.[181] The "purported motive of this common criminal plan was to effect a radical change of Cambodian society along ideological lines," which provides the nature and scope of the initial agreement and common intent.[182]

The Co-Prosecutors also state that "[t]hose responsible for these crimes and policies included senior leaders of the Democratic Kampuchea regime," which identifies, without specifically naming, the members of the alleged JCE.[183] The Statement is thus drafted with the basic information necessary to plead JCE according to existing jurisprudence. Although the Co-Investigating Judges (CIJs) have only completed their investigation against one of the initial five charged persons, any indictment returned against an accused will almost certainly allege, at least in part, liability based on participation in a common criminal plan/JCE.

2. The Existence and Nature of the Initial Agreement

i. Policy Considerations: the Extemporaneous Agreement

Factual circumstances rarely arise where a group of people officially form a criminal organization. Instead, JCEs are typically formed secretly or informally. The ICTY Appeals Chamber in *Tadic* acknowledged this reality, holding that "[t]here is no necessity for [the] plan, design or purpose to have been previously arranged or formulated," but rather that such plan "may materialize extemporaneously and be inferred from the fact that a plurality of persons act in unison to put into effect a joint criminal enterprise."[184] This holding has been affirmed

[181] *Id.*
[182] *Id.* at 3.
[183] *Id.*
[184] *Tadic*, Case No. IT-94-1-A, ¶ 227.

repeatedly and the ICTY Appeals Chamber has stated that "the jurisprudence on [the] issue is clear" and explicitly allows for the extemporaneous formation of the original plan.[185]

ii. The Criminal Nature of the Plan

According to the Appeals Chamber in *Tadic*, the original plan must "*amount[] to or involve[] the commission of a crime provided for in the Statute*" of the ICTY.[186] This criminality requirement was recently summarized by the Appeals Chamber of the SCSL in *Brima et al.*, which cited numerous authorities in support of its holding that the objective of the original plan need not be inherently criminal, as long as the participants anticipate the use of illegal means in its implementation.[187] According to the Chamber, this conclusion is based on the fact that both "[t]he objective *and the means to achieve the objective* constitute the common design or plan."[188] The holding in *Brima et al.* is simply a clarification of *Tadic*, in which the Court characterized the underlying JCE as a common criminal plan to "rid the Prijedor region of the non-Serb population, *by committing inhumane acts*," thereby including the planned means within the scope of the initial agreement.[189]

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[185] *Kvocka et al.*, Case No. IT-98/30-1-A , ¶ 117; citing *Tadic*, Case No. IT-94-1-A, ¶ 227(ii); *accord Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment, ¶ 100 (25 February 2004).

[186] *Tadic*, Case No. IT-94-1-A, ¶ 227 (emphasis in original).

[187] *Brima et al*., ¶¶ 70–84 (Holding "that the common purpose of the joint criminal enterprise was not defectively pleaded [because] [a]lthough the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute.) *citing, inter alia, Tadic*, Case No IT-94-1-A, ¶¶ 186, 189-193, 227; *Kvocka et al.*, Case No. IT-98/30-1-A, ¶ 46; *Prosecutor v. Haradinaj*, Case No. IT-04-84, Decision on Motion to Amend the Indictment and on Challenges to the Form of the Amended Indictment, ¶ 25 (25 October 2006); Rome Statute, *supra* note 2, art. 25(3) (Stating that in terms of JCE liability, an act must "i. [b]e made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; *or* ii. [b]e made in the knowledge of the intention of the group to commit the crime.") (emphasis added).

[188] *Id.* ¶ 76 (emphasis added).

[189] *Tadic*, Case No. IT-94-1-A, ¶ 231 (emphasis added). The language of the Statement of the Co-Prosecutors follows the language of *Tadic* and *Brima et al*., characterizing the common plan as one to "effect radical change in Cambodian society along ideological lines" through the anticipated means of "systematic and unlawful denial of basic rights of the Cambodian population and the targeted persecution of certain groups." Statement of the Co-Prosecutors, *supra* note 179, at 3.

As a practical matter, how the prosecution alleges the scope of the initial agreement is crucial to issues of proof and the interplay between basic and extended JCE liability. If the crime is specifically envisioned when the original plan was formulated, the prosecution can rely on basic JCE and thus avoid having to prove that the crime was the foreseeable result of the original plan and that the particular accused was aware of this likelihood and willfully ignored such risk. However, the more broadly the JCE is alleged, the harder it becomes for the prosecution to clearly identify the members of the JCE, making the framing of the JCE by the prosecution a crucial tactical decision.

iii. The Common Criminal Plan and the ECCC

The Co-Prosecutors seemingly intend to rely primarily on basic JCE to impute liability to the charged persons Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith. This is reflected by the nation-wide scope of the alleged common criminal plan, which logically embraces the Democratic Kampuchea ("DK") regime's drive to reshape "Cambodian society" by committing unlawful acts against "the Cambodian population" and "specific groups."[190] According to this approach, the "senior leaders of the DK regime" knew by virtue of their positions of authority that many of the charged crimes would be committed in executing the common purpose. This can certainly be said with regards to the crimes noted by the Co-Prosecutors in the July 18, 2007 Statement.[191] Nevertheless, certain acts such as starvation or deprivation of basic medical provisions as crimes against humanity may fall outside of this common plan.[192] If this happens, the Co-Prosecutors will be forced to establish liability for each of the accused via extended JCE.

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[190] Statement of the Co-Prosecutors, *supra* note 179.
[191] The Statement refers to acts of murder, torture, forcible transfer, unlawful detention, forced labor and religious, political and ethnic persecution. *Id.*
[192] Both of these crimes are not explicitly set forth under Article 5 of the ECCC Law. However, there is a strong argument that such acts constitute "other inhumane acts" as recognized under that provision. *See* ECCC Law, *supra* note 3, art. 5.

3. The Act in Furtherance Requirement

i. Policy and *Actus Reus* Considerations

To differentiate between JCE liability and mere "guilt by association," the Appeals Chamber in *Tadic* held that the accused must commit an act in furtherance of the common criminal plan to be liable.[193] The Chamber also held that such act "need not involve commission of a specific crime . . . but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."[194] In *Tadic* the Chamber found this element satisfied because the accused "actively took part" in the "common criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts," including "rounding up and severely beating" some of the victims.[195]

ii. The Adoption of a "Significant Act" Threshold

Tadic sparked a flurry of criticism over the seemingly low threshold of the required act on the part of the accused to impute liability for a potentially long list of crimes committed in furtherance of a JCE.[196] The ICTY Appeals Chamber addressed this criticism in *Prosecutor v. Kvocka et al.*, holding that the act in furtherance must be at least "significant."[197] However, the Chamber also stated that the prosecutor need not prove that "the accused's participation is a *sine qua non*, without which the crimes could or would not have been committed," holding that "the argument that an accused did not participate in the [JCE] because he was easily replaceable must

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[193] *Brdjanin*, Case No. IT-99-36-A; *see also Prosecutor v. Kvocka et al.* Case No. IT-98-30/1-T Judgment, ¶ 309 (2 November 2001) (holding that, "[t]he participation in the enterprise must be significant").
[194] *Tadic*, Case No. IT-94-1-A, ¶ 227.
[195] *Id.* ¶¶ 231-232.
[196] This criticism focused primarily on the lack of a formal mechanism to prevent imputation of all crimes *down* the chain of command to relative peons, in addition to imputing liability *up* the chain of command to those most culpable. *E.g.* Danner & Martinez, *supra* note 52, at 150-151 (Arguing that JCE liability should only attach when the accused's act in furtherance can be characterized as "substantial.").
[197] This requirement was first explicitly stated in *Kvocka et al*., Case No. IT-98-30/1-T, ¶ 309 (Explaining 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."). This requirement has become imbedded in the basic requirements of proving a JCE in subsequent jurisprudence. *See, e.g., Brdjanin*, Case No. IT-99-36-A, ¶ 430, *citing Kvocka et al.*, Case No. IT-98-30/1-A, ¶¶ 97-98.

be rejected."[198] Furthermore, although the act in furtherance must be significant, "[a] participant in a [JCE] need not physically participate in any element of any crime."[199]

Recent case law has done little to clarify the exact *actus reus* requirement of JCE. For example, the ICTY Appeals Chamber recently discussed what level of acts are required in *Prosecutor v. Brdjanin* and simply noted that the accused's act in furtherance need not be a "necessary or substantial" contribution in order qualify as "significant."[200] The Chamber cited the Judge Advocate's statement in *Trial of Feurstein and others* that an accused "must be a cog in the wheel of events leading up to the result which in fact occurred" in support of the "significant" threshold.[201] Thus, how exactly the significant requirement differs from any act that in some way furthers the JCE or a substantial act remains somewhat unclear.

Despite the persistent ambiguity regarding the definition of the term "significant," the threshold has provided Courts with a method of formally distinguishing between low level functionaries and truly culpable members of a JCE who perform tasks critical to the criminal enterprise.[202] This requirement also serves as a convenient check against the prosecution charging a JCE without clearly defining its scope because as the scope of the JCE grows, so too does the level of participation by the accused required to be considered legally "significant." Finally, while formally an accused's act in furtherance must be "significant," Professor Antonio

[198] *Kvocka et al.*, Case No. IT-98-30/1-A, ¶ 98, *citing Tadic*, Case No. IT-94-1-A, ¶¶ 191, 199.
[199] *Id.* ¶ 99.
[200] *Brdjanin*, Case No. IT-99-36-A, ¶ 440, *citing Kvocka et al.*, Case No. IT-98-30/1-A, ¶ 427.
[201] *Id.* ¶ 427, fn 909, *citing, inter alia, Feurstein and others*, at 7.
[202] It should be noted that the internal rules of the ECCC precludes prosecutorial overreaching down the ranks of the Khmer Rouge to less culpable members due to its limitation of prosecution to "senior leaders" and "those most responsible" for the crimes committed during DK from 1975-1979. ECCC Law, *supra* note 3, Chapter II, art. 2. For a discussion of differentiating between culpable and non-culpable members of a systemic JCE, *see Kvocka et al.* Case No. IT-98-30/1-T, ¶¶ 307-312.

Cassese has stated that case law bears out that this characterization effectively amounts to a "substantial" threshold requirement.[203]

4. Issues of Proof

i. Policy Considerations and Contextualization

In most JCE prosecutions there is significant evidentiary overlap between proofs. Due to the scope and nature of international crimes, determining liability requires an inquiry into a variety of "contextual factors" upon which logical inferences must be drawn.[204] Therefore, the prosecution's case is usually proved by a vast number of small pieces of evidence. In this way, building a JCE case is much like building a large wall out of many small bricks. For example, in *Tadic*, it took the Trial Chamber 126 paragraphs to analyze the "Background and Preliminary Factual Findings" outlining the "Context of the Conflict."[205] The Trial Chamber then spent another 297 paragraphs analyzing the personal history of Dusko Tadic, the specific factual instances of the commission of crimes and Tadic's role therein.[206] The Appeals Chamber relied heavily on these extensive findings in overturning the Trial Chamber and finding Tadic guilty of participating in the killings of five men in Jaski based on extended JCE.[207]

ii. Specific Contextual Factors Probative of Liability

As JCE liability is predicated on an examination of the totality of the circumstances, there is no single contextual factor that automatically establishes liability if proved. International courts have, however, highlighted several factors that may be especially probative.

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[203] Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109, 133 (2007) (characterizing case law as implicitly requiring the act in furtherance to be "substantial").
[204] *Kvocka et al.*, Case No. IT-98-30/1-A, ¶ 101.
[205] *Prosecutor v. Tadic*, Case No. IT-94-1, Judgment (TC), ¶¶ 53-179 (7 May 1997).
[206] *Id.* ¶¶ 180-477.
[207] *Tadic*, Case No. IT-94-1-A, ¶ 233.

a. Holding a Position of Authority

Prime amongst the factors probative of JCE liability is whether the accused held a "position of authority" within the JCE.[208] According to the Appeals Chamber of the ICTY, when applied to a systemic JCE, this position of authority also:

> may be relevant evidence for establishing the accused's awareness of the system, his participation in enforcing or perpetuating the common criminal purpose of the system, and, eventually, for evaluating his level of participation for sentencing purposes.[209]

A position of authority is thus probative of the accused's knowledge of and participation in the original plan. This position is also especially useful when extended JCE is charged as it speaks to the accused's subjective knowledge of the likelihood of the commission of further, foreseeable crimes.

b. Acts in Concert by a Plurality of Persons

Another contextual factor that can be probative on several fronts is "the fact that a plurality of persons act[ed] in unison to put into effect a joint criminal enterprise."[210] These acts in concert may be used as evidence of the existence of the criminal plan as well as its nature. Moreover, when one of a series of concerted acts is committed by the particular accused, such act is probative of both the accused's membership in the JCE and the requisite act in furtherance thereof.

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[208] *Kvocka et al.*, Case No. IT-98-30/1-A, ¶ 100.
[209] *Id.* ¶ 101, *citing Krnojelac*, ¶ 96. Both *Kvocka et al.* and *Krnojelac* involve analysis of proofs required for systemic JCEs, however their discussion of how knowledge of and participation in a JCE can be inferred via an accused's position of authority is germane to JCE liability in general.
[210] *Tadic*, Case No. IT-94-1-A, ¶ 227.

c. Specific Acts of the Accused

Whether an act in furtherance qualifies as "significant" is inherently a case-specific inquiry that varies according to the size and nature of the common plan as discussed *supra*.[211] Most often, this showing is satisfied by the same evidence used to demonstrate the accused's shared intent to pursue the common purpose, and as one of a series of acts in concert by various actors used to infer the existence and nature of the original criminal plan.[212]

iii. Evidentiary Contextualization in *Tadic*

In *Tadic*, the accused satisfied the act in furtherance requirement by engaging in the inhumane treatment of non-Serbs.[213] These acts also evidenced Tadic's underlying membership in the JCE.[214] Finally, Tadic's actions were consistent with the purpose of the JCE and thus provided some evidentiary support for the very existence and nature of the criminal plan. The Appeals Chamber relied on the extensive factual findings of the Trial Chamber in finding that there existed a plan, carried out by the Bosnian Serb Army ("JNA") with civilian assistance, to ethnically cleanse the Prijedor region of non-Serbs utilizing through "a policy to commit inhumane acts against the non-Serb civilian population."[215] This plan was distilled from numerous acts in concert by JNA members and data taken from internal communiqués. Furthermore, Tadic's personal history and participation in Serb nationalist meetings were also probative of his intent to join in this criminal plan. When Tadic committed inhumane acts against non-Serb civilians, such actions both tended to prove his membership in the JCE and Tadic's requisite act in furtherance thereof. The *Tadic* Trial and Appeals Chamber Judgments

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[211] *See, e.g., Kvocka et al.*, Case No. IT-98-30/1-A, ¶¶ 100-104.
[212] *Id.* ¶ 97 ("In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.").
[213] *Tadic*, Case No. IT-94-1-A, ¶ 231.
[214] *Id.*
[215] *Id.* ¶ 230, discussing the findings of the Trial Chamber, ¶¶ 127-179 (discussing the background of the conflict in the region and the JNA's policy of ethnic cleansing).

illustrate the organic nature of proving the existence of a criminal plan, where the same evidence is probative of independent, yet related elements of JCE liability.

iv. Contextualization and Likely Proofs Before the ECCC

While the JCE likely to be alleged appears to be geographically wide in scope, the burden on the prosecution to clearly identify members of the JCE is offset by the limited personal jurisdiction of the Tribunal and the highly centralized decision-making apparatus of the DK regime. Four of the initial charged persons occupied a senior leadership role within the DK.[216] Proving membership in the Standing Committee of the DK Central Committee will likely be sufficient to prove membership/participation in the common criminal plan.[217]

Ieng Thirith, the least senior of the four accused persons, was nevertheless a "Candidate Member" of the Standing Committee as early as October 1975.[218] Although "Candidate Members" ultimately exercised less influence on DK policy than "Full-Right" members, they still possessed considerable authority and were largely responsible for the administrative and implementation aspects of DK policy. Documents in the case file indicate that Ieng Thirith also personally identified individual "traitor[s]" within her "unit" and singled out people to be arrested and sent to S-21.[219] Furthermore, Ieng Thirith had other duties that likely provided her with notice of the criminal nature of the DK regime. For example, after assuming her position as DK Minister of Social Affairs, Ieng Thirith visited the Northwestern Zone in mid-1976 at the

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[216] For a detailed discussion of the individual responsibility of Nuon Chea, Khieu Samphan, and Ieng Sary based on common plan liability, *see* STEPHEN HEDER & BRIAN D. TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION (War Crimes Research Office, American University, 2004).

[217] The existence of Standing Committee is verified by internal documents dating to around the time of the January 1976 Congress. *Id.*

[218] *E.g.*, Standing Committee File Number D00677, "Minutes of October 9, 1975 Meeting," on file with the Documentation Center of Cambodia. The record of attendance includes "Comrade Phea," which is undisputedly an alias used by Ieng Thirith.

[219] Decision on Appeal Against Provision Detention Order of Ieng Thirith, Criminal Case File No. 002/19-09-2007/ECCC/OCIJ (PTC02) (9 July 2008), ¶¶ 27, 32 [hereinafter "Decision on Appeal Against Detention of Ieng Thirith"].

request of Pol Pot to investigate rumors concerning the health sector.[220] Such evidence is highly probative of her personal knowledge of the common criminal purpose, particularly with regards to acts of forced labor, starvation, and the deprivation of basic medical supplies and services.

The Co-Prosecutors must also prove that the accused intended to participate in the plan. Such intent may likely be inferred from the factual record demonstrating that the four charged persons "actively supported and implemented the Party's policies."[221] Evidence of an accused's specific role in the formulation of policy in clear violation of international law, such as Nuon Chea's active participation in designing and overseeing CPK's "execution policies,"[222] is strongly suggestive of this intent.

5. The Maximum Size and Scope of a JCE

i. Issues of Proof as the Sole Limiting Factor

Individuals accused under JCE liability for membership in vast criminal enterprises have argued that JCE is applicable only to relatively small-scale criminal enterprises.[223] This issue was raised at the ICTR in *Rwamakuba*, where the Appeals Chamber, citing the *Justice* case, held that liability under JCE "may be as narrow or as broad as the plan in which he willingly participated . . . even if the plan amounts to a 'nation wide government-organized system of cruelty and injustice'."[224] The ICTY also summarily rejected such an argument in *Brdjanin*, wherein the Appeals Chamber upheld the pleading of a vast JCE covering large portions of the

[220] Biography of Ieng Thirith, DC-Cam Internal Working Document. This is not the only instance in which Ieng Thirith traveled to the various zones to observe conditions on the ground. *See also* Decision on Appeal Against Detention of Ieng Thirith, ¶ 38.
[221] HEDER & TITTEMORE, *supra* note 216 (discussing Nuon Chea's individual criminal responsibility according to common purpose doctrine).
[222] *Id.* at 59-75.
[223] *Brdjanin*, Case No. IT-99-36-A, ¶ 386.
[224] *Id.* ¶ 25, *quoting* The *Justice* case, at 985.

former Yugoslavia, holding that JCE liability may attach for an original criminal plan with any geographic and/or temporal scope.[225]

ii. The Practicality of Pleading a Narrow JCE

In practice, the prosecution often frames JCEs as narrowly as possible. This is primarily due to the burden of identifying, with specificity, the characteristics of the JCE and the identity of its members. The Appeals Chamber noted such difficulties in *Brdjanin*, stating that "seeking to include structurally remote individuals within the JCE creates difficulties in identifying the agreed criminal object of that enterprise."[226] Thus, according to current jurisprudence, JCE liability may be as broad in scope as the prosecution can prove, with any limitations being purely evidentiary in nature.

6. The *Dolus Eventualis Mens Rea* Required by Extended JCE

i. Basic Requirements

The most controversial form of JCE liability is the extended category, which holds members of a JCE responsible for crimes not specifically planned in the original agreement provided such crimes were foreseeable. This controversy largely revolves around the *mens rea* requirement of extended JCE, which is twofold. First, as with basic JCE, the accused must share the original common intent.[227] Second, the accused must be aware that the commission of the charged offense is "natural and foreseeable" and continue to support the enterprise with this

[225] *Brdjanin*, Case No. IT-99-36-A, ¶ 425.
[226] *Id.* ¶ 424. In fact, the increasing difficulty of delimiting the scope and nature of the initial agreement when averring a massive JCE is a useful, built-in check on the attenuated imposition of individual liability. As the alleged JCE grows, it becomes more difficult for the prosecution to prove that the original plan existed, any individual structurally remote individual was truly a member of the JCE and that the actions of such person were "significant" contributions to the effectuation of the larger plan.
[227] This underlying intent satisfies the *mens rea* requirement for basic JCE and is the first step of the analysis in extended JCE. *E.g. Kvocka et al.*, Case No. IT-98-30-1-A, ¶ 90 ("Where . . . the accused knows that his assistance is supporting the crimes of a group of persons involved in a [JCE] 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.").

knowledge.[228] The second *mens rea* requirement has been described as "willing assumption of the risk" or *dolus eventualis* (advertent recklessness).[229] The *Tadic* Appeals Chamber Judgment summed up the special *mens rea* for extended JCE as follows:

> [w]hat is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required.[230]

ii. Application in Case Law

Although the principle of *dolus eventualis* is now well-accepted in international jurisprudence, its nuances can present difficulties when applied. To prove the accused's *dolus eventualis mens rea* the prosecution must show that the commission of the crime outside of the initial agreement was foreseeable "to the accused in particular" and that the accused was subjectively aware of this objective foreseeability, creating a hybrid objective-subjective standard.[231] For example, in *Prosecutor v. Stakic*, the Trial Chamber found that the accused

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[228] *Brdjanin*, Case No. IT-99-36-A, ¶ 265. Antonio Cassese, former President of the ICTY uses the term "nexus" when discussing the relationship between the original criminal plan and the commission of the charged crime not specifically planned. Cassese, *supra* note 203 at 119.

[229] *Tadic* (AC) *supra* note 33, ¶ 220.

[230] *Id.* The use of the term *dolus eventualis* was upheld by the ICTY Appeals Chamber in *Prosecutor v. Stakic*. In *Stakic*, the Chamber held that the concept of *dolus eventualis* does not violate the principles of *non crimen sine lege* or *in dubio pro reo* because "[a]s [JCE] does not violate the principle of legality, its individual components do not violate that principle either," leaving no ambiguity for the courts to resolve in the accused's favor. *Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgment, ¶¶ 101-102 (22 March 2006).

[231] *Id.* ¶ 65 *citing Tadic*, Case No. IT-94-1-A, ¶ 220. This subjective-objective hybrid however, is considered by many commentators as practically creating a purely objective inquiry. E.g. Cassese, *supra* note 203, at 123 (stating that:

> at the international level what is required is not that the secondary offender actually foresaw the criminal conduct likely to be taken by the primary offender*; the test is rather whether a man of reasonable prudence would have foreseen that conduct under the circumstances prevailing at the time*. Three reasons seem to warrant the acceptance of a lower threshold at the international level. First, the crimes at issue are massive and of extreme gravity; moreover they are normally perpetrated under exceptional circumstances of armed violence. Under these circumstances one can legitimately expect that combatants and other persons participating in armed hostilities or involved in large scale atrocities be particularly alert to the possible consequences of their actions. Secondly, the gravity of the crimes at issue makes it necessary for the world community to prevent and punish serious misconduct to the maximum extent allowed by the principle of legality. Thirdly, in international criminal law there is no fixed scale of penalties; courts are therefore free duly to appraise the level of culpability of the accused and accordingly impose a congruous sentence.).

"was one of the co-perpetrators in a plan to consolidate Serb power in the municipality at *any* cost, including the lives of innocent non-Serb civilians."[232] By participating in the decision to set up three prison camps, Stakic was found to possess the requisite *dolus eventualis* when he "acted in the knowledge that the existence of such an environment would in all likelihood result in killings, and that he reconciled himself to and made peace with this probable outcome."[233] The Appeals Chamber upheld the Trial Chamber's convictions for extermination and murder pursuant to extended JCE liability.[234]

7. Third Party Perpetrators

i. The Post-*Tadic* Debate and Holding of *Brdjanin*

One of the biggest questions left unanswered by *Tadic* was whether the *actus reus* of the charged crime need be carried out by a member of the JCE. This issue is related to arguments regarding the maximum scope of a single JCE, as it primarily arises where a small group of individuals in positions of power agree to a criminal plan, but largely rely on subordinates for implementation. The ICTY Appeals Chamber addressed the issue in *Brdjanin*, overturning the Trial Chamber's holding that the physical perpetrator of a substantive crime must be a member of the JCE in order for liability to attach to all members.[235] Relying primarily on the post-WWII *RuSHA* and *Justice* cases for support, the Appeals Chamber in *Brdjanin* held that in basic JCE situations:

> what matters in a first category JCE 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. In cases where the principal perpetrator of a particular crime is not a member of the JCE, this essential

[232] Prosecutor v. *Stakic*, Case No. IT-97-24-T, Judgment, ¶ 598 (31 July 2003).
[233] *Stakic*, Case No. IT-97-24-A, ¶ 104.
[234] *Id.* ¶ 98.
[235] *Brdjanin*, Case No. IT-99-36-A**.** In *Brdjanin*, the physical crimes were committed by members of the military, police and paramilitary groups which were not members of the underlying JCE, which consisted of a plan to forcibly remove non-Serbs from the planned Serb state lands.

> requirement may be inferred from various circumstances, including the fact that the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose.[236]

The Chamber then turned to extended JCE liability, finding that imputation requires proof that:

> it was foreseeable that [the charged crime(s)] be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose.[237]

ii. Imputing Liability to a JCE Member

As to the relationship between the physical perpetrator and members of the JCE itself, the prosecution must prove that:

> the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan.[238]

This makes JCE liability possible when JCE members use non-members as "tools" to effectuate the common plan, as long as there is a direct link between at least one JCE member and the physical perpetrator. [239] This link must "be assessed on a case-by-case basis."[240]

iii. Residual Debate and Declaration of Judge Van Den Wyngaert

If viewed too expansively, the holding of the Appeals Chamber in *Brdjanin*, creates the possibility of JCE liability lapsing into the forbidden realm of guilt by association. In fact, Antonio Cassese praised the Judgment of the Trial Chamber before it was overturned.[241] The

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[236] *Id.* ¶ 410.
[237] *Id.* ¶ 411.
[238] *Id.* ¶ 413.
[239] *Id.*
[240] *Id.*
[241] Cassese, *supra* note 203, at 126 (Stating that to:

> extend criminal liability to where there was no agreement or common plan between the perpetrators and those who participated in the common plan would seem to excessively broaden the notion, which is always premised on the sharing of a criminal intent by all those who take part in the common enterprise.).

While Cassese's reservations about extending the scope of JCE liability are well-founded, the Appeals Chamber addressed these concerns in its Judgment by holding that: (1) the charged crime must be the natural result of the original plan; (2) a JCE member acted in furtherance of the plan in using a third party perpetrator; and most importantly, (3) that the crime(s) of such perpetrator be directly imputable to at least one member of the JCE. Once

Appeals Chamber however, disagreed, taking "the view that [JCE] as it stands provides sufficient safeguards against overreaching or lapsing into guilt by association."[242] As Judge Van Den Wyngaert notes in her Declaration Separate from the Judgment on Appeal:

> [t]he link between the accused and the criminal conduct of the principal perpetrator does not follow from the perpetrator's membership of the JCE but from the actual contribution of the accused to the JCE, which must be *significant*.[243]

Judge Van Den Wyngaert goes on to state that, apart from the significant act in furtherance requirement, liability is better limited by the scope of the original agreement rather than by the identity of the physical perpetrators.[244] While Van Den Wyngaert believes the existing checks on JCE liability are sufficient, she also warns that limiting liability to acts committed by members of the JCE would insulate top officials from liability as long as one intermediary is involved in implementation.[245]

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these elements are established the author of the *actus reus* of the charged crime becomes inconsequential. For example, there appears to be no logical reason to differentiate between a JCE member who kills members of a group being forced from their homes and a JCE member who orders his subordinates to kill the same victims. In fact, if anything, the use of others as "tools" to effectuate one's criminal plan suggests a higher level of culpability.

[242] *Brdjanin*, Case No. IT-99-36-A, ¶ 426.

[243] *Id.* Declaration of Judge Van Den Wyngaert, ¶ 4 (emphasis in original).

[244] *Id.* ("The key issue indeed remains that of ascertaining whether the crime in question forms part of the common criminal purpose, which is a mater of evidence.).

[245] *See id.* Van Den Wyngaert provides the following example to illustrate the fundamental flaw of requiring physical perpetration by a JCE member at ¶ 2:

> A1 (a military commander), A2 (a police commander), and A3 (a civilian leader) enter into a JCE aiming at the ethnic cleansing of a particular area. B1, B2, and B3, subordinates of (respectively) A1, A2, and A3 are called upon to implement the plan. C1, C2, and C3 are the principal perpetrators who execute the plan (deportation, forced transfer, deprivations of liberty, killings, destruction of property, etc.). If the Trial Chamber's reasoning would be followed, then C1, C2, and C3 should be formal members of the JCE. In addition A1, A2, and A3 would have to enter into individual agreements with C1, C2, and C3 in order to incur criminal responsibility under the JCE doctrine. This is something that would never happen in practice. Why would A1, A2, and A3 have the need to do so if they can act through their direct subordinates (B1, B2, and B3)? If this reasoning were to be followed, higher-up military and political leaders could never be held responsible for crimes under joint criminal enterprise as long as there were middlemen (B1, B2, and B3) between the A-level and the C-level.

iv. The Partial Dissent of Judge Shahabuddeen

The sole partial dissent in *Brdjanin* was written by Judge Shahabuddeen, who favors adhering to the Trial Chamber's interpretation of JCE requiring that the physical perpetrator be part of the JCE.[246] Judge Shahabuddeen reasons his dissent in terms of intentionality, arguing that JCE liability is only legitimate because all JCE members "accept responsibility for certain crimes committed by fellow members of the JCE" when the original agreement is formed.[247] Judge Shahabuddeen likens the original agreement forming a JCE to a contract between a group of individuals who agree to a certain course of conduct.[248] Shahabuddeen also disagrees with the majority's characterization of the *Justice* and *RuSHA* cases, opining that these two instances were "ordinary case[s] of one person inducing another to commit a crime" because the physical perpetrators were merely the "factual machinery through which the accused exerted their intention that the impugned acts would be perpetrated."[249] The partial dissent, however, does provide a corollary mechanism to impute liability for acts committed by those outside the initial agreement, whereby physical perpetrators may join the JCE by following the directions of an existing JCE member while "aware of the general intendment" of the underlying JCE.[250]

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[246] *Brdjanin*, Case No. IT-99-36-A**,** Partly Dissenting Opinion of J. Shahabuddeen, ¶ 2 ("My opinion, which has not prospered with the majority, agrees with the opposite submission of the prosecution at trial: the physical perpetrator has to be a member of the JCE.").
[247] *Id.* ¶ 3.
[248] *Id.* ¶ 5.
[249] *Id.* ¶ 16.
[250] *Id.* ¶ 7-9. While the thrust of Judge Shahabuddeen's argument aims at limiting the potential scope of JCE liability, his apparent approval of inferring a physical perpetrator's membership in the JCE when following directives with knowledge of the nature of the JCE has the potential to expand JCE liability well beyond its current boundaries, down to low-level functionaries. Judge Van Den Wyngaert addresses this issue in her Declaration, stating that "[i]f liability for membership is based on mere acquiescence to the JCE, this would lead to a situation in which not only the mastermind of a JCE, but also his driver and his interpreter could be held responsible for all of the crimes committed in furtherance of the JCE, if they commit at least one crime themselves." *Brdjanin*, Case No. IT-99-36-A, Declaration of Judge Van Den Wyngaert, ¶ 6.

v. Separate Opinion of Judge Meron

Judge Meron also provided additional commentary on the nature of JCE liability where the physical perpetrator is not a member of the JCE. In a Separate Opinion, Meron argues that, when a member of a JCE uses a non-JCE physical perpetrator as a tool to commit acts in furtherance of the JCE, the liability that such member would personally incur vis-à-vis his relationship with the physical perpetrator should be imputed to all members of the JCE.[251] Thus, for example, when a member of the JCE orders a subordinate non-JCE member to commit an act in furtherance of the JCE, each member should be convicted of "ordering," rather than "committing" the crime(s) of the physical perpetrator.[252]

vi. Critique of *Brdjanin*: WWII Jurisprudential Interpretation

The Appeals Chamber in *Brdjanin* found that both the *Justice* case and the *RuSHA* case[253] supported the Prosecution's assertion that the post-WWII jurisprudence:

> (1) recognizes the imposition of liability upon an accused for his participation in a common criminal purpose, where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose; and (2) does not require proof that there was an understanding or an agreement to commit that particular crime between the accused and the principal perpetrator of the crime."[254]

The Chamber noted that none of the accused in case perpetrated the *actus reus* of the physical crimes with which they were convicted.[255] Rather, the physical perpetrators were the

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[251] *Brdjanin*, Case No. IT-99-36-A, Separate Opinion of Judge Meron, ¶ 6.
[252] *Id.*
[253] *U.S.A. v. Ulrich Greifelt, et al.* (Case 8) "RuSHA" [Race and Settlement Main Office of the SS] Trial of War Criminals Before the Nuremberg Military Tribunals, Vol. IV. 599-601. The accused were "leading" officials in the SS Race and Resettlement Main Office or of three other agencies within the Supreme High Command of the SS. In its judgment, the Tribunal declared that the agencies existed for the "primary purpose [of] effecting the ideology and program of Hitler," to be accomplished through "[t] he two-fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations." RuSHA Case, Judgment, Vol. V.
[254] *Brdjanin*, Case No. IT-99-36-A, ¶ 394.
[255] *Id.* ¶¶ 398, 403.

executioners in the *Justice* case and the medical examiners in the *RuSHA* case.[256] In spite of this fact, the NMT did not address the mental state of the physical perpetrators with regards to their awareness of the broader common plan their conduct was furthering, or the specifics of the relationship between them and the accused.[257]

However, *Brdjanin's* reliance on *RuSHA* is questionable because the *RuSHA* judgement does not clearly specify the extent to which the NMT relied on common plan liability in convicting the accused, particularly Hofmann and Hildebrandt,[258] for their roles in furthering the execution of the 'Germanisation' plan.[259] For example, in response to the argument by the defense that many of the activities charged did not fall within the accused's scope of authority but were committed by other persons or organizations, the NMT declined to hold the accused accountable where "certain assertions of this nature were creditable."[260] This suggests that the NMT did not impute criminal responsibility in these instances even though the charged criminal acts may have been committed by fellow participants in pursuit of the aforementioned common purpose.[261]

Furthermore, the Appeals Chamber in *Brdjanin* bases its common plan analysis on the fact that the NMT failed to discuss "whether an agreement existed between Hoffman, Hildebrandt, and any of the examiners" in addressing their criminal responsibility for RuSHA's

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[256] *Id.*
[257] *Id.* ¶¶ 398, 400-401.
[258] Otto Hofmann (Chief of RuSHA from 1940-1943) and Richard Hildebrandt (higher SS and Police Leader at Danzig-West Prussia from 1939-Feb. 1943, Chief of RuSHA April 1943 – end of war) were two of the fourteen accused.
[259] This plan involved "a systematic Program of genocide, aimed at the destruction of foreign nationals and ethnic groups … in part by elimination and suppression of national characteristics… and by the extermination of 'undesirable' racial elements." The alleged principal means used to carry out this program included kidnappings; forced abortions; forced deportation for purposes of extermination; execution, imprisonment in concentration camps, or Germanizing Eastern Workers and POWs; preventing marriages and frustrating reproduction of foreign nationals; and participating in the persecution and extermination of Jews. RuSHA Case, Judgment, Vol. V.
[260] RuSHA Case, Judgment, Vol. V, pp. 152-154.
[261] *Id.*

kidnapping and abortion programs.[262] Other language in the *RuSHA* Judgement suggests however, that the criminal responsibility of the accused was more likely the result of ordering the crimes or failing to exercise superior responsibility.[263] For example, the examiners involved in the kidnapping programme "were working directly at different intervals under the control and supervision of Hofmann and Hildebrandt respectively, who had knowledge of their activities."[264] Hofmann and Hildebrandt also "issued directives detailing how [the abortion program] was to be put into effect."[265]

vii. *Brdjanin* and the ECCC

While the attribution of crimes physically committed by non-JCE members has sparked intense debate in legal arenas, its basic foundation is now firmly established. The exigencies of situations in which international crimes are typically committed often create situations where the most culpable parties are also the furthest removed from the physical ramifications of their criminal plan. Furthermore, top officials are still protected by the burdens of proof that become increasingly demanding as the prosecution proceeds up the chain of command.

The ECCC provides a fitting scenario for applying the Appeals Chamber's interpretation in *Brdjanin* because the JCE alleged appears to be vast in scope but small in membership. As a result, each member is likely to be both highly culpable due to their senior leadership position yet simultaneously structurally remote from the physical perpetration of the crimes.

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[262] *Brdjanin*, Case No. IT-99-36-A, ¶¶ 400-401.

[263] In rejecting the contention by the defense that liability cannot attach for those acts that the accused did not physically perpetrate but which the accused directed or ordered, the Tribunal stated:

> [i]t is no defense for a defendant to insist, for instance, that he never evacuated populations when orders exist, signed by him, in which he directed that the evacuation should take place. The defendant might not have actually carried out the physical evacuation in the sense that he did not personally evacuate the population, he nevertheless is responsible for the action, and his participation by instigating the action is more pronounced than that of those who actually performed the deed. *RuSHA* Judgement, at 110.

[264] *Id.* at 106.

[265] *Brdjanin*, Case No. IT-99-36-A, ¶ 401 *citing RuSHA* Judgment, at 110-111.

Furthermore, if the use of third part perpetrators were allowed to insulate senior officials from criminal accountability it would frustrate the very foundation of international criminal law, predicated on individual accountability. This is because in certain circumstances, horrific crimes could be committed, without a single directly responsible person, but rather only a group of accomplices and no principal. This result appears fundamentally unjust and does not accurately reflect the culpability of those who cause atrocities to be committed in the first place.

8. Imputing the Acts of the Physical Perpetrator to a JCE Member

The Appeals Chamber in *Brdjanin* did not discuss in depth the nature of the relationship between the physical perpetrator and one member of the JCE necessary to impute liability throughout the JCE, stating that such a determination involves a "case-by-case" analysis.[266] Although decided before the Appeals Chamber's Judgment in *Brdjanin*, the case of *Prosecutor v. Krajisnik* provides some guidance regarding this fact-intensive inquiry. In *Krajisnik*, the Trial Chamber noted that the nature of a JCE requires that its members "rely on each other's contributions, as well as on acts of persons who are not members of the JCE but who have been procured to commit crimes."[267] The Chamber also addressed the issue of "what kind of evidence . . . would distinguish perpetrators of crimes acting as part of a JCE from persons . . . committing similar crimes."[268] The prosecution's submissions on the issue were adopted by the Trial Chamber, and "essentially identify indicia (from an indefinite range of such indicia) concerning connections or relationships among persons working together in the implementation of a common objective."[269] Thus, the Trial Chamber's Judgment in *Krajisnik* provides guidance to

[266] *Brdjanin*, Case No. IT-99-36-A, ¶ 413.
[267] *Prosecutor v. Krajisnik* Case No. IT-00-39-T Judgment, ¶ 1082 (27 September 2006).
[268] *Id.* ¶ 1081.
[269] *Id.* ¶ 1082. These factors include:

> [1] [w]hether the perpetrator was a member of, or associated with, any organised *(sic)* bodies connected to the JCE; [2] whether the crimes committed were consistent with the pattern of similar crimes by JCE members against similar kinds of victims; [3] whether the perpetrator acted

courts attempting to apply the *Brdjanin* reasoning to determine when acts of a third party physical perpetrator are within the scope of the initial agreement.

9. Specific Intent Crimes and JCE *Mens Rea* Compatibility

i. General Issues: Basic and Systemic JCE

Another contentious issue that has arisen in JCE jurisprudence involves the interplay between the *mens rea* required for specific intent crimes such as persecution and genocide, and the *mens rea* requirements of JCE. The compatibility of *mens rea* requirements of JCE and substantive specific intent crimes differs between the three categories of JCE, complicating the issue. Basic JCE requires the intent of the accused to bring about the crimes envisioned in the original plan and thus meshes easily with the requirements of specific intent crimes if established.[270] Systemic JCE requires that the accused have knowledge of a pervasive system of ill-treatment and take action in support of the system with such knowledge. Due to systemic JCE's "act with knowledge" rather than "intent" *mens rea* standard, systemic JCE becomes somewhat problematic when applied to specific intent crimes.[271] The Appeals Chamber in its Judgment in *Kvocka et al.* held that "participants in a basic or systemic form of joint criminal enterprise must be shown to *share the required intent of the principal perpetrators*" in order to

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> at the same time as members of the JCE, or as persons who were tools or instruments of the JCE; [4] whether the perpetrator's act advanced the objective of the JCE; [5] whether the perpetrator's act was ratified implicitly or explicitly by members of the JCE; [6] whether the perpetrator acted in cooperation or conjunction with members of the JCE at any relevant time; [7] whether any meaningful effort was made to punish the act by any member of the JCE in a position to do so; [8] whether similar acts were punished by JCE members in a position to do so; [9] whether members of the JCE or those who were tools of the JCE continued to affiliate with the perpetrators after the act; [10] finally – and this is a non-exhaustive list – whether the acts were performed in the context of a systematic attack, including one of relatively low intensity over a long period.

Id. ¶ 1081; *quoting* the Prosecution's final trial brief, ¶ 3.

[270] If part of the original common plan involves the commission of a specific intent crime, the accused must have shared the common specific intent of the other JCE members in order to even be a part of the JCE.

[271] However, the law often infers that a person "intends" that natural and foreseeable consequences of her actions.

be considered co-perpetrators rather than mere aidors and abettors.[272] Therefore, according to *Kvocka et al.*, the specific intent of the accused must always be proved for specific intent crime convictions via basic or systemic JCE liability.

ii. Extended JCE Liability and Specific Intent Crimes

Arguments against imputing liability for specific intent crimes have gained the most momentum in the context of extended JCE, which requires only proof of *dolus eventualis*, a standard that does not mesh well with the stringent *dolus specialis* of specific intent crimes.[273] Legal opinion on how to reconcile JCE liability and specific intent crimes has been divided between two general groups. The first group considers JCE solely as an imputation mechanism, which is thus applicable to any crime with no further *mens rea* showing required on the part of the accused. JCE case law has consistently followed this view.[274] The second group, which consists of various commentators, espouses the view that at least in regards to extended JCE, liability should not impute for specific intent crimes.[275]

Courts have consistently held that liability may impute for specific intent crimes through all forms of JCE.[276] However, application of JCE to specific intent crimes has yet to result in a

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[272] *Kvocka et al.*, Case No. IT-98-30/1-A, ¶ 110 (emphasis added). For an example of a conviction for the crime of persecution predicated on a finding of specific intent through the accused's participation in a systemic JCE, *see Krnojelac*, ¶¶ 111-112, (Holding that the accused "was part of the system and thereby intended to further it" based on evidence of his "duties [as warden of a prison camp], the time over which he exercised those duties, his knowledge of the system in place, the crimes committed as part of that system and their discriminatory nature," the Trial Chamber erred in "finding that Krnojelac was guilty as an aider and abettor and not a co-perpetrator of persecution," and entering a conviction as a co-perpetrator of, rather than accomplice to the crime of persecution.).

[273] *E.g.* Cassese, *supra* note 203, at 121-122 (Arguing that extended JCE should be unavailable to impute liability for specific intent crimes because *dolus eventualis* falls short of the requisite *mens rea* of specific intent crimes.).

[274] For an analysis of JCE as a mechanism for attaching liability which is completely unrelated to the nature of the substantive crime charged, *see Prosecutor v. Brdjanin* Case No. IT-99-36-A, Decision on Interlocutory Appeal, (19 March 2004).

[275] *E.g.* Cassese, *supra* note 203, at 121 ("Resorting to [extended JCE] would be intrinsically ill-founded when the crime committed by the 'primary offender' requires a special or specific intent (*dolus specialis*)."); *accord* Danner & Martinez, *supra* note 52, at 151.

[276] *Rwamakuba*, ¶ 30 (Holding that JCE was recognized under international law as a mechanism of imputing liability for genocide "before 1992," after a survey of the Genocide Convention, WWII era jurisprudence, especially the *RuSHA* and *Justice* cases, and modern international jurisprudence.); *Prosecutor v. Karemara et al.*, ¶ 5 (stating that

conviction via extended JCE, thus illustrating the hesitancy of prosecutors to pursue such convictions and of courts to directly address how and when liability attaches. The ICTY Appeals Chamber has stated that JCE is solely a mechanism for imputing liability and is completely divorced from the substantive crime.[277] Therefore, liability for any crime may attach via JCE without an additional showing of the accused's subjective *dolus specialis.*[278] In making this determination, in a Decision on Appeal in *Brdjanin,* the Chamber reinstated charges of genocide imputed to the accused through extended JCE liability, holding that the "Trial Chamber erred by conflating the *mens rea* requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused."[279] The Chamber then states:

> [t]he fact that the third category of [JCE] is distinguishable from other heads of liability is beside the point. Provided that the standard applicable to that head of liability, i.e. 'reasonably foreseeable and natural consequences' is established, criminal liability can attach to an accused for *any* crime that falls outside of an agreed upon [JCE].[280]

The *Brdjanin* Decision clearly holds that the inquiry into whether the elements of JCE liability are met is completely divorced (aside from issues of foreseeability in extended JCE) from the inquiry into the commission of the substantive crime. The *Brdjanin* Decision was cited with approval in a Decision on Appeal of the ICTR in *Rwamakuba,* which rejected a narrow *nullum crimen* defense that liability for genocide through extended JCE was not part of customary international law as of 1992.[281]

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it is "well established that [JCE] can apply to the crime of genocide") *citing Prosecutor v. Semanza,* Case No. ICTR-97-20-T, Judgment (15 May 2003) (subsequent citations omitted).

[277] *Brdjanin,* Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶ 9.

[278] *Id*.

[279] *Id.* ¶10.

[280] *Id.* ¶ 9 (emphasis added).

[281] *Rwamakuba,* ¶¶ 6, 31 (Holding "that customary international law recognized the application of the mode of liability of joint criminal enterprise to the crime of genocide before 1992" and therefore the ICTR has "jurisdiction

iii. Residual Issues

Although case law explicitly recognizes that the *mens rea* requirements of JCE and the charged crime(s) are completely unrelated, there exists a dearth of convictions for specific intent crimes utilizing JCE liability.[282] The ICTY Appeals Chamber reversed a conviction in *Prosecutor v. Krstic* which had inferred the accused's genocidal intent from his role in an underlying JCE.[283] The original JCE's goal was ethnic cleansing, which the Trial Chamber found eventually evolved into a genocide perpetrated against all military age non-Serb males in the area of operation. However, the Chamber was unable to pinpoint when this evolution occurred.[284] In reversing the Trial Chamber, the Appeals Chamber found that "all that the evidence can establish is that Krstic was aware of the intent to commit genocide on the part of

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to try the [accused] on a charge of genocide through the mode of liability of joint criminal enterprise.") *citing Brdjanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶¶ 5-10.

[282] For example, the Trial Chamber acquitted Brdjanin of genocide via JCE liability. *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgment, ¶ 1152 (1 September 2004). Brdjanin was acquitted of genocide via basic JCE because the Trial Chamber found that the JCE which the accused was a member of did not, beyond a reasonable doubt, share common genocidal intent. *Id.* ¶ 984. This first holding turned on the sufficiency of the evidence and merely found that the common plan did not necessarily entail a campaign of genocide against non-Serbs. Furthermore, the Trial Chamber did not reach the question of whether Brdjanin was guilty of genocide via extended JCE because the Chamber erroneously required two further showings: (1) that the physical perpetrators of the acts of genocide had to be members of the JCE; and (2) have a subsequent agreement with the particular accused wherein the accused acquiesces to the commission of the crime in furtherance of the JCE. *Id.* While the Appeals Chamber reversed both of these holdings, the Prosecution did not appeal the Trial Chamber's acquittal of the accused for genocide and the agreement *inter partes* on appeal precluded the Appeals Chamber from addressing the issue of *mens rea* because the agreement disallowed any new convictions based on acts of non-JCE physical perpetrators. *Brdjanin*, Case No. IT-99-36-A, ¶ 449. Additionally, Rwamakuba was eventually acquitted of genocide charges due to insufficient evidence. *Prosecutor v. Rwamakuba*, Case No. 98-44C-I, Summary of the Judgment, at 9 (20 September 2006) (Stating that the Prosecution "failed to prove beyond reasonable doubt the charges against the [a]ccused" and thus "the Chamber need not to discuss the allegations and evidence concerning his criminal intent or disposition in relation to these alleged incidents."). Also, at the ICTY Slobodan Milosevic died before he could go to trial on charges of, *inter alia*, genocide via extended JCE. Before Milosevic's death, however, the Trial Chamber dismissed a challenge to the validity of the extended JCE genocide charge, citing the *Brdjanin* Decision on Interlocutory Appeal, and stating that it is "not necessary for the Prosecution to prove that the Accused possessed the required intent for genocide before a conviction can be entered on [an extended JCE] basis of liability." *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 291 (16 June 2004).

[283] *Prosecutor v. Krstic*, Case No. 98-33-A, Judgment, ¶ 134 (19 April 2004).

[284] *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, ¶ 573 (2 August 2001) (Stating that the Chamber "is unable to determine the precise date on which the decision to kill all the military aged men was taken.").

some members of the [original JCE], and with that knowledge, he did nothing to prevent the use" of the military units and resources under his command "to facilitate those killings."[285]

The Appeals Chamber found that, while some members of the Bosnian Serb Army's Main Staff possessed genocidal intent and Krstic was aware of such intent, "[t]his knowledge on his part alone cannot support an inference of genocidal intent."[286] The Chamber therefore found that the accused did not share the common intent required for basic JCE and was thus simply not a member of the second, genocidal JCE. Unfortunately, the Prosecution did not allege extended JCE liability for genocide in the alternative, leaving the state of the law unclear. However, the Chamber did state that because "genocide is one of the worst crimes known to humankind . . . [c]onvictions for genocide can be entered only where [specific] intent has been unequivocally established."[287]

In sum, international jurisprudence apparently requires that the *dolus specialis* of specific intent crimes must be proved in all JCE cases. It appears, however, that in cases of extended JCE this *mens rea* is required only on the part of the physical perpetrator rather than all those charged with the crime via extended JCE. These JCE member(s) must only be shown to possess the common intent and *dolus eventualis* for liability to attach.[288]

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[285] *Krstic*, Case No. IT-98-33-A, ¶ 134 (emphasis added).
[286] *Id.*
[287] *Id.*
[288] There has been a dearth of case law discussing what *mens rea*, if any, is required on behalf of the physical perpetrator of crimes of specific intent that can be imputed to the members of a JCE. The holdings in the various cases discussed *supra* suggest that the accused must possess the specific intent for basic and extended JCE, while such intent would be required only on the part of the physical perpetrator in cases of extended JCE. This would seem to be an incongruous result, as the liability of the accused would then hinge on the subjective intent of a third party, who may not even be a member of the JCE. As the ICTY Appeals Chamber noted, such perpetrators are usually being used as a "tool" by superiors who are members of the JCE. Therefore it would logically follow that the mind state of such "tools" is irrelevant, just as if they were inanimate objects being used to facilitate the commission of a crime. Although difficult to prove, it would seem more accurate to focus on the *mens rea* of the accused for specific intent crimes while still allowing convictions under extended JCE. Thus, if the requisite *dolus specialis* could be shown on behalf of accused member(s) of a JCE, which is not common to the entire JCE, such member could be prosecuted for the commission of a specific intent crime where the *actus reus* of the crime (such as targeted killing in the case of genocide) was part of (or the foreseeable consequence of) the original JCE.

D. Conclusion

JCE has become a fixture in international criminal jurisprudence. While the doctrine encompasses a relatively large body of law, which has been accused of being unwieldy, it does provide an organized method of representing the culpability of top officials for mass atrocities. While JCE has been accused of being a "magic bullet," the doctrine has numerous safeguards that prevent it from creating mere organizational liability. The doctrine is flexible, but when extended to mid and low-level officials of criminal organizations, becomes increasingly difficult to prove.

When applied to the DK regime, the usefulness of JCE becomes apparent. The doctrine could establish the individual responsibility of the senior officials of the DK regime for the unspeakable crimes committed between 1975 and 1979, while not automatically imputing liability down to mid and low-level cadre leaders who may or may not have been culpable for some or all of these crimes.

IV. *Nullum Crimen Sine Lege* Applied to Common Plan/JCE Liability

A. Existing JCE-Specific *Nullum Crimen* Jurisprudence

The defense of *nullum crimen* has been raised repeatedly before international criminal tribunals.[289] International courts have required that a challenged law satisfy three elements in order to survive a *nullum crimen* challenge. These elements, discussed *supra* in section I, are the: (1) existence; (2) specificity creating foreseeability; and (3) accessibility of the law at the time the accused acted.[290] *Nullum crimen* challenges to the application of JCE have thus turned on when: (1) JCE became part of customary international law; (2) in a form specific enough to make liability for the accused's acts foreseeable; and (3) became sufficiently accessible to the specific accused.[291]

The ICTY addressed the issue of *nullum crimen* specifically related to JCE in an Decision on Appeal in *Prosecutor v. Milutinovic et al*.[292] In *Milutinovic et al.*, the Appeals Chamber held that the use of JCE to impute liability to the accused Odjanic for his participation in a criminal enterprise in 1999 did not violate the principle of *nullum crimen*.[293] In support of its holding, the Chamber found that: (1) that JCE, which is an alternate label for common plan liability, existed as customary international law before 1999; (2) the basic tenets of JCE were specific enough to make criminal liability for the accused's acts foreseeable; and (3) these tenets existed in a form sufficiently accessible to the accused to put him on notice.[294] The Chamber's analysis of these three elements will be examined in turn.

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[289] *E.g., Milutinovic et al* (ICTY).; *Sam Hinga Norman* (Dismissing *nullum crimen* challenge to the criminality of the recruitment of children into the military as of November 1996) (ICTR).
[290] *E.g. Streletz et al.* ¶ 91; *Milutinovic et al.*, ¶ 21.
[291] *See Milutinovic et al.*
[292] *Id.*
[293] *Id.* ¶ 45.
[294] *Id.* ¶¶ 36, 43-45.

1. Existence of JCE at the Relevant Time

The Appeals Chamber in *Milutinovic et al.* did not go into depth in its analysis of whether JCE existed as a mode of liability under international law as of 1999. This is because the Judgment on Appeal in *Tadic* firmly established that JCE existed under customary international law as of at least 1992.[295] In *Stakic*, the Appeals Chamber addressed a narrower *nullum crimen* challenge to the use of the *dolus eventualis mens rea* standard under extended JCE.[296] The Chamber summarily dismissed the challenge, stating that "[a]s [JCE] does not violate the principle of legality, its individual components parts do not violate the principle either," holding that "in the instant case, the use of *dolus eventualis* within the context of the third category of [JCE] does not violate the principles of *nullum crimen*."[297] Furthermore, in *Milutinovic et al.*, the Appeals Chamber also stated that JCE and common plan liability are two different names for same doctrine, suggesting that JCE existed well before 1992.[298] Thus, according to modern jurisprudence, JCE is merely a clarification of common plan liability, which dates back to post-WWII jurisprudence.

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[295] *Tadic*, Case No. IT-94-1-A, ¶¶ 227-228 (Summarizing the elements of common plan/JCE, modes of liability that are available under the jurisdiction of the ICTY, which begins in 1992.); *accord Milutinovic et al.*, ¶ 30 ("In sum, the Defense has failed to show that there are cogent reasons in the interest of justice for the Appeals Chamber to depart from its finding in the *Tadic* case, that [JCE] was both provided for in the Statute [of the ICTY] and that it existed under customary international law was in any way unreasonable at the relevant time.").

[296] *Stakic*.

[297] *Id.* ¶¶ 101, 103.

[298] *Milutinovic et al.*, ¶ 36; *accord Stakic*. Furthermore, the ICTY Appeals Chamber has stated that the:

> "concept" of JCE has been "labeled . . . variously, and apparently interchangeably as a common criminal plan, a common criminal purpose, a common design or purpose, a common criminal design, a common purpose, a common design, and a common concerted design. The common purpose is also described, more generally, as being part of a criminal enterprise, a criminal enterprise, and a joint criminal enterprise." *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, ¶ 24 (26 June 2001) (internal citations omitted).

2. Specificity Creating Foreseeability and Accessibility

The same evidence is typically used to prove the requisite specificity and accessibility of a challenged legal provision under *nullum crimen*. This is because the only requirement that accessibility adds beyond specificity is that the legal documents embodying the specifics of the relevant law are accessible to the particular accused. The Chamber in *Milutinovic et al.* found: (1) parallel modes of liability in domestic law; (2) state practice and other sources of international law; and (3) the inherent culpability of the acts of the accused, all probative of whether the elements of specificity and accessibility were met.[299] Each factor will be addressed in turn.

i. Parallels Modes of Liability in Domestic Law

The Appeals Chamber in *Milutinovic et al.* stated that domestic legal parallels to JCE, although not necessarily conclusive of foreseeability or accessibility, are highly probative.[300] For example, the Chamber found that "many domestic jurisdictions . . . provide for" forms of "liability under various names" sufficiently similar to JCE that such forms "run parallel to custom."[301] Of particular importance is whether the domestic jurisdiction of the accused provides for liability similar to JCE.[302] In *Milutinovic et al.* the Chamber found that Article 26 of the Criminal Code of the Federal Republic of Yugoslavia ("Criminal Code") "in force at th[e relevant] time did provide for criminal liability for the foreseeable acts of others in terms strikingly similar to those used to define [JCE]."[303] This segment of the Criminal Code and

[299] *Milutinovic et al.*, ¶ 43.
[300] *Id.* ¶ 41 ("Although domestic law (in particular the law of the country of the accused) may provide some notice to the effect that a given act is regarded as criminal under international law, it may not necessarily provide sufficient notice of that fact.").
[301] *Id.* ¶ 43.
[302] *Id.* ¶ 40 (Stating that the Tribunal may "have recourse to domestic law for the purpose of establishing that\ the accused could reasonably have known that the offence in question or that offence committed in the way charged in the indictment was prohibited and punishable.).
[303] *Id.* ¶ 40. The portion of the Code quoted by the Chamber states:

similar provisions in the penal law of other states provided notice to the accused that he could be held liable under JCE for his specific acts in a form undeniably accessible to him.[304]

ii. State Practice and Other Sources of International Law

As the Appeals Chamber recognized in *Milutinovic et al.*, "rules of customary law may provide sufficient guidance as to [] standard[s,] the violation of which could entail criminal liability."[305] Thus, if there is sufficient evidence of a rule of customary international criminal law available to the accused, there need not be any parallel domestic legislation. For example, in *Milutinovic et al.*, the Appeals Chamber found that at the relevant time there existed "a long and consistent stream of judicial decisions, international instruments and domestic legislation" cited in *Tadic*, which put the accused on notice of the existence of JCE as a mode of liability and allowed him the opportunity to "regulate his conduct accordingly" in order to avoid criminal responsibility.[306]

iii. The Inherent Culpability of the Acts of the Accused

Due to the "lack of any written norms or standards," International Criminal Tribunals "often rel[y] upon the atrocious nature of the crimes charged to conclude that the perpetrator of such an act must have known that he was committing a crime."[307] As stated in *Milutinovic et al.*:

> Anybody creating or making use of an organisation *(sic)*, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of these acts." (internal citations omitted).

[304] *Id.* ¶ 41 (This notice is not necessarily sufficient on its own terms, as the Chamber noted, stating that "[a]lthough domestic law (in particular the law of the accused) may provide some notice to the effect that a given act is regarded as criminal under international law, it may not necessarily provide sufficient notice of that fact.").
[305] *Id. citing X, Y and Z v. the United Kingdom*, App. No. 8710/79, Eur. Ct. H.R., Decisions and Records, pp. 77, 80-81 (22 April 1997).
[306] *Id. citing Tadic*, Case No. IT-94-1-A, ¶¶ 195 *et seq.*
[307] *Id.* ¶ 42.

> the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation [*sic*] under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence [*sic*] that it did not know of the criminal nature of the acts.[308]

While JCE is simply a mode of liability for imputing separate, substantive crimes, the Appeals Chamber in *Tadic* noted that liability via participation in a JCE does nothing to lessen or even modify the moral culpability of the accused.[309] Therefore, although JCE is not an offense in itself, actively participating in a criminal enterprise associated with the commission of international crimes is often inherently culpable enough to put an accused on notice of the illegality of his actions at the relevant time.[310]

B. *Nullum Crimen* and Common Plan/JCE Liability: ECCC Jurisdiction (1975-79)

It is very likely the defense of *nullum crimen* will be raised by some of the accused before the ECCC due to the Court's unique temporal jurisdiction covering crimes committed between 1975 and 1979.[311] This temporal jurisdiction covers a period of time well before that of any other modern international criminal court. Therefore, one area of applicability where *nullum crimen* will present a serious challenge to the jurisdiction of the ECCC is in regards to the availability and form of common plan/JCE liability.

1. Existence of Common Plan/JCE Liability

[308] *Id.*
[309] *Tadic*, Case No. IT-94-1-A, ¶ 191 (Stating that "the moral gravity of [JCE] participants is often no less – or indeed no different – from that of those actually carrying out the acts in question.").
[310] The Appeals Chamber took this tact in *Milutinovic et al*., discussing the substantive crimes the accused was charged of as evidence that the accused must have known that he was committing a crime when he acted. *Milutinovic et al.*, ¶¶ 42-43 (Noting that the "egregious nature of the crimes charged" would, combined with other factors, "provided notice to anyone that the acts committed by the accused" were illegal in 1999, when they were committed.).
[311] ECCC Law, *supra* note 3, art. 4.

While JCE as a mode of liability under international law is now well-established,[312] there exists no modern jurisprudence stating when modern JCE achieved this status. Thus, the Chambers of the ECCC will have to determine, as a threshold matter, what form of common plan/JCE liability existed in customary international law as of 1975. This determination will turn largely on the Court's view of how closely the *Tadic* formulation of JCE mirrors post-WWII jurisprudence.

If the ECCC accepts the central holdings of the *Tadic* line of JCE jurisprudence and its interpretation of post-WWII jurisprudence, it logically follows for the ECCC to hold that JCE existed in a form substantially similar to its modern incarnation. This is due to the fact that virtually all of the legal precedent cited by the Appeals Chamber in *Tadic* existed well before 1975.[313] The only evidence cited in *Tadic* that was promulgated after the temporal jurisdiction of the ECCC are two multilateral treaties and a small percentage of the domestic parallel modes of liability, all of which were analyzed as subsidiary evidence of general state practice and *opinio juris*.[314]

The ICTY Appeals Chamber has also explicitly stated that JCE and common plan liability are one and the same, lending further support to the argument that JCE crystallized in international law sometime during or shortly after the immediate post-WWII era.[315] Therefore, if the ECCC holds that JCE existed in some form significantly distinct from its modern version,

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[312] *See, e.g., Stakic* ¶ 62; *quoting Tadic*, Case No. IT-94-1-A, ¶ 220 (Noting that "[JCE] is a mode of liability which is 'firmly established in customary international law'".).
[313] *Tadic*, Case No. IT-94-1-A, ¶¶ 172 *et seq.*
[314] *Id.* ¶¶ 224-225 (Citing domestic penal codes with modes of liability similar to JCE, while noting that "[i]t should be emphasised *(sic)* that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems."). Furthermore, as noted *supra* at page 5, sources of law promulgated after the relevant time may be still be probative as codifications or restatements of previously existing custom.
[315] *Milutinovic et al.*, ¶ 36.

it will be implicitly disagreeing with the ICTY, ICTR and SCSL's reading of the post-WWII jurisprudence.[316]

[316] It is worthy of note that, according to the Statement of the Co-Prosecutor's of 18 July 2007, the Prosecution has framed its allegations against the initial five charged persons as attaching via their participation in a "common plan" rather than JCE. Statement of Co-Prosecutors, *supra* note 179, at 3. The terminology used by the Prosecution thus tracks more closely with the post-WWII jurisprudence than modern JCE, as modern Tribunals have preferred the use of the term JCE. *See, e.g., Brdjanin and Talic*, ¶ 24. However, these same Tribunals have held that the various labels affixed to the concepts of common plan/JCE liability all reference the same body of law. *E.g. id.*

2. Specificity Creating Foreseeability and Accessibility (ECCC)

Should the ECCC hold that common plan/JCE liability existed in some form in customary international law in 1975, it will also have to determine whether each accused had sufficient notice of this form of liability at the relevant time.

i. The 1956 Cambodian Penal Code & Other Domestic Jurisdictions

Many domestic criminal codes provided indirect support for JCE as a legal concept by 1975.[317] Furthermore, in addition to crimes under international law applicable to Cambodia in 1975, the ECCC has jurisdiction over crimes under the 1956 Cambodian Penal Code ("Code").[318] The Code is based on French criminal law and has several articles that discuss the general requirements of group liability for criminal conduct. There are three terms used in the Code in the articles discussing group liability. These terms are: (1) co-action; (2) complicity; and (3) co-authorship.[319] The Code is rather opaque however, regarding how to differentiate between these interrelated concepts.[320]

a. General Liability and Article 82 - Co-Action and Complicity

Chapter Two of the Code describes the general characteristics of persons punishable for crimes.[321] Article 82 divides criminal violations involving more than one perpetrator into two

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[317] For an overview of domestic legislation generally supporting the concepts imbedded in JCE, *see Tadic*, Case No. IT-94-1-A, ¶ 224.
[318] ECCC Law, *supra* note 3 arts. 2-3.
[319] CODE PÉNAL ET LOIS PÉNALES, Royaume Du Cambodge, Ministère de la Justice, Livre II, arts. 82 ("la participation direct constitue la coaction [co-action], la participation indirecte constitue la complicité [complicity]"), 145 (stating that there exists a "pluralité d'auteurs [plurality of authors]" whenever it is established that two or more persons "se concertèrent [confer]" in order to commit an infraction) (1956) (Translated from the French and Khmer with assistance of the Documentation Center of Cambodia. All transliteration based on the French text.). [hereinafter "1956 Code"].
[320] This is likely due to the fact that liability for co-action, complicity and co-authorship are punishable by the same sentence as the principal offender. The only possible differentiation in punishment between the three concepts appears in article 139(3), which lists criminal acts committed "in unison" as an aggravating factor. Article 139(3) however, is ultimately unhelpful, as from the face of the text it is unclear whether the word "unison" applies to complicity, co-action and co-authorship or some combination thereof. *Id.*
[321] *Id.* art. 76. The article states that any competent person is liable for his or her criminal actions unless there exists: (1) an exception in the law; (2) a legal justification; (3) a legal excuse; or (4) the statute of limitations has expired.

categories: "co-action" and "complicity."[322] To qualify as a co-actor, an accused must voluntarily and directly participate in the commission of a crime.[323] Conversely, voluntary but indirect participation in the commission of a crime creates complicity rather than co-action.[324]

b. Article 145 - Co-Authorship

The Code provides a definition of criminal "co-authorship" in article 145, which states that there exists a "plurality of authors" when it is established that two or more persons "confer or consult" ("se concertèrent") with one another regarding the commission of a crime.[325] When the actions of a second person amount only to aid or assistance, such person is considered an accomplice rather than a co-author.[326]

c. Article 82 - Complicity

The Code provides a more detailed definition of complicity liability, helping to clarify the differences between the three concepts and thus tells us what actions are not sufficient to amount to co-action. For complicity liability to attach, the acts of the accused must consist of either: (1) provocation[327]; (2) instruction[328]; (3) provision of means[329]; or (4) aiding or assisting[330] the principal to commit the substantive crime.

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[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.* art. 145. The original text in French uses the term "se concerter" which translates as the verbs "confer" and "consult." Furthermore, "concerter" also translates into the verbs "plan" and "devise." When read in context this term appears to be somewhat akin to the concept of conspiracy.
[326] *Id.* However, article 87, as discussed *infra*, states that aid or assistance liability changes from "complicity" to "co-action" when the principal perpetrator makes use of the aid or assistance furnished by the accused in the commission of the substantive crime. The only readily apparent way to reconcile articles 145 and 87 is to conclude that aid or assistance never amounts to co-authorship, but generally is characterized as complicity. Nevertheless it amounts to co-action once the principal perpetrator makes use the furnished aid or assistance. Therefore, the Code is somewhat vague in its delineation between what acts by the accused amount to co-authorship, co-action or complicity. If a hierarchical relationship must be drawn out of the Code however, the interaction between articles 145 and 87 logically suggests that co-authorship is the most difficult to establish (and hence most culpable) mode of liability, followed by co-action, with complicity as the least demanding (and hence least culpable) of the modes of liability.
[327] *Id.* art. 84. "Provocation" consists of suggestions, orders, or advice from a person who is either in a position of authority over the principal author or induces him to act by use of gifts, promises or threats. These acts should also be specifically designed to induce the principal author to act criminally.

d. The 1956 Penal Code and Joint Criminal Enterprise

The Penal Code appears to generally support the basic concepts underlying JCE. Unfortunately, the vagueness of many provisions of the Code and lack of case law interpreting its provisions mean that the exact degree of similarity between the two bodies of law remains unclear. The Code provides for co-authorship via criminal consultation and co-action via voluntary and direct assistance, but provides little clarity as to when liability amounts to "co-commission" rather than "complicity."

ii. International Jurisprudence

In addition to domestic law, the post-WWII jurisprudence also served the accused persons with some general notice that collective criminality triggers individual accountability.[331] Furthermore, as discussed *supra* at pages 9-35, there exists a myriad of sources of international law that now generally provide for such liability.

iv. The Inherent Culpability of the Acts of the Accused

Finally, the serious nature of the crimes within the ECCC's jurisdiction will likely preclude any *nullum crimen* defense predicated on ignorance of the law. According to the Chambers of the ECCC, the crimes that were committed in Cambodia from 1975 to 1979 are "of a gravity such that, 30 years after their commission, they still profoundly disrupt public

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[328] *Id.* art. 85. "Instruction," consists of the accused providing information to the principal perpetrator "with a view to" bring about the commission of the substantive crime. It is unclear whether this view or intent is specific to the charged crime or whether it is a more general desire to bring about criminal action.
[329] *Id.* art. 86. The article creates complicity liability for anyone who provides the principal with the means to commit the substantive crime. The article requires that the means provided be material to the ultimate commission of the crime and be provided by the accused with the ultimate commission of the crime in mind
[330] *Id*. art. 87. "criminal aid or assistance" can create either co-action or complicity. Criminal aid or assistance takes place when an accused helps to prepare or generally facilitate criminal action. This aid or assistance evolves from complicity to co-action when the principal author makes use of such aid or assistance in committing the substantive crime.
[331] For an overview of the post-WWII jurisprudence relied upon by *Tadic*, *see supra* pp. 9-35. It is also noteworthy that Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith all enjoyed greater access to education and travel than the general Cambodian population leading up to 1975 and throughout the DK period. In fact, many high level party officials including Pol Pot, Ieng Sary, and Khieu Samphan pursued advanced degrees in France prior to 1975.

order."[332] Furthermore, according to the Statement of the Co-Prosecutors, the initial accused participated in a criminal plan "constituting a systematic and unlawful denial of basic rights of the Cambodian population and the targeted persecution of specific groups" resulting in the commission of "murder, torture, forcible transfer, unlawful detention, forced labor and religious, political and ethnic persecution" that, when viewed together "constitute crimes against humanity, genocide, grave breaches of the Geneva Conventions, homicide, torture and religious persecution."[333] If the Statement of the Co-Prosecutors accurately depicts the nature of the charges against the accused, the inherent illegality of the charged acts may preclude any claim of ignorance of the law under the principle of *nullum crimen*.

C. Conclusion

There is no definitive answer as to what form of collective liability existed in international law as of 1975. It is ultimately up to the ECCC judiciary to decide how closely modern JCE jurisprudence tracks the body of common plan liability law that emerged from Nuremberg and its progeny. While it would be a sharp departure from well-established law for the ECCC to reject common plan/JCE liability wholesale, the Court may modify or refine the doctrine to some degree premised on the argument that common plan liability evolved into JCE sometime after 1979. However, given the dearth of relevant case law between the *Eichmann* decision and the judgement by the Appeals Chamber in *Tadic*, holding as such entails making a fairly arbitrary decision.

Any reasonable form of common plan/JCE liability the ECCC adopts is likely to survive a *nullum crimen* challenge. This is because the post-WWII case law, various modes of group liability in national systems, the 1956 Cambodian Penal Code, and the egregious nature of the

[332] *See, e.g.,* Provisional Detention Order of Ieng Thirith, Office of the Co-Investigating Judges in the Extraordinary Chambers in the Courts of Cambodia, Criminal Case File No. 002/14-08-2006, ¶ 6 (14 November 2007).
[333] Statement of the Co-Prosecutors, *supra* note 179, at 3.

common plan in which the accused are charged with participating render it difficult to believe that the accused believed their actions were legal at the relevant time. At its essence, the defense of *nullum crimen* is designed to protect those acting with good-faith "ignorance of the law." Stripping the prosecution of any mode of common plan/JCE liability would implicitly state that the accused could have reasonably thought that participating in the *formulation* and *implementation* of a plan to radically alter Cambodian society by committing egregious crimes against their own population was not criminal in 1975. Respect for the substantive justice foundation upon which the defense of *nullum crimen* is built would command that such a conclusion be rejected.