

**JOINT CRIMINAL ENTERPRISE AND THE JURISDICTION OF  
THE EXTRAORDINARY CHAMBERS IN THE COURTS OF  
CAMBODIA**

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## INTRODUCTION

The Extraordinary Chambers in the Courts of Cambodia (“ECCC”) offer a fractured nation the hope that at least some of the former Khmer Rouge leaders responsible for the horrific crimes committed in Cambodia during the period of Democratic Kampuchea (“DK”) from 1975-1979,<sup>1</sup> will be brought to justice. The ECCC’s personal jurisdiction is limited to “senior leaders” and those “most responsible” who “planned, instigated, ordered, aided and abetted, or committed” crimes in Cambodia between April 17, 1975 and January

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1. See KHAMBOLY DY, A HISTORY OF DEMOCRATIC KAMPUCHEA (1975-1979) (Documentation Center of Cambodia 2007), for an overview of the mass atrocities committed during the DK period.

6, 1979.<sup>2</sup> The Court issued its first judgment (Case 001) on July 26, 2010, convicting former Khmer Rouge prison chief Kaing Guek Eav (known by his revolutionary alias, Duch) of various war crimes and crimes against humanity and sentencing him to thirty-five years of imprisonment.<sup>3</sup> While the Duch judgment is a landmark event for Cambodia, it is Case 002 at the ECCC, featuring the four most senior former Khmer Rouge officials still alive (Nuon Chea, Khieu Samphan, Ieng Sary, and Ieng Thirith), that will determine the overall success or failure of the Court as a transitional justice mechanism in Cambodia.<sup>4</sup> Case 002 is expected to reach the trial phase in early 2011 and the ECCC is under intense pressure to expedite the process because of the advanced age of all four of the accused.<sup>5</sup>

Due to the leadership positions held by the accused in Case 002, one key challenge for the prosecution will be imputing liability up the chain of command for crimes committed throughout Cambodia during the DK period. Establishing liability that accurately reflects individual culpability is a recurrent difficulty in international criminal law, as leaders of repressive regimes are often the most culpable parties when mass atrocities are committed, yet frequently remain far-removed from the physical commission of the crime(s) they bring about.<sup>6</sup> The most recent tool employed by prosecuting authorities to impute liability directly to high-level officials has been the doctrine of Joint Criminal Enterprise (“JCE”), which holds all individuals who knowingly and significantly participate in group

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2. Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments (NS/RKM/1004/006), arts. 2, 29 (October 27, 2004) [hereinafter ECCC Law], available at [http://www.eccc.gov.kh/english/Cabinet/law/4/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/Cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

3. KAING Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 567, 568, 631 (July 26, 2010) (sentencing Duch to serve nineteen years in prison as he received credit for time spent in detention prior to trial and for his illegal detention by the Cambodian government without being charged, prior to the creation of the ECCC).

4. See JAYA RAMJI-NOGALES & ANNE HEINDEL, GENOCIDE: WHO ARE THE SENIOR KHMER ROUGE LEADERS TO BE JUDGED? THE IMPORTANCE OF CASE 002, 2-19 (Documentation Center of Cambodia 2010) (detailing the importance of Case 002 and the roles of the four accused during the DK period).

5. See, e.g., Peter Maguire, Op-ed, *Cambodia's Troubled Tribunal*, N.Y. TIMES (July 28, 2010), <http://www.nytimes.com/2010/07/29/opinion/29iht-edmaguire.html>.

6. See David Scheffer & Anthony Dinh, *The Pre-Trial Chamber's Significant Decision on Joint Criminal Enterprise For Individual Responsibility*, CAMBODIA TRIBUNAL MONITOR, June 3, 2010, at 1, available at <http://www.cambodiatribunal.org/images/CTM/ctm%20scheffer%20dinh%20jce%20commentary%203%20june%202010.pdf> (stating that the doctrine of joint criminal enterprise “recognizes that those contributing to the crime but not pulling the trigger may be equally culpable or more culpable than the physical perpetrator”).

criminal behavior liable for “committing” crimes within the scope of a shared criminal objective.<sup>7</sup> JCE liability is not without controversy, however,<sup>8</sup> as it is highly complex and may attach guilt for numerous crimes to seemingly insignificant low-level functionaries if misapplied or misunderstood.

Even in the pre-trial phase, JCE has figured prominently in Case 002 and been the source of considerable controversy. In December 2009, the Co-Investigating Judges issued an order dismissing a preliminary challenge to the applicability of JCE liability at the ECCC and indicated they would include JCE in their investigation of the charged persons in Case 002.<sup>9</sup> The defense teams of charged persons Ieng Sary, Ieng Thirith and Khieu Samphan appealed this order by raising, *inter alia*, the jurisdiction-stripping defense of *nullum crimen sine lege* (“no crime without law”), claiming that JCE liability was not a part of customary law or alternatively, that the doctrine was not sufficiently foreseeable and accessible to themselves from 1975 to 1979.<sup>10</sup> The Co-Prosecutors responded by asserting that JCE is merely a reformulation of a general mode of common plan liability that existed at least as early as the post-World War II (“WWII”) tribunal jurisprudence.<sup>11</sup> The Pre-Trial Chamber

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7. See Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 185-229 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (reviewing cases where the court found a defendant guilty for a crime committed by another, because the defendant significantly contributed to the killing).

8. See, e.g., Harmen van der Wilt, *Guilty by Association: Joint Criminal Enterprise on Trial*, 5 J. INT'L CRIM. JUST. 91 (2007).

9. Case of IENG Sary, IENG Thirith, NUON Chea, KAING Guek Eav, and KHIEU Samphan (Case 002), Case File No. 002/19-09-2007-ECCC-OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, ¶ 23 (Dec. 8, 2009) [hereinafter *CIJ JCE Order*] (finding JCE liability in its modern form “applicable to the international crimes under the jurisdiction of the ECCC”).

10. See, e.g., Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ(PTC35), Ieng Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, ¶¶ 26, 80 (Jan. 22, 2010); see also Case of IENG Thirith, Case No. 002/19-09-2007-ECCC-OCIJ(PTC38), Ieng Thirith Defence Appeal Against 'Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise' of 8 December 2009, ¶ 60 (Jan. 18, 2010); Case of KHIEU Samphan, Case No. 002/19-09-2007-ECCC-OCIJ (CP/39), Reply of Mr. Khieu Samphan's Defence to the Co-Prosecutors' Joint Response on Joint Criminal Enterprise, ¶ 15 (Apr. 2, 2010); MICHAEL G. KARNAVAS, JOINT CRIMINAL ENTERPRISE AT THE ECCC: A CRITICAL ANALYSIS OF TWO DIVERGENT COMMENTARIES ON THE PRE-TRIAL CHAMBER'S DECISION AGAINST THE APPLICATION OF JCE (Documentation Center of Cambodia 2010), available at [http://www.dccam.org/Tribunal/Analysis/pdf/JCE\\_at\\_the\\_ECCC.pdf](http://www.dccam.org/Tribunal/Analysis/pdf/JCE_at_the_ECCC.pdf). Mr. Karnavas is Ieng Sary's international defense co-lawyer at the ECCC and as such his critiques should be considered in light of his duties to his client.

11. Case of IENG Sary, IENG Thirith, and KHIEU Samphan, Case No. 002/19-09-2007-ECCC/OCIJ(PTC 35, 38, & 39), Co-Prosecutors' Joint Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise, ¶¶ 33, 35



(“PTC”), in a sixty-nine page decision (“PTC JCE Decision”), held that the ECCC generally has jurisdiction over JCE liability, but rejected so-called “extended” JCE (also known as JCE III), significantly narrowing the doctrine from its current formulation under international law.<sup>12</sup> The PTC JCE Decision sharply departed from the findings of the Co-Investigating Judges regarding extended JCE, adding juridical fodder to the ongoing debate over the proper limits of JCE liability under international law amongst practitioners, commentators, and judges.<sup>13</sup> It is unclear however, what affect the PTC JCE Decision will ultimately have on JCE jurisprudence at the ECCC, as despite the fact that there is no appeal from decisions of the PTC, such decisions are not binding on the Trial or Supreme Court Chambers.<sup>14</sup> Furthermore, aspects of the PTC JCE Decision are sure to be challenged by both the prosecution and defense teams at the ECCC moving forward into Case 002, as the Decision did not fully accept the submissions of either side.<sup>15</sup>

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(Feb. 19, 2010).

12. Case of IENG Thirith, IENG Sary, and KHIEU Samphan, Case No. 002/19-09-2007-ECCC/OCIJ(PTC38), Public Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, ¶¶ 69, 77 (May 20, 2010) [hereinafter *PTC JCE Decision*] (holding that the ECCC has jurisdiction over JCE liability generally but not the third, “extended” category of JCE).

13. See, e.g., Scheffer & Dinh, *supra* note 6, at 8 (analyzing Case of IENG Thirith, IENG Sary, and KHIEU Samphan, Case No. 002/19-09-2007-ECCC/OCIJ(PTC38), Public Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, and concluding that “[t]he ECCC needs as many tools as is legally available to make sure that those most culpable are held accountable. The doctrine of JCE, as reasoned above, is one of those tools.”); see also Anthony Dinh, *Joint Criminal Enterprise at the ECCC: The Challenge of Individual Criminal Responsibility for Crimes Committed under the Khmer Rouge*, CAMBODIA TRIBUNAL MONITOR, June 18, 2010, at 42 available at <http://www.cambodiatribunal.org/images/CTM/ctm%20adinh-international%20criminal%20law-jce.pdf> (analyzing JCE’s applicability at the ECCC and concluding that “as the situation before the ECCC shows, situations of unimaginable violence do exist such that JCE is an appropriate and necessary tool.”); cf. Wolfgang Schomburg, *Jurisprudence on JCE – Revisiting a Never Ending Story*, CAMBODIA TRIBUNAL MONITOR, June 3, 2010, at 1 available at [http://www.cambodiatribunal.org/images/CTM/ctm\\_blog\\_6-1-2010.pdf](http://www.cambodiatribunal.org/images/CTM/ctm_blog_6-1-2010.pdf) (describing the PTC JCE Decision as “admirable in its thorough analysis of some post WW II decisions [and the holding of the PTC as] more than welcome after years of dangerous confusion”); KARNAVAS, *supra* note 10 (critiquing the arguments put forth by Scheffer and Dinh as unfounded and arguing that the analysis of Judge Schomburg is superior).

14. Case of KAING Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Decision on Group I - Civil Parties’ Co-Lawyers’ Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, ¶ 12 (Sept. 23, 2009) (“The Trial Chamber notes the decisions of the Pre-Trial Chamber but recalls that it is not bound by them.”).

15. See, e.g., Case of IENG Sary, IENG Thirith, and KHIEU Samphan, Case No. 002/19-09-2009-ECCC/OCIJ(PTC 35, 38, & 39), Co-Prosecutors’ Joint Response to

The Trial Chamber has yet to explicitly endorse or reject the holding of the PTC JCE Decision stripping the Court's jurisdiction over extended JCE. In the *Duch* Judgment, the Trial Chamber convicted Duch of certain crimes via JCE, but did not address the issue of extended JCE's applicability at the Court, as the Co-Prosecutors did not allege extended JCE.<sup>16</sup> Most recently, the Co-Investigating Judges issued a Closing Order in Case 002 ("Case 002 Closing Order") formally indicting all four former Khmer Rouge officials.<sup>17</sup> Individual liability of each of the four accused was predicated almost completely on JCE liability, but the language of the order suggests that the judges did not rely on extended JCE at all.<sup>18</sup> Ultimately, the issue of the applicability and form of JCE at the ECCC is destined to be decided by the ECCC's Supreme Court Chamber, as it is an important and highly contentious issue of law, illustrated by the pointed disagreement amongst judges at the Court to date.<sup>19</sup> The final decision on JCE's role at the ECCC may affect fundamental issues of guilt and innocence for certain crimes at the Court and will thus have a massive impact on the delivery of justice in Cambodia.<sup>20</sup>

This Article analyzes the applicability of JCE liability at the ECCC in light of the defense of *nullum crimen sine lege*. In Part I, the defense of *nullum crimen sine lege* is laid out and divided into its constituent elements. Part II provides an overview of the post-WWII jurisprudence that has been used as the framework of modern JCE liability. Part III outlines the elements of modern JCE and discusses recent JCE-specific jurisprudence. Part IV applies the defense of

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IENG Sary, IENG Thirith and KHIEU Samphan's Appeals on Joint Criminal Enterprise, ¶¶ 44-64 (Feb. 19, 2010) (arguing that all three forms of JCE liability fall under the jurisdiction of the ECCC); cf. e.g., KARNAVAS, *supra* note 10, at 2-4 (arguing that the ECCC does not have jurisdiction over JCE generally, in all forms).

16. Case of KAING Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 513 (July 26, 2010) ("The Chamber notes that the Co-Prosecutors indicated that they would rely only on the basic and systemic forms of [JCE] during the initial hearing, and sought to apply the extended form of [JCE] only in the alternative . . . . The Chamber consequently considers that it need not generally pronounce on the customary status of the third extended form of [JCE] during the 1975 to 1979 period.") (internal citations omitted).

17. Case of NUON Chea, KHIEU Samphan, IENG Sary and IENG Thirith, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, Office of the Co-Investigating Judges, ¶ 1613 (Sept. 15, 2010) [hereinafter *Case 002 Closing Order*].

18. *Id.* ¶¶ 156-59.

19. See, e.g., *supra* note 9 and accompanying text. *But see* PTC JCE Decision, *supra* note 12.

20. See John Ciorciari, *Joint Criminal Enterprise and the Khmer Rouge Prosecutions*, SEARCHING FOR THE TRUTH: MAGAZINE OF THE DOCUMENTATION CENTER OF CAMBODIA, Dec. 2008, at 31-32 (summarizing why JCE will be important to the prosecution in Case 002).

*nullum crimen sine lege* to JCE in light of the ECCC's temporal jurisdiction and suggests possible outcomes.

## I. THE DEFENSE OF NULLUM CRIMEN SINE LEGE

### A. Introduction and ECCC Applicability

The doctrine of *nullum crimen sine lege* (“no crime without law”) [hereinafter *nullum crimen*] is an affirmative defense and a fundamental tenet of international criminal law.<sup>21</sup> The doctrine is the international equivalent to the prohibitions against *ex post facto* (“after the fact”) criminal legislation ubiquitous in domestic legal systems.<sup>22</sup> 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.”<sup>23</sup>

The *nullum crimen* doctrine 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”).<sup>24</sup> Article 15(1) of the ICCPR states: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”<sup>25</sup>

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

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21. See generally BETH VAN SCHAACK & RONALD SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 825 (Foundation Press 2007). *Nullum crimen* is alternatively referred to as the doctrine of “legality” and is codified in the Rome Statute of the International Criminal Court, the European Convention for the Protection of Human Rights, and Fundamental Freedoms and the International Covenant on Civil and Political Rights. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, art. 22 (entered into force July 1, 2002) [hereinafter Rome Statute]; Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 7 (entered into force Sept. 3, 1953) (as amended by Protocol 11) (entered into force Nov. 1, 1998, E.T.S No. 155); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 15 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

22. VAN SCHAACK & SLYE, *supra* note 21, at 825.

23. *Id.*

24. ECCC Law, *supra* note 2, art. 33. ICCPR article 15 merely codifies the customary defense of *nullum crimen*, which is a core fair trial right for any individual accused under international law. See, e.g., VAN SCHAACK & SLYE, *supra* note 21, at 825. Article 33 of the ECCC Law also requires that these fair trial rights of the accused be protected, stating that “the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused . . .” ECCC Law, *supra* note 2, art. 33.

25. ICCPR, *supra* note 21, art. 15(1).

"[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 to the general principles of law recognized by the community of nations."<sup>26</sup> Thus, any legal instrument levied by the prosecution at the ECCC must have existed as enforceable law between April 17, 1975 and January 6, 1979.<sup>27</sup>

### B. *Policy Considerations and Basic Elements*

The defense of *nullum crimen* was repeatedly invoked by the various defendants at the International Military Tribunal in Nuremberg ("IMT") in the wake of WWII.<sup>28</sup> In addressing *nullum crimen* challenges raised, the IMT characterized the doctrine as a "general principle of justice."<sup>29</sup> The Tribunal held that the doctrine provided no defense for perpetrators of the crime of aggression under international law, stating that:

To 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 far 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 no application to the present facts.<sup>30</sup>

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 other textual sources.<sup>31</sup>

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.<sup>32</sup> Whereas domestic jurisdictions, with code-based

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26. *Id.* art. 15(2).

27. ECCC Law, *supra* note 2, art. 2 (discussing temporal jurisdiction of the ECCC).

28. VAN SCHAACK & SLYE, *supra* note 21, at 825.

29. *Id.* at 826 (citing Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT'L L. 172, 217 (1947) [hereinafter *IMT Judgment*]).

30. *Id.* (citing IMT Judgment).

31. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 106 (2d ed. 2008).

32. An oft-quoted characterization of this special need to allow for the evolution of international law is contained in *United States v. Alstoeffer (The Justice Case)*, 3 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 954, 974-75 (1957), available at <http://www.mazal.org/NMT-HOME.htm> [hereinafter *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

criminal laws can adopt a bright-line legality test, international law must employ a standard.<sup>33</sup> 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; (2) in a form sufficiently specific to render the imposition of criminal sanctions for the acts of the accused foreseeable; and (3) accessible to the particular accused.<sup>34</sup> Regarding the elements of specificity and accessibility, the European Court of Human Rights (“ECHR”) has held that “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

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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 a common law decision of an international tribunal, or to the international acquiescence which follows the events. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth.

*Id.* See Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ¶ 39 (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2003) [hereinafter *Milutinović JCE Decision*] (quoting *The Justice Case*, 974-75). The Justice Case was one of twelve trials conducted by the United States between October 1946 and May of 1949, known as the Trials of War Criminals before the Nuremberg Military Tribunal. 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 International Military Tribunal; see also Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, Andre Rwamakuba and Mathieu Ndirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, ¶ 43 (May 11, 2004) [hereinafter *Karemera JCE Decision*] (“hold[ing] 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 31, at 141 (“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.”).

33. *E.g.*, CASSESE, *supra* note 31, at 142.

34. *E.g.*, Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 198 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 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.”); accord Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ¶ 21 (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2003). 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; see, *e.g.*, *Streletz v. Germany*, 33 Eur. Ct. H.R. 31 at ¶ 91 (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.”).

number and status of those to whom it is addressed.”<sup>35</sup>

### 1. The Existence of the Law

The threshold inquiry in addressing a claim of *nullum crimen* involves a determination of whether the legal principle being challenged existed at the relevant time.<sup>36</sup> 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”).<sup>37</sup> 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.<sup>38</sup> 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*

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35. *Groppera Radio v. Switzerland*, 12 Eur. Ct. H.R. 321, 341 (1990).

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

37. 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.

United Nations Charter, Statute of the International Court of Justice, art. 38, ¶ 1, Oct. 24, 1945, 59 Stat. 1031, 1978 [hereinafter *ICJ Statute*].

38. See, e.g., *Norman*, *supra* note 36, ¶ 50 (citing Protocol II to the Convention on the Rights of the Child, which was signed on May 25, 2000 and entered into force on February 12, 2002 as evidence of the customary status of the crime of child military recruitment as of 1996); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, ¶ 126 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 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. *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, ¶ 193 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002). 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 itself a mode of 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 *Norman*, *supra* note 36, ¶¶ 30-53 (analyzing whether international law provided for individual criminal accountability for recruiting child soldiers as of 1996 and concluding that it did).

protects against are still satisfied.<sup>39</sup>

## 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.<sup>40</sup> This examination, however, “does not entail that courts are barred from refining and elaborating upon, by way of construction, *existing* rules.”<sup>41</sup> For example, in the ECHR case of *C.R. v. United Kingdom*, the Court 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 valid 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.”<sup>42</sup>

In *S.W. v. United Kingdom*, a companion case to *C.R.*, the ECHR 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*.<sup>43</sup> Thus, the crime’s elements must only be specific enough to make it roughly foreseeable to the accused that his acts are illegal at time of commission; an interpretation consistently upheld.<sup>44</sup>

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39. See, e.g., Prosecutor v. Stakić, Case No. IT-97-24-A, Appeal Judgment, ¶ 67 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006) (Shahabuddeen, J., dissenting in part) (“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.”). 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.

40. See, e.g., *Milutinović* JCE Decision, *supra* note 32, ¶ 37 (stating that in order to apply any international criminal legal provision, the Tribunal must be satisfied that “the criminal liability in question was sufficiently foreseeable”).

41. CASSESE, *supra* note 31, at 44 (citing *Aleksovski*, Case No. IT-95-14/1, Judgment, ¶ 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 *Milutinović* JCE Decision, *supra* note 32, ¶ 37; Groppera Radio v. Switzerland, 12 Eur. Ct. H.R. 321, 341 (1990); Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 196 (Crim. Trib. for the Former Yugoslavia Nov. 29, 2002).

42. *C.R. v. United Kingdom*, 21 Eur. H.R. Rep. 363, 402 (1995).

43. *S.W. v. United Kingdom*, 21 Eur. H.R. Rep. 363, 377 (1995).

44. See, e.g., *Cantoni v. France*, App. No. 17682/91, Judgment, ¶ 35 (Eur. Ct. H.R.,

### 3. Accessibility

The prosecution must also show that the challenged law was “sufficiently accessible at the relevant time” to the specific accused.<sup>45</sup> 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.<sup>46</sup> This inquiry is critical because customary law is often not codified and 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.<sup>47</sup> These sources include “judicial decisions, international instruments and domestic legislation,” which are all probative of accessibility.<sup>48</sup> Of particular importance is whether a domestic corollary to challenged law existed at the relevant time.<sup>49</sup> Finally, international courts have also relied on the “atrocious nature of the crimes charged to conclude that the perpetrator of [the acts predicated liability] must have known that he was committing a crime.”<sup>50</sup>

#### C. *The Rule Against Analogy*

Although it is not specifically part of the body of law comprising *nullum crimen*, the rule against analogy under international law is often implicated when *nullum crimen* issues are analyzed. The ban on analogy is drawn from civil law systems, which forbid courts from “extend[ing] the scope and purport of a criminal rule to a matter that is unregulated by law (*analogia legis*).”<sup>51</sup> In the international arena, the ban on analogy forbids the extrapolation of specific provisions of international law into the field of general applicability.<sup>52</sup> For example, if a multilateral treaty illegalizes a specific type of weapon,

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Nov. 15, 1996); *Milutinović* JCE Decision, *supra* note 32.

45. *Milutinović* JCE Decision, *supra* note 32, ¶ 21.

46. 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 was available to him. See CASSESE, *supra* note 31, at 65 (“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 . . .”).

47. See generally *Milutinović* JCE Decision, *supra* note 32.

48. *Id.* ¶ 41.

49. *Id.* ¶ 40 (noting 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 the offence committed in the way charged in the indictment was prohibited and punishable”).

50. *Id.* ¶ 42.

51. CASSESE, *supra* note 31, at 47.

52. *Id.* at 48.



it would violate the ban on analogy for a court to rule a similar weapon illegal because of their similarities.<sup>53</sup> This rule is not implicated by more general international laws, such as the ban on “inhumane acts,” which requires the use of factual analogy and comparison to apply.<sup>54</sup>

#### D. *Favor Rei*

A challenged legal provision must also not violate the doctrine of *favor rei*, which requires international courts, when choosing between multiple, reasonable interpretations of the law, to choose the interpretation that is most favorable to the accused.<sup>55</sup> 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.<sup>56</sup> As discussed *supra*, the charged persons in ECCC Case 002 have already challenged the ECCC’s jurisdiction over JCE liability by invoking the defense of *nullum crimen*, resulting in disagreement between the Co-Investigating Judges and the PTC.<sup>57</sup> These challenges are especially provocative because the doctrine of JCE/common plan liability dates back to the body of post-WWII jurisprudence, but remained dormant until reinvigorated and given a much more thorough treatment and definition by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) in the landmark case of *Prosecutor v. Tadić*.<sup>58</sup>

The ECCC’s Trial and Supreme Court Chambers will ultimately decide what form of common plan liability existed in April of 1975 and how this form of liability interacts with the defense of *nullum crimen*. To conduct this inquiry, the Chambers 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 post-WWII

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53. *Id.*

54. *Id.* at 49.

55. *Id.* at 50-51. 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. *See id.*

56. *See, e.g., VAN SCHAACK & SLYE, supra* note 21, at 825.

57. *See supra* pp. 194-98.

58. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶¶ 185-229 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

common plan liability and therefore liability under the ECCC's jurisdiction is strictly limited to common plan liability as understood in the post-WWII cases; (2) JCE evolved from common plan liability and existed in some modified form between 1975 and 1979; or (3) JCE is merely a clarification of the common plan liability jurisprudence of the post-WWII cases 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 highlight legal and factual JCE-related issues likely to arise at the ECCC, and suggest possible outcomes.

## II. POST-WORLD WAR II JURISPRUDENCE AND THE ORIGINS OF COMMON PLAN LIABILITY

This Part sketches the existence of common plan liability in customary international law prior to 1975 and elucidates certain core principles regarding its scope and nature.<sup>59</sup> Common plan liability finds its origins in post-WWII jurisprudence and thus this Part draws predominantly on international and national case law from this 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-WWII period: the London Charter of the International Military Tribunal ("London Charter"),<sup>60</sup> Control Council Law Number 10 ("Control Law 10"),<sup>61</sup> and the Charter of the

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59. Customary international law is formed by the combination of (1) state practice and (2) *opinio juris*. See ICJ Statute, *supra* note 37, art. 38. For a discussion of *opinio juris*, see *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 183 (June 27).

60. Agreement between the United States of America and the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republic, Respecting the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, 59 Stat. 1544, Aug. 8, 1945, 82 U.N.T.S. 279 (entered into force Aug. 8, 1945) [hereinafter London Charter].

61. Allied Control Authority Germany, Control Council Law No. 10: Punishment of

International Military Tribunal for the Far East (“IMTFE Charter”).<sup>62</sup>

### 1. The London Charter, Control Law 10, and 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.<sup>63</sup> Article 6 explicitly outlines the modes of commission by which accused persons could be held responsible, stating: “[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.”<sup>64</sup> The plain language of the provision, which was drafted with the “Anglo-Saxon concept of ‘conspiracy’” in mind,<sup>65</sup> thus explicitly supports the principle that a participant in a common plan may be held criminally responsible for acts 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 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.”<sup>66</sup>

While the London Charter set forth the legal framework for the IMT, Control Law 10 authorized the four occupying authorities in

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Persons Guilty of War Crimes, Crimes against Peace and against Humanity, in 1 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 306 (1945), available at [http://www.loc.gov/rr/frd/Military\\_Law/Enactments/Volume-I.pdf](http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf) [hereinafter Control Council Law No. 10]. The Law was issued by the Allied Control Council on December 20, 1945 and came into effect in January 1946.

62. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946 [hereinafter IMTFE Charter], reprinted in SENATE COMMITTEE ON FOREIGN RELATIONS & DEPARTMENT OF STATE, A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1941-49 (1950).

63. London Charter, *supra* note 60, 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 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).

64. London Charter, *supra* note 60, 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 the responsibility of persons participating in a common plan.” International Military Tribunal, Judgment, The Law as to Common Plan or Conspiracy, available at <http://avalon.law.yale.edu/imt/judlawco.asp> [hereinafter IMT Judgment].

65. Harmen van der Wilt, *supra* note 8, at 93.

66. London Charter, *supra* note 60, art. 6.

Germany to prosecute suspected war criminals within their respective zone of occupation.<sup>67</sup> However, because the law sought to build a “uniform legal basis in Germany” to prosecute war criminals, Article I of the Control Law 10 explicitly incorporated both the Moscow Declaration<sup>68</sup> and the London Charter as “integral parts of [the] law.”<sup>69</sup>

Under Article II(2)(d) of Control Law 10, criminal liability extended to any crime an accused was found to have been “connected with plans or enterprises involving [the charged crime’s] commission.”<sup>70</sup> 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.<sup>71</sup>

Unlike the London Charter, which sets forth the modes of liability for substantive crimes in a distinct paragraph in Article 6,<sup>72</sup> the Charter of the IMTFE incorporated its version of common plan liability into the specific provisions for crimes against peace and

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67. Control Council Law No. 10, *supra* note 61, art. 3, ¶ 3 (stating that all “[p]ersons wanted for trial by an International Military Tribunal [could] not be tried without the consent of the Committee of Chief Prosecutors”).

68. The Moscow Declaration was a joint declaration signed by U.S. President Franklin D. Roosevelt, British Prime Minister Winston Churchill, and Soviet leader Joseph Stalin. The declaration denounced the international crimes perpetrated by the Nazis, was signed November 1, 1943, and helped pave the way for the post-WWII prosecutions by national tribunals and courts martial. Statement on Atrocities of the Joint Four-Nation Declaration (Moscow Declaration) (Oct. 1943), *available at* <http://www.ibiblio.org/pha/policy/1943/431000a.html>. China joined the document generally as the fourth nation; however, the statement on atrocities was not signed by a Chinese representative.

69. Control Council Law No. 10, *supra* note 61, 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. See, e.g., *id.* art. III(3) (stating that “[p]ersons wanted for trial by an IMT could not be tried without the consent of the Committee of Chief Prosecutors”). However, each Zone Commander exercised expansive discretion under the arrangement, which included the authority to determine the tribunal forum and rules of procedure. See *id.* art. III(2).

70. *Id.* art. II(2)(d). Article II criminalized crimes against peace, war crimes, crimes against humanity, and membership in a criminal group of organization declared criminal by the IMT. *Id.*

71. Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgment, ¶ 395 (Int’l Crim. Trib. for the Former Yugoslavia April 3, 2007) (citing Control Council Law No. 10, *supra* note 61, 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 . . . .”

72. London Charter, *supra* note 60, art. 6.

crimes against humanity.<sup>73</sup> 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.<sup>74</sup> 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*.<sup>75</sup>

### 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,<sup>76</sup> the IMT in *U.S. v. Goering* adopted a conservative view of liability by requiring proof that an accused directly participated in a crime.<sup>77</sup> 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

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73. IMTFE Charter, *supra* note 62, art. 5. Article 5 confers the Tribunal with subject matter jurisdiction to prosecute crimes against peace, conventional war crimes, and crimes against humanity. *Id.* 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. PETER H. MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* 132 (Columbia University Press 2000). 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. *Id.*

74. IMTFE Charter, *supra* note 62, art. 5.

75. “[L]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.” *Id.*

76. 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 73, at 176; TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 26-28 (Knopf 1992). Whether or not convictions for crimes against humanity at the IMT violated the principle of *nullum crimen* is outside the parameters of this paper.

77. IMT Judgment, *supra* note 64. 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 and conspiracy” in which the accused “participated as leaders, organizers, instigators, and accomplices.” *Id.*

encompassed the particular crime(s).<sup>78</sup> 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.<sup>79</sup>

## 2. Application in Post-WWII Jurisprudence

The ICTY Appeals Chamber in *Tadić* relied heavily upon the jurisprudence of less prominent post-WWII military proceedings in expounding the modern contours of common criminal plan doctrine/JCE liability.<sup>80</sup> The most commonly cited among these

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78. 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 Judgment, Goering, *supra* note 64. Nevertheless, Goering was “far from disinterested or inactive” in this process, and issued a July 31, 1941, decree directing Himmler and Heydrich to bring “about a complete solution of the Jewish question in the German sphere of influence in Europe.” *Id.* While the Judgment 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. *Id.* 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.

79. 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 Law 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 CALIF. L. REV. 75, 109-20 (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, *supra* note 64. 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.

80. See Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 185-229 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999); see also Danner & Martinez, *supra* note 79, at 110.

include cases from U.S. military courts, British military courts, and Canadian military courts.<sup>81</sup>

There were also post-WWII trials held in other countries wherein domestic courts analyzed criminal responsibility for violations of international law in which multiple individuals participated with varying degrees of involvement. The Appeals Chamber in *Tadić* 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.<sup>82</sup> 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.<sup>83</sup> The Appeals Chamber in *Tadić* therefore placed considerable emphasis on analogy and contextualization in drawing out the major legal principles concerning common plan liability from these cases.<sup>84</sup>

The Trials of War Criminals before the Nuremberg Military Tribunals (“NMT”) also employed common plan liability in certain instances.<sup>85</sup> 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 immediately post-WWII 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.<sup>86</sup>

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81. Contemporary analysis is devoid of any reference to jurisprudence from either the French or Soviet zones of occupied post-war Germany and there appears to be no readily accessible record of these cases.

82. *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 201. Co-perpetration entails that all of the accused participate in the same criminal conduct and share the same mens rea. CASSESE, *supra* note 31, at 189.

83. 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 79, at 111.

84. Due to the practical difficulties associated with obtaining the cases relied upon by *Tadić*, this Part relies heavily on *Tadić* for the relevant facts and law discussed in those cases.

85. 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 *Tadić* does cite the *Einsatzgruppen* case. *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 200. However, this is the only NMT case it cites in addressing “common criminal purpose” under customary international law.

86. 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

### a. The Scope of the Plan

The post-WWII judgments recognized 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 a crime.

In *Goering*, the prosecution sought to define a single, overarching common plan of sufficient size and specificity to hold senior Nazi leaders responsible for crimes committed, but flexible enough to account for large-scale criminal acts prompted by the execution of the plan's basic objectives.<sup>87</sup> The IMT rejected this formulation, concluding that the evidence established the existence of multiple, "separate" plans rather than one all-encompassing conspiracy.<sup>88</sup> 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.<sup>89</sup>

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,<sup>90</sup> which charged the accused with participating as "leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy . . . [to] wage wars of aggression, and war or wars in violation of international law."<sup>91</sup> The alleged object of the

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indicator for how nations perceived the state of common plan liability under international law at that time.

87. According to the indictment, the "common plan or conspiracy embraced the commission of Crimes against Peace." IMT Judgment, *supra* note 64, 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, both within Germany and within occupied territories." *Id.*

88. *Id.* at 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.

89. *Id.* at 43.

90. *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, ch. IX: Findings on Counts of the Indictment, 1137, 1143 (Nov. 4-12, 1948), available at <http://www.ibiblio.org/hyperwar/PTO/IMTFE/index.html> [hereinafter IMTFE Judgment].

91. Jacob A. Ramer, *Hate by Association: Joint Criminal Enterprise Liability for Persecution*, 7 CHI.-KENT J. INT'L & COMP. L. 31, 48 (2007) (citing ARNOLD C.



common plan was for Japan to “secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and all [surrounding] countries and islands therein.”<sup>92</sup> In reaching its conclusion, the IMTFE first determined whether a conspiracy to pursue the alleged criminal object had been proved to exist.<sup>93</sup> 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.”<sup>94</sup>

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<sup>95</sup> in rejecting the argument that JCE liability can only be applied in small-scale cases.<sup>96</sup> 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.<sup>97</sup> 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

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BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS (1987)).

92. IMTFE Judgment, *supra* note 90, ch. IX: Findings on Counts of the Indictment, at 1137.

93. *Id.*

94. *Id.* at 1141-42. 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. “[T]he conspiracy threatens the security of the peoples of the world” while the execution of the conspiracy inevitably produces large-scale “death and suffering.” *Id.* at 1142.

95. The *Justice* Case, *supra* note 32.

96. *Rwamakuba v. Prosecutor*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ¶ 25 (Oct. 22, 2004) [hereinafter “*Rwamakuba* JCE Genocide Appeals Decision”] (citing The *Justice* Case, *supra* note 32); *accord*, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 228 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

97. 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 countries.” The *Justice* Case, *supra* note 32, 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. *Id.*

extermination” on a large scale.<sup>98</sup>

The District Court of Jerusalem in *Israel v. Eichmann* also relied upon a wide-reaching plan in analyzing individual criminal responsibility.<sup>99</sup> Among the various charges against Eichmann was Crimes against the Jewish People, a domestic offense prohibiting acts of genocide against the Jewish people.<sup>100</sup> The Court found that the killing of Jews with the specific intent to destroy the Jewish population of Europe formed the basis of one massive criminal plan known as “the Final Solution of the Jewish Question.”<sup>101</sup>

b. Common Plan Liability Applies to a “Complete Dictatorship”

One issue that the IMT addressed that is likely to be raised by the defense in ECCC Case 002 is whether JCE liability can exist “where there is complete dictatorship.”<sup>102</sup> At trial, the defense teams may claim that the charged accused were simply acting under the direction of Pol Pot, who had final authority over all decisions in DK.<sup>103</sup> The IMT rejected the WWII analog 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

98. 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 32, available at <http://www.mazal.org/archive/nmt/03/NMT03-T0032.htm> (Prosecutor’s Opening Statement in The *Justice* Case).

99. CrimC (Jer) 40/61 *Israel v. Eichmann*, Judgment, [1961], English translation available at [http://www.ess.uwe.ac.uk/genocide/Eichmann\\_Index.htm](http://www.ess.uwe.ac.uk/genocide/Eichmann_Index.htm) [hereinafter *Eichmann Judgment*]. Eichmann was tried and convicted in the District Court of Israel on fifteen 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. CA 336/61 *Eichmann v. Att’y Gen. of Israel*, Judgment on Appeal [1962] IsSC, English translation available at <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/Appeal>.

100. *Eichmann Judgment*, *supra* note 99, Legal Analysis of the Findings in the Light of the Indictment. The 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.” *Id.* ¶ 182. 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. *Id.* 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.*

101. *Id.* (according to the Court, this plan began “in mid-1941 when Hitler” ordered the general extermination of the Jews).

102. IMT Judgment, *supra* note 64.

103. See generally DAVID P. CHANDLER, BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT 104 (Westview Press 1999) (discussing Pol Pot and his role as leader of the Khmer Rouge).

by only one of them.”<sup>104</sup> Since the execution of such a plan depends on the cooperation of key officials, responsibility attaches to these participants when, aware of their leader’s aims, they become parties to the plan.<sup>105</sup>

c. 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 the post-WWII 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 within frequently complex factual circumstances.

To impute criminal responsibility where the charged offense was envisioned as part of the common plan, the early jurisprudence generally required that the accused intend to participate in the plan, while aware of its criminal nature 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 worked to enforce that system with such knowledge. Where the act was extraneous to 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.

i. Georg Otto Sandrock et. al. (the Almelo Trial)

According to the *Tadić* Appeals Chamber, a British military court in *Sandrock* (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.<sup>106</sup> In undertaking the killing, one of the Germans did the shooting, another gave the order, and a third remained by the car to ensure that nobody came near the area.<sup>107</sup> 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

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104. IMT Judgment, *supra* note 64.

105. *Id.*

106. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 197 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (citing 1 U.N. WAR CRIMES COMM’N, *The Almelo Trial: Trial of Otto Sandrock and Three Others*, in LAW REPORTS OF TRIALS OF WAR CRIMINALS 35) (His Majesty’s Stationary Office 1947) [hereinafter *Almelo*]).

107. *Id.* ¶ 84 n.234.

and took affirmative measures toward this end.<sup>108</sup>

ii. The Belsen and Dachau Concentration Camp Cases

The next cases involving common plan liability were the *Belsen* case,<sup>109</sup> followed shortly thereafter by the *Dachau Concentration Camp* case.<sup>110</sup> 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.<sup>111</sup> 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 criminal design were guilty of all crimes perpetrated therein, while acknowledging distinctions in the “nature and extent of the participation.”<sup>112</sup>

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.”<sup>113</sup> Unsurprisingly, knowledge of the system and level of contribution were directly related to an accused’s position within the camp hierarchy.<sup>114</sup> Thus, in contrast to the *Almelo* trial, 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.<sup>115</sup> If such knowledge was established and the accused actively enforced the system, then all crimes committed in

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108. *Id.*

109. *Id.* ¶ 202 (referring to 2 U.N. WAR CRIMES COMM’N, *The Belsen Trial*, in LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (His Majesty’s Stationary Office 1947), available at <http://www.ess.uwe.ac.uk/WCC/belsen1.htm> [hereinafter *Belsen*]).

110. *Id.* (citing 11 UNITED NATIONS WAR CRIMES COMM’N, *The Dachau Concentration Camp Trial: Trial of Martin Gottfried Weiss and Thirty-nine Others*, in LAW REPORTS OF TRIALS OF WAR CRIMINALS 5 (His Majesty’s Stationary Office 1949) [hereinafter *Dachau*]).

111. *Id.* at 88 n.250 (quoting *Dachau*, *supra* note 110, at 14).

112. *Id.* (quoting *Dachau*, *supra* note 110, at 14).

113. *Dachau*, *supra* note 110, 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. *See id.*

114. *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 203. 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.* at 88 n.252 (emphasis added by ICTY Appeals Chamber) (quoting *Belsen*, *supra* note 109, at 120).

115. *See id.* at 88 (citing *Belsen*, *supra* note 109, at 121) & n.250 (citing *Dachau*, *supra* note 110, at 14).

execution of the common design were imputable.<sup>116</sup>

iii. 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 prisoners of war (“POWs”) by a German mob.<sup>117</sup> Among the accused was Captain Heyer, who ordered a German soldier to transport the three POWs to a Luftwaffe unit.<sup>118</sup> According to the facts set forth in *Tadić*, 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.”<sup>119</sup> 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.<sup>120</sup> As the POWs were marched through the streets of Essen, the growing crowd began assaulting them.<sup>121</sup> One of the POWs was shot and wounded by an unknown German corporal.<sup>122</sup> 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.<sup>123</sup>

The court was thus forced to assess criminal liability for the

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116. *Belsen*, *supra* note 109, at 120. The court summarized the statements of the Judge Advocate and convicted thirty of the forty-four accused of some or all charges predicated on the Judge Advocate’s theory of the case. *Id.* at 122. Regarding the mode of liability, the court summarized the Judge Advocate’s position as follows:

The case for the Prosecution was that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened.

*Id.* at 120.

117. *Tadić*, Case No. IT-94-1-A, Judgment, ¶¶ 207-09 (citing 1 U.N. WAR CRIME COMM’N, *The Essen Lynching Case: Trial of Erich Heyer and six others*, in LAW REPORTS OF TRIALS OF WAR CRIMINALS 88 (His Majesty’s Stationary Office 1947) [hereinafter *Essen Lynching*]).

118. *Id.* ¶ 207.

119. *Id.*

120. *Id.*

121. *Id.* (quoting *Essen Lynching*, *supra* note 118, at 89).

122. *Id.*

123. *Id.*

deaths of the POWs under nebulous circumstances in which many people played some role.<sup>124</sup> 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.<sup>125</sup> Ultimately, the court convicted Heyer, the soldier escort, and three civilians.<sup>126</sup> Since each of the accused was “concerned in the killing,” the Appeals Chamber in *Tadić* inferred that the military court based its murder convictions on the notion that the killing of the POWs was a foreseeable consequence of assaulting them or “implicitly incit[ing]” murder.<sup>127</sup> 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.<sup>128</sup> It is also worth noting that Heyer was physically removed from the scene of the crime he was convicted of committing.<sup>129</sup>

#### iv. Kurt Goebell et al. (Borkum Island case)

Fewer than three months after the *Essen West* decision, a U.S. military court in *Goebell* (also known as the *Borkum Island case*)<sup>130</sup>

124. *See id.* 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 three unidentified airmen in circumstances which the British law would have amounted to either murder or manslaughter.” *Id.* ¶ 208 (emphasis added by ICTY Appeals Chamber).

125. *Id.* ¶ 208

126. *Id.* No judge advocate was appointed in Heyer’s case and the *Tadić* court thus assumed that the court accepted the prosecution’s theory in his case. *Id.* The soldier escort breached his duty to prevent the POWs from being molested, and was sentenced to five years imprisonment. *Id.* Three civilians were convicted of murder because they each actively participated in the ill-treatment leading to the deaths of the POWs. *Id.* 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 airmen’s death (comprising one of the earliest to be inflicted).” *Id.* at 92 n.259 (quoting *Essen Lynching*, *supra* note 117, at 91).

127. *Id.* ¶ 209. The *Tadić* Appeals Chamber’s reliance on the *Essen Lynching* 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. Danner & Martinez, *supra* note 79, at 110-11. 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.” *Id.*

128. *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 208.

129. *Id.* ¶ 207. Heyer had placed the victims in the custody of subordinate officers when they were attacked and killed. *Id.*

130. *Id.* ¶¶ 210-13 (citing U.N. WAR CRIME COMM’N, *Kurt Goebell et al.*, in LAW REPORTS OF TRIALS OF WAR CRIMINALS 91 (His Majesty’s Stationary Office 1947) [hereinafter *Goebell et al.*]).

addressed similar factual circumstances involving seven American POWs who were escorted through the streets of Borkum and subjected to mob beatings before being executed by German soldiers.<sup>131</sup> 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.<sup>132</sup>

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.”<sup>133</sup> One thus sees advancement of the notion whereby various accused acted as “cogs in the wheel of [a] common design,” where the charged criminal offense was the result of a collective effort.<sup>134</sup> 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.<sup>135</sup>

The *Borkum Island* court convicted certain of the accused for both murder and assault, while others were only found guilty of assault.<sup>136</sup> The Appeals Chamber in *Tadić* thus reasoned that all of

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131. *Id.* ¶ 210 (citing *Goebell et al.*, *supra* note 130). The POWs were first beaten by members of the Reich’s Labor Corps at the behest of a German officer. *Id.* They were then beaten by civilians on the street. *Id.* Later yet, the mayor of Borkum urged the mob to “to kill them ‘like dogs.’” *Id.* The mob beatings continued, with the encouragement and participation of the soldier escorts. *Id.* Eventually, all of the POWs were shot to death by the soldiers near the city hall. *Id.*

132. *Id.* (quoting Charge Sheet, in U.S. Nat’l Archives Microfilm Publication, at 1186).

133. *Id.* (citing Charge Sheet, in U.S. Nat’l Archives Microfilm Publication, at 1186).

134. *Id.*

135. *Id.* The *Tadić* Appeals Chamber noted 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.

136. “The accused Akkerman, Krolikovski, Schmitz, Wentzel, Seiler and Goebbels” were convicted “on both the killing and assault charges.” *Id.* at nn.268-69. All were sentenced to death, except for Krolikovski who was given life imprisonment. *Id.* “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.* Such a conviction inherently rejected the prosecutor’s implicit assertion that, by playing his part, each of the accused was guilty of murder. *See id.* ¶ 210. After all, if the accused was found to have voluntarily participated in the common design to mistreat the 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). *See id.*

these accused intended to participate in a common design entailing the criminal assault of the POWs.<sup>137</sup> However, those convicted of murder in the absence of any “evidence that they had actually killed the prisoners . . . [or] 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.”<sup>138</sup> Unfortunately, the Appeals Chamber in *Tadić* does not provide any additional details about the individual role and contribution of each of the accused.

The *Essen West* and *Borkum Island* cases are unique in that they suggest criminal responsibility for acts not explicitly envisaged by a common criminal plan may nevertheless be imputed to another party to the plan where the crime was *foreseeable* or *predictable* to the accused and where the accused took deliberate measures to assist in the common plan.<sup>139</sup>

v. Hoelzer et al. Case

In April 1946, the Judge Advocate in a Canadian military court in *Hoelzer et al.* employed the phrase “common enterprise” in convicting three Germans of murder for transporting a Canadian POW to a certain area for the known purpose of killing him.<sup>140</sup> The facts of *Hoelzer et al.* appear to have been substantially similar to those of *Almelo*, involving cooperation amongst three accused to effectuate the commission of a murder.<sup>141</sup> Furthermore, both courts utilized the term “common enterprise,”<sup>142</sup> suggesting agreement between the British and Canadian legal authorities under the auspices of Control Law 10 on the issue of co-perpetration.

vi. Trial of Franz Schonfeld and others

The British 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

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

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137. *Id.* ¶ 213.

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

139. *See id.* ¶¶ 205-13.

140. *Id.* ¶ 197 (citing *Hoelzer et al.*, Can. Mil.Ct., Aurich, Germany, 1 Record of Proceedings 25 Mar. – 6 Apr. 1946, at 341, 347, 349 [hereinafter *Hoelzer et al.*]).

141. *See Almelo*, *supra* note 106.

142. *Tadić*, Case No. IT-94-1-A, ¶ 197.



the assembly.<sup>143</sup>

The court however, appears to have required the physical presence of the accused in order to impute liability for the murder under the circumstances.<sup>144</sup> Furthermore, the charged act was committed during the “effectuation” of the common purpose and not incidental to it.<sup>145</sup> Finally, it is not clear what mens rea requirement was utilized, specifically whether the court implicitly applied a foreseeability standard tantamount to that in the *Essen West* and *Borkum Island* cases.<sup>146</sup>

#### vii. The *Ferrida* Judgment

In the *Ferrida* Judgment of July 25, 1946, the Italian Court of Cassation found the accused not guilty of murder and thus protected from prosecution under the general amnesty decree for Nazi collaborators where the accused had participated in a “mop-up” operation in which partisans were killed because the accused had participated “only in his capacity as a nurse.”<sup>147</sup> The outcome suggests that the court distinguished between mere presence at the scene of a crime and active participation therein, as the accused was apparently found to have been lawfully fulfilling his duties as a nurse and did not contribute to the killing in any way, despite his presence at the killing site.<sup>148</sup>

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143. *Id.* ¶ 198 (quoting 10 U.N. WAR CRIME COMM’N, *Trial of Franz Schonfeld and others*, in LAW REPORTS OF TRIALS OF WAR CRIMINALS 68 (1946) [hereinafter *Schonfeld and others*]).

144. *See Schonfeld and others*, *supra* note 143 (quoting the Judge Advocate in *Schonfeld and others* as stating that “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 the purpose, kills a man, it is murder in all who are present, whether they actually aid or abet or not, provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly”).

145. *See* 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS, 68-69 (United Nations War Crimes Commission by His Majesty’s Stationary Office 1949). The Judge Advocate noted that if the law of “common design” applied and the common plan in question was to murder the three victims, then each accused present would be “guilty of murder whether or not they aided or abetted the offense.” *Id.*

146. *See id.* The Judge Advocate’s analysis suggests that the court considered the necessary degree of participation in the killings for murder liability to attach in light of each accused’s subjective mens rea.

147. *Tadić*, Case No. IT-94-1-A, ¶ 217 (citing *Ferrida* Judgment in *Archivio penale*, 1947, Part II, p. 88). This case and all other Italian Court of Cassation cases except *Mannelli infra* Part II.B.2.c.xv, 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. *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 214-18.

148. *Id.* ¶ 217.

## viii. 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 of persons concerned.”<sup>149</sup> In imputing liability to the accused, the Court stressed that the more serious crime was nevertheless “a consequence, albeit indirect, of his participation.”<sup>150</sup> The Appeals Chamber in *Tadić* did not address the mental state of the accused with regards to his “indirect” role.<sup>151</sup> The relationship between the mens rea and contribution of the accused is thus unclear in this instance.

## ix. 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.<sup>152</sup> According to the *Tadić* Appeals Chamber, the British Judge Advocate did not object to the following submission by the prosecutor articulating Jepsen’s criminal responsibility:

[I]f 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.<sup>153</sup>

However, in contrast to the court in *Bonatie et al.*, the court in *Jepsen and others* was imputing liability to the accused for killings that were part of the common plan and in which the accused played a direct role.<sup>154</sup>

## x. 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.*<sup>155</sup> In concluding that the amnesty for Nazi collaborators applied, the court found that the accused did not actively participate in an operation in which a

149. *Id.* (citing handwritten text of the (unpublished) Judgment of July 5, 1946, p. 19).

150. *Id.*

151. *See id.* ¶ 220.

152. *Id.* ¶ 198 (citing *Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany* (Aug. 13-23, 1946), Judgment of 24 August 1946 [hereinafter *Jepsen and others*]).

153. *Id.*

154. In *Jepsen and others* the accused had killed concentration camp internees who were in transit to another camp. The accused were thus considered to be participating in the overall systematic murder of internees in the camps. *Id.*

155. *Id.* ¶ 217 (citing *Tossani*, Judgment, Sept. 12, 1946, Court of Cassation, in *Archivio penale*, 1947, Part II, pp. 88-89 [hereinafter *Tossani*]).

German soldier killed a partisan, because the accused was unarmed, and the killing was “an exceptional and unforeseen (*imprevisto*) event.”<sup>156</sup> It thus appears that the accused lacked both the requisite *mens rea* and degree of contribution (*actus reus*) to be held responsible.<sup>157</sup>

xi. 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 capture concentration camp escapees and one of the escapees was shot and subsequently died.<sup>158</sup> 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.<sup>159</sup> By relying on loaded 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.”<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup>

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156. *Id.*

157. The amnesty law excluded murder and the accused was therefore acquitted of the murder, predicated on the facts that the killing was an unforeseeable act, committed spontaneously and the accused did not participate therein. *Id.*

158. *Id.* ¶ 215 (citing handwritten text of the (unpublished) Judgment, p. 6).

159. *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 causati.*” *Id.*

160. *Id.* ¶ 234 (citing handwritten text of the (unpublished) Judgment, pp. 6-7 (unofficial translation) (emphasis added)). Translation by Professor Antonio Cassese of the case is available in *Oxford Journal of International Criminal Justice*, *D'Ottavio and Others Case*, 5 J. INT'L CRIM. JUST. 232 (2007). The original case was decided in the Italian Court of Cassation, Criminal Section I, Case No. 270 (Mar. 12, 1947) [hereinafter *D'Ottavio et al.*].

161. The Court found that the accused had set out together to unlawfully capture the escapees while armed. From the summary of the judgment provided in *Tadić* it appears that the Court found all four accused guilty of manslaughter because the underlying common criminal plan was to capture the escapees by using forced, including deadly weapons. *Id.*

162. In *D'Ottavio et al.*, the Court found that “all the participants had directly cooperated in the crime of attempted ‘illegal restraint’ . . . by surrounding and

xii. 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, conspiracy or common plan served solely as a mode of liability.<sup>163</sup> 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.<sup>164</sup> The burden 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 individual defendant in furtherance of the plan."<sup>165</sup> Criminal liability attached to all parties who acted to further a shared criminal purpose regardless of who actually served as the physical perpetrator.<sup>166</sup>

The Tribunal emphatically rejected the claim that the accused lacked knowledge of the Final Solution plan in light of the overwhelming evidence of the atrocities committed by the Gestapo and in concentration camps.<sup>167</sup> The evidence conclusively proved that each of the accused had a "[g]eneral knowledge of the broad outlines" of the common plan.<sup>168</sup> The Tribunal thus turned to whether the accused consciously participated in the plan or took a consenting part therein.<sup>169</sup>

Acknowledging the absolute power of Hitler to "enact, enforce and adjudicate law," and the absolute supremacy of such law in the

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pursuing two prisoners of war on the run, armed with a gun and a rifle, with a view to illegally capturing them." *Id.*

163. See *The Justice Case*, *supra* note 32, 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.").

164. *Id.* at 1063.

165. *Id.* (referring to these two elements to be proved as the "material facts" under this mode of analysis).

166. *Id.* (describing such an approach as "but an application of general concepts of criminal law").

167. See *id.* "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.

168. *Id.*

169. *Id.* at 1081-87.

Reich, the Tribunal considered the accused judges as falling within two categories.<sup>170</sup> The first category included those judges who sought to retain some degree of judicial independence, impartiality, and moderation in administering the law.<sup>171</sup> The second category consisted of those judges “who with fanatical zeal enforced the will of the party.”<sup>172</sup> This distinction reflected an inquiry by the Tribunal into the subjective mens rea of the accused to participate in the common plan.<sup>173</sup> 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.<sup>174</sup>

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.”<sup>175</sup> He was accordingly convicted of war crimes and crimes against humanity.<sup>176</sup> 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.<sup>177</sup> In

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170. *Id.* at 1010, 1025.

171. 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.* at 1025.

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

173. The Tribunal convicted the accused Lautz and Rothaug based on their zealous fulfillment of their duties as Nazi party judges and acquitted accused Cuhorst based on his attempts to mitigate miscarriages of justice under his judicial authority to the extent possible. *Id.* at 1025, 1128, 1157-58.

174. The Tribunal implicitly considered that judges who zealously enforced Nazi laws thereby voluntarily joined the overall plan to subvert the justice system to the facilitate the commission of war crimes and crimes against humanity by the Nazi party, whereas judges who clearly did not agree with the overall plan and tried to mitigate the damage they caused were acquitted or convicted of lesser offenses and given mitigated sentences. *Id.*

175. *Id.* at 1123. For instance, Lautz authorized the indictments for Poles who had been detained while attempting to flee from Germany and enter Switzerland. *Id.*; see also Prosecutor v. Brdanin, Case No. IT-99-36-A, Judgment, ¶ 398 (Int’l Crim. Trib. for the Former Yugoslavia April 3, 2007) (quoting *The Justice Case*, supra note 32).

176. 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.

*The Justice Case*, supra note 32, at 1128.

177. *Id.* at 1156.

contrast, the Tribunal found the accused Cuhorst not guilty of persecution as a crime against humanity in part because he fell into the first category by virtue of the fact that the Nazi party itself had declared Cuhorst did not "conform to what the State and Party demanded of a judge."<sup>178</sup> This distinction demonstrates that the NMT affirmatively sought to avoid the imposition of guilt solely predicated upon association.

xiii. 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 case of *United States v. Ohlenfort* (the "*Einsatzgruppen*" Case)<sup>179</sup> 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.<sup>180</sup>

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 direct individual responsibility for the crimes committed.<sup>181</sup>

xiv. The *Ponzano* Case

The *Ponzano* case built on common purpose jurisprudence by addressing the necessary contribution of the accused in terms of causation.<sup>182</sup> The British Judge Advocate explained that an accused could share responsibility for an offense via "an indirect degree of

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178. *Id.* at 1158. Cuhorst was found not guilty on all counts. *Id.* at 1157. 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 was lost to fire. *Id.* at 1158.

179. *United States v. Ohlenfort*, in 4 LAW REPORTS OF THE TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1951) [hereinafter *The Einsatzgruppen Case*] (quoted in *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 200 n.245 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999)). 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. *Id.* at 13-22.

180. *Id.* at 373 (emphasis added).

181. *Id.*

182. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 199 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

participation” where he was a “cog in the wheel of events leading up to the result which in fact occurred.”<sup>183</sup> The accused could further the criminal object “by a variety of other means”<sup>184</sup> and the participation of the accused need not be a “*sine qua non*” (necessary condition) for the charged offense to occur.<sup>185</sup> However, the accused must have knowledge “that when he did take part in [the criminal enterprise] he knew the intended purpose of it.”<sup>186</sup> The more relaxed causation standard was thus held in check by the mens rea requirement that the accused be aware of the criminal nature of the plan when participating therein.<sup>187</sup>

#### xv. The *Mannelli* Judgment

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

For 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 prevedibile 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.<sup>188</sup>

The notion of predictability is emphasized again, as the Court held that an “incidental” relationship between the two crimes was insufficient to impute liability.<sup>189</sup> Instead, the crime not envisaged had to flow naturally from the pursuit of the criminal purpose sought.<sup>190</sup>

#### xvi. 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

183. *Id.* (quoting *Trial of Feurstein and others*, Proceedings of a War Crimes Trial held at Hamburg, Germany (Aug. 4-24, 1948), Judgment of 24 August 1948 [hereinafter *Feurstein and others*]).

184. *Id.*

185. *Id.*

186. *Id.* ¶ 199 n.243 (quoting *Feurstein and others*, *supra* note 183, at 8).

187. It appears that the Court considered that because the underlying common plan was to commit targeted and systematic murders, mens rea superseded the degree of actual participation of each accused in terms of individual culpability. *Id.* ¶ 199 (quoting *Feurstein and others*, *supra* note 183).

188. *Id.* ¶ 218 (quoting *Giustizia penale*, 1950, Part II, cols. 696-97).

189. *Id.*

190. *See id.*

partisans during a firefight.<sup>191</sup> 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.<sup>192</sup> In finding that the trial court erred by extending liability to each member of the militia, the Court stressed that some members lacked intent to kill the partisans.<sup>193</sup> To impute liability for murder perpetrated during “a mopping-up operation” executed by a group of people, “it was necessary to establish that, in participating in this operation, a voluntary activity also concerning homicide had been brought into being.”<sup>194</sup> 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.<sup>195</sup>

xvii. *Israel v. Eichmann*

In addressing Eichmann’s liability for crimes against the Jewish people (a domestic formulation of genocide), Israel’s Attorney General argued that the plan for the Final Solution constituted “a criminal conspiracy” encompassing the myriad of criminal acts connected with the extermination campaign perpetrated against the Jews within areas of Nazi Germany’s influence.<sup>196</sup> Since Eichmann participated in the criminal conspiracy, the Attorney General contended that he “must be held liable *ipso facto* for all of the offences committed to bring about its implementation” regardless of the nature, geographic location of, and Eichmann’s “active participation” in, the underlying criminal activities.<sup>197</sup>

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

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191. *Id.* ¶ 216 (citing handwritten text of the (unpublished) Judgment, pp. 13-14). Neither a common plan nor criminal means can be readily discerned from the facts as set forth in *Tadić*. The judgment only mentions that “the crime committed was more serious than that intended.” *Id.*

192. *Id.*

193. *Id.* (citing handwritten text of the (unpublished) Judgment, pp. 13-14 (describing the murder as a clearly “unintended event (*evento non voluto*)”).

194. *Id.*

195. As with the *Mannelli* Judgment, discussed *supra*, Part II.B.2.c.xv, the Court in *Aratano et al.* was reluctant to attach liability for the crime of murder for individuals who participated in a common plan that was formed with only the intent to commit significantly less serious crimes. *Id.*

196. *Eichmann* Judgment, *supra* note 99, ¶ 187.

197. *Id.*



criminal responsibility is to be decided upon accordingly.”<sup>198</sup> By analyzing criminal acts in the context of one larger, comprehensive plan, the Court seemingly constructed an expansive framework to impute individual criminal responsibility to the accused.<sup>199</sup>

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.”<sup>200</sup> Liability was thus imputed as follows:

Everyone who acted in the extermination of 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.*<sup>201</sup>

Professor William Schabas has interpreted this holding as establishing complicity to commit genocide, rather than as genocide through common plan liability.<sup>202</sup> 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.”<sup>203</sup>

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198. *Id.* ¶ 190. The Court’s reluctance to accept the Attorney General’s legal theory of Eichmann’s individual criminal responsibility for all offenses committed in the implementation of the Final Solution appears to stem from the belief that “[m]ere knowledge is not, of itself, enough; there must be something further.” *Id.* ¶ 189 (citing *Regina v. Bullock*, (1955) 1 All E.R. 15 (appeal taken from Eng.)). 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.* ¶¶ 188-90.

199. 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.

200. *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.* ¶¶ 190, 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.* ¶ 193.

201. *Id.* ¶ 194 (emphasis added).

202. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 345-46 (2d ed. 2009). 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. *Id.* at 247.

203. Eichmann Judgment, *supra* note 99, at ¶ 194. The Court noted the inverse relationship between one’s proximity to the physical act(s) and one’s responsibility for

The Court's mode of analysis for determining Eichmann's individual criminal responsibility closely resembled that applied by courts discussed *supra* that also addressed responsibility for crimes envisioned by the common plan. The Court considered Eichmann's awareness of the plan, his voluntary participation in the plan, and his intent to further the plan.<sup>204</sup> The evidence 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 (Race and Settlement Main Office of the SS) as early as August 1941;<sup>205</sup> and he possessed the requisite intent (here, specific genocidal intent) to further the criminal plan as evidenced by "[t]he very breadth of the scope of his activities" undertaken to achieve the biological extermination of the Jewish people.<sup>206</sup> 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."<sup>207</sup>

### C. Conclusion

The existence of common plan liability is well-grounded in the post-WWII case law. The London Charter, the IMTFE Charter, and Control Law 10 all explicitly recognized participation in a "common plan" as a mode of liability.<sup>208</sup> 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 crimes committed in its execution, even if the accused did not physically perpetrate such crimes.

The case law also demonstrates that a common plan may be large or small in terms of its geographical scope.<sup>209</sup> Moreover,

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the act(s): "[i]n 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 . . ." *Id.* ¶ 197.

204. Full awareness of the scope of the plan's operations was not necessary. *Id.* ¶ 193. Indeed, the court noted that many of the principal perpetrators may have possessed only compartmentalized knowledge. *Id.*

205. *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.*

206. *Id.* ¶ 183.

207. *Id.* ¶ 195.

208. London Charter, *supra* note 60, art. 6; IMTFE Charter, *supra* note 62, art. 5; Control Council Law 10, *supra* note 61, art. 2.

209. *See, e.g.,* Eichmann Judgment, *supra* note 99, ¶¶ 181-97 (discussing the so-called "Final Solution" to exterminate the Jews in Europe as forming a massive

common planning can exist even in a “complete dictatorship.”<sup>210</sup> Therefore, high-ranking accused may not shield themselves from liability by claiming that they were merely pawns executing the will of a single, all-powerful leader.

With regard to the requisite *mens rea* and contribution of the accused, one sees the various courts struggling to define this relationship in certain instances while trying to protect the paramount criminal law principle of individual culpability.<sup>211</sup> 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.<sup>212</sup> Where the offense was committed as part of a distinct, organized system of oppression such as in 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.<sup>213</sup>

The jurisprudence is ultimately the least clear where the act was outside of the envisaged plan.<sup>214</sup> In general, the courts required some

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criminal plan formulated and implemented by the Nazi high command.); *cf. Hoelzer et al.*, *supra* note 140 (prosecuting three accused for formulating and carrying out a common plan to commit a single murder).

210. IMT Judgment, *supra* note 64.

211. *See, e.g.*, The Justice Case, *supra* note 32 (attempting to differentiate between the culpability of various Nazi judges, ranging from those who zealously participated in the Nazi subversion of the legal process to judges who reluctantly participated while attempting to mitigate the harm they caused); *see also supra* notes 191-95 and accompanying text (describing the Court of Cassation's attempt in *Aratano* to distinguish between civilians who shared the intent to commit murder from amongst a group of civilians who originally shared only the intent to commit lesser crimes).

212. *See, e.g., Hoelzer et al.*, *supra* note 140 (finding the three accused guilty of jointly committing murder, despite their disparate degrees of participation in the act of killing, predicated on the Court's finding that the three accused were all acting pursuant to a common plan to commit the murder).

213. *See supra* notes 113-16 and accompanying text.

214. Critics of the more controversial or extended forms of modern-day JCE jurisprudence challenge as “dubious” the *Tadić* 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 deaths of the prisoners is clear from the facts of the case. In each of the cases cited in *Tadić*, 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 79, at 111.

nexus 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.<sup>215</sup> In addition, the requisite *actus reus* is often uncertain. Courts typically required that the accused act to further the common purpose, but some appear to have been more concerned with whether the accused was physically present and/or participated in the additional act in some way.<sup>216</sup> Nonetheless, it is undeniable that in certain instances courts sought to extend liability where the criminal act was outside the scope of the envisaged common plan.<sup>217</sup> 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-WWII era declined to explicitly expound on the use of common plan liability in such a context. This lack of legal clarity appears to be due to the particular circumstances of the crimes committed during WWII. The massive scale of these atrocities, inherently political nature of the trials and abundance of evidence against most of the accused, created a situation where there was ultimately little need for the courts to delve into liability for unplanned crimes or to discuss the boundaries of common plan liability in any depth.

### III. JOINT CRIMINAL ENTERPRISE: MODERN COMMON 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 1999, when the Appeals Chamber of the ICTY delivered its Judgment in *Tadić*, discussing common plan liability and coining the term JCE.<sup>218</sup> The Chamber in *Tadić* 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

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215. See, e.g., *Tossani*, *supra* note 155; *D'Ottavio et al.*, *supra* note 158.

216. See, e.g., *Schonfeld and others*, *supra* note 143.

217. See, e.g., *Tossani*, *supra* note 155; *D'Ottavio et al.*, *supra* note 158.

218. Prosecutor v. *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 227 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). 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., *Milutinović JCE Decision*, *supra* note 32, ¶ 36.

conditions[.]”<sup>219</sup> The Chamber also noted that JCE liability is concordant with the object and purpose of the ICTY Statute and is “warranted by the very nature of many international crimes which are committed most commonly in wartime situations.”<sup>220</sup>

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.<sup>221</sup> 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.<sup>222</sup> ECCC Law confers the Court with jurisdiction to bring to trial “senior leaders” and those “most responsible” who “committed,” *inter alia*, genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, destruction of cultural property during armed conflict, and/or crimes against international protected persons.<sup>223</sup> Although consistent jurisprudence has held that JCE is a form of “commission,” it will be for the Trial and Supreme Court Chambers of the ECCC to ultimately decide whether or not ECCC Law implicitly provides for JCE as a mode of commission, and if so, in what form.

#### B. *Tadić* and Three Category JCE

The Appeals Chamber in *Tadić* outlined the basic elements of JCE liability and went on to discuss three specific “categories” of JCE. All three categories share four 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 the plan; and (4) the ultimate commission of the charged crime.<sup>224</sup>

The Chamber divided JCE liability into three subcategories, each with a distinct mens rea requirement.<sup>225</sup> 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

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219. *Tadić*, IT-94-1-A, Judgment, ¶ 190.

220. *Id.* ¶ 191.

221. *Id.* ¶¶ 185-93.

222. *See, e.g.*, Prosecutor v. Brima, SCSL-2004-16-A, Judgment, ¶ 75 (Feb. 22, 2008); *Karemará et al.*, JCE Decision, *supra* note 32, ¶ 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.”).

223. ECCC Law, *supra* note 2, arts. 4–8, 29.

224. *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 227.

225. *Id.* ¶ 228.

accused's intent to join in the plan.<sup>226</sup> The second, "systemic" category of JCE involves a prison or concentration camp scenario and requires proof of the accused's "personal knowledge of the system of ill-treatment," along with the intent to further this "common concerted system."<sup>227</sup> The third, "extended" category of JCE 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.<sup>228</sup> For extended JCE, the prosecution must initially prove the accused's intent to join the original criminal plan just as in basic JCE.<sup>229</sup> The prosecution must also prove that the accused was subjectively aware of the objective likelihood of the commission of the charged crime and "willingly took that risk," amounting to a mens rea of *dolus eventualis* ("advertent recklessness").<sup>230</sup>

### C. Subsequent JCE Jurisprudence

Prior to the PTC's May 2010 decision, holding that the ECCC does not have jurisdiction over extended JCE,<sup>231</sup> only the Pre-Trial Chamber at the ICC<sup>232</sup> and one ICTY Trial Chamber<sup>233</sup> had departed from the JCE-related holdings of the *Tadić* Appeals Chamber.<sup>234</sup> However, numerous issues have arisen regarding the application of JCE, including: (1) the requisite specificity when pleading JCE; (2)

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226. *Id.* 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 that accused's . . . criminal responsibility." Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment, ¶ 105 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005) (internal citation omitted); see also Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 100 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003) ("[S]hared criminal intent does not require the co-perpetrator's personal satisfaction or enthusiasm or his personal initiative in contributing to the joint enterprise.").

227. *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 228 (This knowledge can be proved via either "express testimony" or inference drawn from the defendant's "position of authority.").

228. *Id.*

229. *Id.*

230. *Id.* ¶¶ 220, 228.

231. PTC JCE Decision, *supra* note 12, at 24.

232. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Pre-Trial Chamber, Decision on Confirmation of Charges, ¶¶ 322-40 (Jan. 29, 2007) (rejecting the notion that JCE forms part of customary international law applicable to the ICC).

233. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 428 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

234. See Scheffer & Dinh, *supra* note 6, at 2-3 (discussing the controversy surrounding JCE and the need to re-examine its underpinnings in post-WWII jurisprudence).

proving the existence and nature of the original plan; (3) the requisite contribution to the plan by the accused; (4) general issues of proof; (5) the applicability of JCE to large-scale criminal enterprises; (6) the specific 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

### a. General Policy Considerations and Background

There have been numerous challenges to the pleading of JCE at the SCSL, ICTY and ICTR.<sup>235</sup> 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 prepare a vigorous defense.<sup>236</sup> Generally, courts have recognized that international crimes cannot be alleged as specifically as domestic crimes because of their nature and scale.<sup>237</sup> 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

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235. *E.g.*, Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment (Feb. 22, 2008); Prosecutor v. Nchamihigo, Case No. ICTR-2001-63-R50, Decision on Defence Motion on Defects in the Form of the Indictment (Sept. 27, 2006) [hereinafter *Nchamihigo* Indictment Decision]; Prosecutor v. Kvočka, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 12, 1999).

236. For a discussion of the general requirements of allegations made by the prosecution, see *Nchamihigo* Indictment Decision, *supra* note 235, ¶ 3; see also KAING Guek Eav alias "Duch", Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Public Decision on Appeal Against the Closing Order Indicting KAING Guek Eav alias "Duch", ECCC Doc. No. D99/3/42, Pre-Trial Chamber, ¶141 (Dec. 5, 2008) (holding that because "[t]he Charged Person was not informed of the allegation related to his participation in the S-21 JCE prior to the Final Submission . . . the Pre-Trial Chamber will not add it to the Closing Order at this stage").

237. See, for example, *Kvočka*, IT-98-30-1, Decision on Defence Preliminary Motions on the Forms of the Indictment, ¶ 17, in which 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.

*Id.*

defence.”<sup>238</sup>

### b. 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.<sup>239</sup> However, the prosecution may allege more than one form of JCE under a single set of facts.<sup>240</sup> 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.”<sup>241</sup>

The prosecution need not necessarily name every member of the JCE, but may describe the characteristics of membership more broadly.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup> 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

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238. *Prosecutor v. Kupreškić*, Case No. IT-95-16, Appeal Judgment, ¶ 88 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).

239. *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment, ¶ 42 (Int’l Crim. Trib. for the Former Yugoslavia Feb 28, 2005).

240. *E.g.*, *Nchamihigo* Indictment Decision, *supra* note 235, ¶ 14. As a practical matter the prosecution often pleads basic and extended JCE liability alternatively. *See id.* ¶ 15.

241. *Id.* ¶ 14 (citing *Prosecutor v. Stanišić*, Case No. IT-03-69-PT, Decision on Defence Preliminary Motions (Int’l Crim. Trib. for the Former Yugoslavia Nov. 14, 2003)); *Prosecutor v. Mejakić*, Case No. IT-02-65-PT, Decision on Duško Knežević’s Preliminary Motion on the Form of the Indictment (Int’l Crim. Trib. for the Former Yugoslavia Apr. 4, 2003).

242. *See, e.g.*, *Nchamihigo* Indictment Decision, *supra* note 235, ¶ 21, where the Trial Chamber held that the members of the JCE could be simply described as members of the *Interahamwe*, rather than by name, stating that “[w]here 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.” *Id.*

243. *Kvočka*, IT-98-30/1-A, Judgment, ¶ 32.

244. *E.g., id.* ¶ 33.



pleading stage.<sup>245</sup> 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 plans to produce at trial.<sup>246</sup>

c. Likely Indictment Issues Involving JCE at the  
ECCC

The factual allegations underlying the legal theories of the Co-Prosecutors in Case 002 at the ECCC will not become publicly accessible until the trial phase, due to the secrecy requirements of civil law jurisdictions during the investigative and pre-trial phases.<sup>247</sup> Thus, the only available insights into the prosecution's planned JCE allegations in Case 002 are contained in a public Statement of the ECCC Co-Prosecutors ("Statement") released July 18, 2007,<sup>248</sup> and the Case 002 Closing Order of September 25, 2010.<sup>249</sup> According to the Statement, the four charged persons in Case 002 (along with Duch in some instances) participated in a "common criminal plan constituting a systematic and unlawful denial of basic rights of the Cambodian population and the targeted persecution of specific groups."<sup>250</sup> 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."<sup>251</sup> Similarly, in the Case 002 Closing Order, the Co-Investigating Judges held that all four accused were members of a JCE comprised of senior DK leaders, the "common purpose of [which] was to implement rapid socialist revolution in Cambodia through a 'great leap forward' and defend the Party against internal and external enemies, by whatever means necessary."<sup>252</sup> The Co-Investigating Judges also found that this common purpose, while not necessarily intrinsically criminal, envisioned implementation involving: forced relocations, the creation of "cooperatives and

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245. *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 24, 1999).

246. *Id.*

247. Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.5), arts. 54, 56 (Feb. 9, 2010), available at <http://www.eccc.gov.kh/english/cabinet/file Upload/121/IRv5-EN.pdf> (requiring secrecy on the part of the Co-Prosecutors and Co-Investigating Judges during the pre-trial stages).

248. See Statement of the Co-Prosecutors, Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Prosecutors (July 18, 2007), [http://www.yale.edu/cgp/downloads/Statement\\_of\\_Co-Prosecutors18-July-2007.pdf](http://www.yale.edu/cgp/downloads/Statement_of_Co-Prosecutors18-July-2007.pdf) [hereinafter Statement of the Co-Prosecutors] (last visited Oct. 13, 2010).

249. *Case 002 Closing Order*, *supra* note 17.

250. Statement of the Co-Prosecutors, *supra* note 248, at 3.

251. *Id.* at 4.

252. *Case 002 Closing Order*, *supra* note 17, ¶ 156.

worksites, the reeducation . . . and killing of ‘enemies,’ . . . [t]he targeting of specific groups” such as Buddhists and Cham Muslims, and “[t]he regulation of marriage,”<sup>253</sup> and that these means involved the commission of various serious crimes under the ECCC’s jurisdiction.<sup>254</sup> The findings of the judges reflect the initial statement of the Co-Prosecutors, which alleged at least “twenty-five distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labor and religious, political and ethnic persecution.”<sup>255</sup> The Co-Prosecutors also alleged a similar common purpose to that found by the Co-Investigating Judges in the Case 002 Closing Order, stating that the “purported motive of this common criminal plan was to effect a radical change of Cambodian society along ideological lines.” Both the Statement and Case 002 Closing Order thus provide the nature and scope of the initial agreement and common intent necessary for the accused to prepare a defense to JCE-based allegations at trial.<sup>256</sup>

The Co-Prosecutors also stated 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.<sup>257</sup> Indeed, the PTC held in its JCE Decision that the prosecution provided adequate notice of JCE to the charged persons in Case 002.<sup>258</sup> Notice of the identity of the JCE members in Case 002 is confirmed in the Case 002 Closing Order, wherein the Co-Investigating Judges specifically name all four accused, along with other senior DK officials as members of the common plan to revolutionize Cambodia by any means necessary. Additionally, the Trial Chamber employed both basic and systemic JCE in the *Duch* Judgment, despite the fact that the PTC previously held that Duch lacked sufficient notice of JCE during the pre-trial phase.<sup>259</sup> Thus, due to the submissions by the prosecution, the extensive litigation on the issue of JCE throughout the *Duch* case,

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253. *Id.* ¶ 157.

254. *Id.*

255. Statement of the Co-Prosecutors, *supra* note 248, at 4.

256. *Id.* at 3; *Case 002 Closing Order*, *supra* note 17, ¶¶ 156-57.

257. Statement of the Co-Prosecutors, *supra* note 248, at 3.

258. PTC JCE Decision, *supra* note 12, ¶ 97 (holding “the [PTC] is of the view that the [Office of the Co-Prosecutors] provided to the Charged Persons sufficient details of the facts related to the allegation that the accused participated in a JCE, allowing them to fully participate in the investigation and be on sufficient notice during that stage of the proceedings”).

259. KAINING Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 502 (July 26, 2010) (holding that “[t]he Accused was repeatedly made aware of, and provided with a timely opportunity to address, the specific possibility that joint criminal enterprise, including its systemic form, might be held applicable to the charges against him”).

and in the pre-trial phase of Case 002 at the ECCC, it appears that all four accused were made abundantly aware of the fact that that the prosecution intends to rely on JCE to impute liability to them at trial.

## 2. The Existence and Nature of the Initial Agreement

### a. 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 *Tadić* 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.”<sup>260</sup> This holding has been affirmed repeatedly and the ICTY Appeals Chamber has stated that “[t]he jurisprudence on [the] issue is clear” and explicitly allows for the extemporaneous formation of the original plan.<sup>261</sup>

### b. The Criminal Nature of the Plan

According to the Appeals Chamber in *Tadić*, the original plan must “amount[ ] to or involve[ ] the commission of a crime provided for in the Statute” of the ICTY.<sup>262</sup> 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.<sup>263</sup> According to the Chamber, this conclusion is

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260. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 227 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

261. Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment, ¶ 117 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005) (citing *Tadić*, IT-94-1-A, Judgment, ¶ 227(ii)).

262. *Tadić*, IT-94-1-A, Judgment, ¶ 227.

263. Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶¶ 70–84 (Feb. 22, 2008) (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.”); see also *Tadić*, IT-94-1-A, Judgment, ¶¶ 186, 189-193, 227; *Kvočka*, IT-98/30-1-A, Judgment, ¶ 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 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 25, 2006); Rome Statute, *supra* note 21, art. 25(3)(d) (stating that in terms of JCE liability, an act

based on the fact that both “[t]he objective *and the means to achieve the objective* constitute the common design or plan.”<sup>264</sup> The holding in *Brima et al.* is simply a clarification of *Tadić*, 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.<sup>265</sup>

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.<sup>266</sup> 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.

### c. 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.<sup>267</sup> This is reflected by the nation-wide scope of the alleged common criminal plan, which embraces the regime’s drive to reshape “Cambodian society” by committing unlawful acts against “the Cambodian population” and “specific groups.”<sup>268</sup> Moreover, this approach appears to have been adopted by the Co-Investigating Judges in the Case 002 Closing Order, which appears to rely on basic and systemic JCE only.<sup>269</sup> According to this approach, one may surmise that “senior leaders of

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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).

264. *Brima*, SCSL-2004-16-A, Judgment, ¶ 76 (emphasis added).

265. *Tadić*, IT-94-1-A, Judgment, ¶ 231 (emphasis added). The language of the Statement of the Co-Prosecutors follows the language of *Tadić* and *Brima*, characterizing the common plan as one “to effect a radical change of 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 specific groups.” Statement of the Co-Prosecutors, *supra* note 248, at 3.

266. *See, e.g., Tadić*, IT-94-1-A, Judgment, ¶ 220; *accord* Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶¶ 101-102 (Int’l Crim. Trib. for the Former Yugoslavia March 22, 2006).

267. *See* Statement of the Co-Prosecutors, *supra* note 248, at 3.

268. *Id.*

269. *Case 002 Closing Order*, *supra* note 17, ¶¶ 156-220.

the DK regime” knew by virtue of their positions of authority that many of the charged crimes were envisaged as intrinsic parts of the common plan. This can certainly be said with regards to the crimes noted by the Co-Prosecutors in the Statement<sup>270</sup> and the wording of the Case 002 Closing Order.<sup>271</sup> Nevertheless, certain acts such as starvation or deprivation of basic medical provisions, which may form crimes against humanity, may have been foreseeable consequences, rather than intrinsic parts of Khmer Rouge policy.<sup>272</sup> If this happens, the Co-Prosecutors will be forced to establish liability for such crime(s) via extended JCE.

### 3. The Act in Furtherance Requirement

#### a. Policy and Actus Reus Considerations

To differentiate between JCE liability and mere “guilt by association,” the Appeals Chamber in *Tadić* held that the accused must commit an affirmative act in furtherance of the common criminal plan to be liable.<sup>273</sup> 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.”<sup>274</sup> In *Tadić*, 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,” which included “rounding up and severely beating some of the” victims.<sup>275</sup>

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270. Statement of the Co-Prosecutors, *supra* note 248, at 3. The Statement refers to acts of “murder, torture, forcible transfer, unlawful detention, forced labor and religious, political and ethnic persecution.” *Id.* at 4. These crimes appear to have been committed as part of official DK policy. *See, e.g.* DY, *supra* note 1, at 45-47; STEPHEN HEDER & BRIAN D. TITTEMORE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE 10-12 (2004).

271. *Case 002 Closing Order*, *supra* note 17, ¶¶ 156-220.

272. *See* David Marcus, *Famine Crimes in International Law*, 97 AM. J. INT’L L. 245 (2003) (discussing famine crimes under international criminal law generally); J. Solomon Bashi, *Starvation Under the Democratic Kampuchea Regime*, SEARCHING FOR THE TRUTH: THE MAGAZINE OF THE DOCUMENTATION CENTER OF CAMBODIA, Second Quarter 2008, at 49 (discussing famine in Cambodia during the DK period); J. Solomon Bashi, *Prosecuting Starvation under the ECCC Law*, SEARCHING FOR THE TRUTH: THE MAGAZINE OF THE DOCUMENTATION CENTER OF CAMBODIA, Third Quarter 2008, at 45 (discussing possible crimes that could be charged at the ECCC predicated on the DK period famine in Cambodia).

273. *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgment, ¶ 371 (Int’l Crim. Trib. for the Former Yugoslavia April 3, 2007); *see also* *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 220 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999); *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment, ¶ 309 (Nov. 2, 2001) (holding that “[t]he participation in the enterprise must be significant”).

274. *Tadić*, IT-94-1-A, Judgment, ¶ 227.

275. *Id.* ¶¶ 231-32.

### b. The Adoption of a "Significant Act" Threshold

*Tadić* sparked a flurry of criticism over the seemingly low threshold of the required act necessary to impute liability for a potentially long list of crimes committed in furtherance of a JCE.<sup>276</sup> The ICTY Appeals Chamber addressed this criticism in *Prosecutor v. Kvočka et al.*, holding that the act in furtherance must be at least "significant."<sup>277</sup> 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 be rejected."<sup>278</sup> Furthermore, although the act in furtherance must be significant, "[a] participant in a [JCE] need not physically participate in any element of any crime."<sup>279</sup>

Recent case law has done little to clarify the exact actus reus requirement for JCE liability. For example, the ICTY Appeals Chamber discussed what level of acts are required in *Brdanin* and merely noted that the accused's act in furtherance need not be a "necessary or substantial" contribution in order to qualify as "significant."<sup>280</sup> 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.<sup>281</sup> Thus, how exactly the "significant act" requirement differs from any act that in some way furthers the JCE, versus rendering substantial assistance remains unclear.

Despite the persistent ambiguity regarding the definition of the term "significant," the threshold has provided courts with a formal method of distinguishing between low level functionaries and

276. 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 79, at 150-51 (arguing that JCE liability should only attach when the accused's act in furtherance can be characterized as "substantial").

277. This requirement was first explicitly stated in *Kvočka*, IT-98-30/1-T, Judgment, ¶ 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., Brdanin*, IT-99-36-A, Judgment, ¶ 430 (citing *Kvočka*, IT-98-30/1-A, Judgment, ¶¶ 97-98).

278. *Kvočka*, IT-98-30/1-A, Judgment, ¶ 98.

279. *Id.* ¶ 99.

280. *Brdanin*, IT-99-36-A, Judgment, ¶ 430 (citing *Kvočka*, IT-98-30/1-A, Judgment, ¶ 97-98).

281. *Id.* ¶ 427 n.909 (citing, *inter alia*, *Feurstein and others*, *supra* note 183, at 7).

significantly more culpable members of a JCE who perform tasks critical to the criminal enterprise.<sup>282</sup> 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.”<sup>283</sup>

#### 4. Issues of Proof

##### a. 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.<sup>284</sup> 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 *Tadić*, it took the Trial Chamber 126 paragraphs to analyze the “Background and Preliminary Factual Findings” outlining the “Context of the Conflict.”<sup>285</sup> The Trial Chamber then spent another 297 paragraphs analyzing the personal history of Duško Tadić, the specific factual instances of the commission of charged crimes, and Tadić’s role therein.<sup>286</sup> The Appeals Chamber relied heavily on these extensive findings in overturning the Trial Chamber and finding Tadić guilty of participating in the killings of five men in Jaskići village based on extended JCE.<sup>287</sup>

##### b. Specific Contextual Factors Probative of Liability

As JCE liability is predicated on an examination of the totality of

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282. 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 2, art. 2. For a discussion of differentiating between culpable and non-culpable members of a systemic JCE, see also *Kvočka*, IT-98-30/1-T, Judgment, ¶¶ 307-11.

283. Indeed, Professor Antonio Cassese has opined that case law bears out that this characterization effectively amounts to a “substantial” threshold requirement. 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”).

284. See Prosecutor v. *Kvočka*, Case No. IT-98-30/1-A, Judgment, ¶ 101 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005).

285. Prosecutor v. *Tadić*, Case No. IT-94-1-T, Judgment, ¶¶ 53-179 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

286. *Id.* ¶¶ 180-477.

287. Prosecutor v. *Tadić*, Case No. IT-94-1-A, Judgment, ¶¶ 29-233 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

the circumstances, there is no single contextual factor that automatically establishes liability if proved.<sup>288</sup> International courts have, however, highlighted several factors that may be especially probative.

i. 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.<sup>289</sup> 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.”<sup>290</sup> 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 may speak to the accused’s subjective knowledge of the likelihood of the commission of further, foreseeable crimes.

ii. 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.”<sup>291</sup> These acts in concert may be used as evidence of the existence of the criminal plan as well as its nature.<sup>292</sup> 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.<sup>293</sup>

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288. See *Kvočka*, IT-98-30/1-A, Judgment, ¶ 101.

289. *Id.*

290. *Id.* (citing *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶ 96 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003)). Both *Kvočka* and *Krnojelac* involve analysis of proofs required for systemic JCE’s, 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.

291. *Tadić*, IT-94-1-A, Judgment, ¶ 227.

292. *See id.*

293. *See id.* ¶¶ 230-32 (finding that 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” by taking part in an armed attack that resulted in the killing of five civilians, “the only possible inference to be drawn is that the Appellant had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them”).



### iii. 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*.<sup>294</sup> 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.<sup>295</sup>

#### c. Evidentiary Contextualization in *Tadić*

In *Tadić*, the accused satisfied the act in furtherance requirement by engaging in the inhumane treatment of non-Serbs.<sup>296</sup> These acts also evidenced Tadić’s underlying membership in the JCE.<sup>297</sup> Finally, Tadić’s actions were consistent with the purpose of the JCE and thus provided some evidentiary support for the very existence and nature of the JCE itself.<sup>298</sup> The Appeals Chamber relied on the extensive factual findings of the Trial Chamber in concluding 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 by utilizing “a policy to commit inhumane acts against the non-Serb civilian population.”<sup>299</sup> This plan was distilled from numerous acts in concert by JNA members and data taken from official statements, witness testimony and internal communiqués.<sup>300</sup> Furthermore, Tadić’s personal history and participation in Serb nationalist meetings were also probative of his intent to join in this criminal plan.<sup>301</sup> When Tadić committed

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294. See, e.g., *Kvočka*, IT-98-30/1-A, Judgment, ¶¶ 100-04 (holding that various contextual factors may be considered in determining whether the accused significantly participated in the alleged JCE, and further holding that despite the fact that the accused was acquitted of charges predicated on superior responsibility, this finding did not preclude the possibility that he could be convicted via JCE liability, as the two forms of liability are distinct).

295. *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.”).

296. *Tadić*, IT-94-1-A, Judgment, ¶ 231.

297. *Id.*

298. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶¶ 127-79 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (outlining the plan to rid the Prijedor region of non-Serbs); *Tadić*, IT-94-1-A, Judgment, ¶¶ 230-32 (discussing how the accused’s actions fit within this plan).

299. *Tadić*, IT-94-1-T, Judgment, ¶ 230 (discussing the background of the conflict in the region, the JNA’s policy of ethnic cleansing, and the findings of the Trial Chamber).

300. *Id.* ¶¶ 104-26.

301. *Id.* ¶¶ 180-92; *Tadić*, IT-94-1-A, Judgment, ¶¶ 230-34.

inhumane acts against non-Serb civilians, such actions both tended to prove his membership in the JCE and Tadić's requisite act in furtherance thereof.<sup>302</sup>

d. Contextualization and Likely Proofs Before the ECCC

While the JCE alleged in ECCC Case 002 appears to be geographically wide in scope,<sup>303</sup> the burden on the prosecution to clearly identify members of the JCE is offset by the limited personal jurisdiction of the Court<sup>304</sup> and the highly centralized decision-making apparatus of the DK regime.<sup>305</sup> All four of the charged persons in Case 002 occupied senior leadership roles within the DK government.<sup>306</sup> The Central Committee and Standing Committee therein, were the two organizations that made and enforced decisions of national importance in DK and evidence strongly suggests that Ieng Sary, Nuon Chea and Khieu Samphan were members of one or both of these committees throughout the DK period.<sup>307</sup> For these three charged persons, establishing members in the Standing and/or Central Committees of DK will likely be sufficient to prove membership/participation in the common criminal plan.<sup>308</sup>

Ieng Thirith, the least senior of the four accused persons, was a "Candidate Member" of the Standing Committee as early as October 1975,<sup>309</sup> but was apparently never formally admitted to the

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302. *Tadić*, IT-94-1-A, Judgment, ¶¶ 230-34.

303. Statement of the Co-Prosecutors, *supra* note 248, at 3 (alleging a "common criminal plan constituting a systematic and unlawful denial of basic rights of the Cambodian population and the targeted persecution of specific groups"); *see also Case 002 Closing Order*, *supra* note 17, ¶¶ 156-220. (discussing a common plan spanning all of Cambodia during the DK period).

304. ECCC Law, *supra* note 2, art. 2.

305. *See, e.g., DY*, *supra* note 1, at 18-25; *see also RAMJI-NOGALES & HEINDEL*, *supra* note 4.

306. *See RAMJI-NOGALES & HEINDEL*, *supra* note 4, at 2-18. For a factual analysis of the individual responsibility of Nuon Chea, Khieu Samphan, and Ieng Sary based on common plan liability; *HEDER & TITTEMORE*, *supra* note 270, at 51-81.

307. *See HEDER & TITTEMORE*, *supra* note 270, at 51-81; *see also Case 002 Closing Order*, *supra* note 17, ¶ 159.

308. The existence of the Standing Committee is verified by internal documents dating to around the time of the January 1976 Congress. *HEDER & TITTEMORE*, *supra* note 270, at 9 n.9; *see Case 002 Closing Order*, *supra* note 17, ¶ 159 ("The persons who shared [the alleged] common purpose included, but were not limited to: members of the Standing Committee, including Nuon Chea and Ieng Sary; members of the Central Committee, including Khieu Samphan; heads of CPK ministries, including Ieng Thirith; zone and autonomous sector secretaries; and heads of the Party Centre military divisions.").

309. *E.g., Standing Committee File Number D00677*, "Minutes of October 9, 1975 Meeting," on file with the Documentation Center of Cambodia ("DC-Cam") (translation

Committee and there is no record of her attending Central or Standing Committee meetings.<sup>310</sup> Nonetheless, in her capacity as Minister of Social Affairs, Ieng Thirith was present at meetings where national policy was set and other “. . . meetings specifically related to health and social affairs where she reported to Nuon Chea and Pol Pot.”<sup>311</sup> Moreover, “[d]ocuments 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.<sup>312</sup> 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 DK’s Northwestern Zone (now Battambang province) in mid-1976 at the request of Pol Pot to investigate rumors concerning the health and general welfare of the worker peasants.<sup>313</sup> In a subsequent interview with journalist Elizabeth Becker, Ieng Thirith admitted the horrible conditions she saw during the trip, although she blamed these poor conditions on so-called “internal enemies.”<sup>314</sup> Shortly after Ieng Thirith returned from the Northwest Zone, it was brutally purged by the DK Party Center.<sup>315</sup> Such evidence is highly probative of her personal knowledge of the common criminal purpose, particularly with regards to acts of forced labor, starvation, extrajudicial executions and the deprivation of basic medical supplies and services.

The Co-Prosecutors must also prove that the accused intended to

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by DC-Cam). The record of attendance includes “Comrade Phea,” which is undisputedly an alias used by Ieng Thirith; *see also* YALE CENTER FOR INTERNATIONAL AND AREA STUDIES, GENOCIDE AND DEMOCRACY IN CAMBODIA: THE KHMER ROUGE, THE UNITED NATIONS AND THE INTERNATIONAL COMMUNITY 13 (Ben Kiernan ed., 1993) (Table 1: “The Political Chain of Command The Standing Committee of the CPK Central Committee, 1975-1979” lists Ieng Thirith as a Candidate Member.).

310. *Case 002 Closing Order*, *supra* note 17, ¶ 1207.

311. *Id.* For an overview of the Khmer Rouge command structure during the DK period generally, *see* HEDER & TITTEMORE, *supra* note 270, at 41-50.

312. *Case of IENG Thirith*, Case No. 002/19-09-2009/ECCC/OCIJ (PTC02), Decision on Appeal Against Provision Detention Order of Ieng Thirith, ¶¶ 27, 32 (July 9, 2008) [hereinafter Decision on Appeal Against Detention of Ieng Thirith]; *see Case 002 Closing Order*, *supra* note 17, ¶¶ 1201-98 (outlining Ieng Thirith’s roles and activities within the Khmer Rouge throughout the DK period).

313. Ieng Thirith herself has confirmed that this trip occurred in subsequent interviews. *See* ELIZABETH BECKER, WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION 236 (Public Affairs 1998). 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, *supra* note 312, ¶ 38.

314. BECKER, *supra* note 313, at 236.

315. *See* DAVID CHANDLER, VOICES FROM S-21: TERROR AND HISTORY IN POL POT’S SECRET PRISON 68-70 (Univ. of Cal. Press 1999) (discussing the 1976-1977 purge of the Northwest Zone).

participate in the plan. Such intent may likely be inferred from the factual record demonstrating that the four charged persons “actively and publicly supported and implemented the Party’s policies.”<sup>316</sup> Evidence of an accused’s specific role in the formulation and implementation of Khmer Rouge policy in clear violation of international law, such as Nuon Chea’s active participation in designing and overseeing CPK’s execution policies,<sup>317</sup> is strongly suggestive of this intent.

## 5. The Maximum Size and Scope of a JCE

### a. Issues of Proof as the Sole Limiting Factor

Individuals charged with JCE liability for alleged membership in vast criminal enterprises have argued that JCE is applicable only to relatively small-scale criminal plans.<sup>318</sup> 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 [the accused] willingly participated . . . even if the plan amounts to a ‘nation wide government-organized system of cruelty and injustice.’”<sup>319</sup> The ICTY also summarily rejected such an argument in *Brđanin*, wherein the Appeals Chamber upheld the pleading of a vast JCE covering large portions of the former Yugoslavia, holding that JCE liability may attach for an original criminal plan with any geographic and/or temporal scope.<sup>320</sup>

### b. The Practicality of Pleading a Narrow JCE

In practice, it is often strategically advantageous for the prosecution to frame 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,<sup>321</sup> combined with the requirement that the act(s) of the accused in furtherance of the overall JCE must be “significant.”<sup>322</sup> The Appeals Chamber noted such difficulties in *Brđanin*, stating that “seeking to include structurally remote individuals within the JCE creates difficulties in

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316. HEDER & TITTEMORE, *supra* note 270, at 63 (discussing Nuon Chea’s individual criminal responsibility according to common purpose doctrine); see *Case 002 Closing Order*, *supra* note 17, ¶¶ 862-1298 (discussing the roles of each of the accused during the DK period).

317. HEDER & TITTEMORE, *supra* note 270, at 53-57.

318. *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgment, ¶ 386 (Int. Crim. Trib. for the Former Yugoslavia Apr. 3, 2007).

319. *Id.* ¶ 368 (quoting *The Justice Case*, *supra* note 32, at 985).

320. *Brđanin*, IT-99-36-A, Judgment, ¶ 425.

321. See *id.* ¶ 430.

322. See *id.* ¶ 427.

identifying the agreed criminal object of that enterprise.”<sup>323</sup> 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 of Extended JCE

### a. Basic Requirements

The most controversial form of JCE liability is the extended category,<sup>324</sup> which holds members of a JCE responsible for crimes not specifically planned in the original agreement, provided such crimes were foreseeable.<sup>325</sup> 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 common intent of the original plan.<sup>326</sup> Second, the accused must be aware that the commission of the charged offense is natural and foreseeable at the time, and continue to support the enterprise with this knowledge.<sup>327</sup> The second mens rea requirement has been described as willing assumption of the risk or *dolus eventualis* (“advertent recklessness”).<sup>328</sup> The *Tadić* Appeals Chamber Judgment summed up the special mens rea for extended JCE as follows:

What 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

323. *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, that any 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.

324. *See, e.g.,* Ciorciari, *supra* note 20, at 31 (“The third form of JCE is the most expansive and most controversial.”); *see also* Schomburg, *supra* note 13, at 1.

325. *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 228 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999); Ciorciari, *supra* note 20, at 31; Schomburg, *supra* note 13, at 6.

326. This underlying intent satisfies the mens rea requirement for basic JCE and is the first step of the analysis in extended JCE. *E.g.,* Prosecutor v. Kvočka, Case No. IT-98-30-1-A, Judgment, ¶ 90 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005) (“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.”).

327. Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgment, ¶ 386 (Int. Crim. Trib. for the Former Yugoslavia Apr. 3, 2007). Professor 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 283, at 119-20.

328. *Tadić*, IT-94-1-A, Judgment, ¶ 220.

nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required.<sup>329</sup>

#### b. Application in Case Law

Although the concept 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.<sup>330</sup> For example, in *Prosecutor v. Stakić*, the ICTY Trial Chamber found that the accused "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."<sup>331</sup> By participating in the decision to set up three prison camps, Stakić 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."<sup>332</sup> The Appeals Chamber upheld the Trial Chamber's

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329. *Id.* The use of the term *dolus eventualis* was upheld by the ICTY Appeals Chamber in *Prosecutor v. Stakić*, wherein 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. Stakić*, Case No. IT-97-24-A, Judgment, ¶ 101 (Int. Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

330. *Stakić*, IT-97-24-A, Judgment, ¶ 65 (citing *Tadić*, IT-94-1-A, Judgment, ¶ 220). This subjective-objective hybrid however, is considered by many commentators as practically creating a purely objective inquiry. See, for example, Cassese, *supra* note 283, 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.

331. *Stakić*, IT-97-24-A, Judgment, ¶ 93.

332. *Id.* ¶ 230.

convictions for extermination and murder pursuant to extended JCE liability.<sup>333</sup>

## 7. Third Party Perpetrators

### a. The Post-*Tadić* Debate and Holding of *Brđanin*

One of the biggest questions left unanswered by *Tadić* 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 *Brđanin*, 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.<sup>334</sup> Relying primarily on the post-WWII *RuSHA* and *Justice* cases for support, the Appeals Chamber in *Brđanin* held that in basic JCE situations

[w]hat 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 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.<sup>335</sup>

The Chamber then turned to extended JCE liability, finding that imputation requires proof that “it was foreseeable that [the charged crime(s)] might 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.”<sup>336</sup>

### b. 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

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333. *Id.* ¶ 98.

334. Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgment, ¶¶ 410-11, 430-31 (Int. Crim. Trib. for the Former Yugoslavia Apr. 3, 2007). In *Brđanin*, 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. *Id.*

335. *Id.* ¶ 410.

336. *Id.* ¶ 411.

accordance with the common plan.”<sup>337</sup> 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.<sup>338</sup> This link must “be assessed on a case-by-case basis.”<sup>339</sup>

### c. Residual Debate and Declaration of Judge Van Den Wyngaert

If viewed too expansively, the holding of the Appeals Chamber in *Brdanin*, creates the possibility of JCE liability lapsing into the forbidden realm of guilt by association. In fact, Professor Antonio Cassese, who is a champion of JCE liability generally, praised the Judgment of the Trial Chamber before it was overturned.<sup>340</sup> The Appeals Chamber however, disagreed, taking “the view that [JCE] as it stands provides sufficient safeguards against overreaching or lapsing into guilt by association.”<sup>341</sup> As Judge Van Den Wyngaert noted 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*.”<sup>342</sup> Judge Van Den Wyngaert further stated 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

337. *Id.* ¶ 413.

338. *See Id.*

339. *Id.*

340. See Cassese, *supra* note 283, at 126, stating that:

To extend criminal liability to instances 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. *Brdanin*, IT-99-36-A, Judgment, ¶ 426-32. Once these elements are established the author of the actus reus of the charged crime becomes inconsequential. *See id.* 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. *See id.*

341. *Brdanin*, IT-99-36-A, Judgment, ¶ 426.

342. *Id.* Declaration of Judge Van Den Wyngaert, ¶ 4.



perpetrators.<sup>343</sup> While Van Den Wyngaert believed the existing checks on JCE liability are sufficient, she also warned that limiting liability to acts committed by members of the JCE would insulate top officials from liability where at least one intermediary is involved in implementation.<sup>344</sup>

#### d. The Partial Dissent of Judge Shahabuddeen

The sole partial dissent in *Brđanin* was written by Judge Shahabuddeen, who favored adhering to the Trial Chamber's interpretation of JCE requiring that the physical perpetrator be part of the JCE.<sup>345</sup> Judge Shahabuddeen reasoned 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.<sup>346</sup> Judge Shahabuddeen likened the original agreement forming a JCE to a contract between several individuals who agree to a certain course of conduct.<sup>347</sup> Shahabuddeen also disagreed 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

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

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

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.

*Id.*

345. *Id.* Judgment, Partly Dissenting Opinion of Judge 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.")

346. *Id.* ¶ 3.

347. *Id.* ¶ 5.

perpetrated.”<sup>348</sup> 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.<sup>349</sup>

#### e. 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 argued 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.<sup>350</sup> 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.<sup>351</sup>

#### f. Critique of *Brđanin*: WWII Jurisprudential Interpretation

The Appeals Chamber in *Brđanin* found that both the *Justice* case and the *RuSHA* case<sup>352</sup> supported the prosecution’s assertion that the post-WWII jurisprudence

- (1) recognizes the imposition of liability upon an accused for his

348. *Id.* ¶ 16.

349. *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.” *Id.* Judgment, Declaration of Judge Van Den Wyngaert, ¶ 6.

350. *Id.* Judgment, Separate Opinion of Judge Meron, ¶ 6.

351. *Id.*

352. *United States v. Ulrich Greifelt*, (Case 8), Trial of War Criminals Before the Nuremberg Military Tribunals 599-601 [hereinafter *RuSHA* Judgment]. The accused were “leading” officials in the SS Race and Resettlement Main Office or from 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.” *Id.*

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.<sup>353</sup>

The Chamber noted that none of the accused in the two cases perpetrated “the *actus reus* of the [physical] crimes with which they were convicted.”<sup>354</sup> Rather, the physical perpetrators were the executioners in the *Justice* case and the medical examiners in the *RuSHA* case.<sup>355</sup> In spite of this fact, the NMT did not address the mental state of the physical perpetrators with regard to their awareness of the broader common plan their conduct was furthering, or the specifics of the relationship between them and the accused.<sup>356</sup>

However, the *Brđanin* Appeals Chamber’s reliance on *RuSHA* is questionable because the *RuSHA* judgment does not clearly specify the extent to which the NMT relied on common plan liability in convicting the accused, particularly Hofmann and Hildebrandt,<sup>357</sup> for their roles in furthering the execution of the “Germanisation” plan.<sup>358</sup> 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.”<sup>359</sup> 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.<sup>360</sup>

Furthermore, the Appeals Chamber in *Brđanin* bases its common plan analysis on the fact that the NMT failed to discuss

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353. *Brđanin*, IT-99-36-A, Judgment, ¶ 394.

354. *Id.* ¶ 398.

355. *Id.* ¶ 403.

356. *See id.* ¶¶ 398, 400-01.

357. 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. *Id.* ¶ 399.

358. 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.” *Id.* 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* Judgment, *supra* note 352, at 609-10.

359. *RuSHA* Judgment, *supra* note 352, at 152-54.

360. *See id.*

“whether an agreement existed between Hoffman, Hildebrandt, and any of the examiners” in addressing their criminal responsibility for RuSHA’s kidnapping and abortion programs.<sup>361</sup> Other language in the *RuSHA* Judgment suggests however, that the criminal responsibility of the accused was more likely the result of ordering the crimes or failing to exercise superior responsibility.<sup>362</sup> For example, the examiners involved in the kidnapping program “were working directly at different intervals under the control and supervision of Hofmann and Hildebrandt respectively, who had knowledge of their activities.”<sup>363</sup> Hofmann and Hildebrandt also “issued directives detailing how [the abortion program] was to be put into effect.”<sup>364</sup>

*g. Brđanin and the ECCC*

While the attribution of crimes physically committed by non-JCE members has sparked debate amongst legal scholars,<sup>365</sup> its basic foundation is now firmly established. The exigencies and sheer scale of most international crimes often create situations where the most culpable parties are also the furthest removed from the physical ramifications of their criminal machinations. Furthermore, top officials are still protected by 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 *Brđanin*, as the JCE alleged appears to be vast in scope but small in membership.<sup>366</sup> As a result, each

361. *Brđanin*, IT-99-36-A, Judgment, ¶¶ 400-01.

362. 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:

It 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* Judgment, *supra* note 352, at 153.

363. *Id.* at 106.

364. *Brđanin*, IT-99-36-A, Judgment, ¶ 401 (citing *RuSHA* Judgment, *supra* note 352, at 110-11).

365. See, e.g., Cliff Farhang, *Point of No Return: Joint Criminal Enterprise in Brđanin*, 23 LEIDEN J. INT’L L. 137, 140-43 (2010) (arguing that the form of JCE applied in the *Brđanin* Appeal Judgment encompasses not only “commission” but also “complicity” liability).

366. Statement of the Co-Prosecutors, *supra* note 248, at 3 (alleging a nationwide criminal plan involving the “systematic and unlawful denial of basic rights”).

member is likely to be both highly culpable due to their senior leadership position, yet simultaneously far-removed from the physical perpetration of crimes committed at their behest during the DK period.<sup>367</sup> Furthermore, if the use of third party perpetrators were allowed to insulate senior officials from criminal accountability, it would frustrate the very foundation of international criminal law, which is 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.<sup>368</sup> This result appears fundamentally unjust and fails to 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 *Brđanin* 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.<sup>369</sup> Although decided before the Appeals Chamber’s Judgment in *Brđanin*, the case of *Prosecutor v. Krajišnik* provides some guidance regarding this fact-intensive inquiry. In *Krajišnik*, 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.”<sup>370</sup> 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

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Furthermore, only a small number of elite Khmer Rouge officials, comprised primarily of the members of the Central and Standing Committees, exercised national authority during the DK period. DY, *supra* note 1, at 18-25; *see also* RAMJI-NOGALES & HEINDEL, *supra* note 4, at 1.

367. Indeed, the Khmer Rouge leaders of DK consciously removed themselves from the general population, operating for the most part out of Cambodia’s capital city, Phnom Penh, which had been almost completely evacuated immediately after the Khmer Rouge took power in April, 1975. *See, e.g.*, DY, *supra* note 1, at 13-22.

368. For example, in the ICTY case of *Prosecutor v. Krstić*, the Appeals Chamber upheld the Trial Chamber’s finding that genocide had been committed in Srebrenica, but found that the accused had only aided and abetted the commission of genocide, perpetrated by then-unindicted members of a genocidal JCE to which the Krstić was not a party. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 144 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (finding that the accused was not part of the genocide JCE in Srebrenica and acquitting him of “committing” genocide). The Appeals Chamber judgment resulted in a backlash of anger from victims.

369. *Brđanin*, IT-99-36-A, Judgment, ¶ 413.

370. *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, ¶ 1082 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006).

crimes.”<sup>371</sup> 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.”<sup>372</sup> Thus, the Trial Chamber’s Judgment in *Krajišnik* provides guidance to courts attempting to apply the *Brđanin* reasoning to determine when acts of a third party physical perpetrator are within the scope of the initial agreement.

## 9. Specific Intent Crimes: Mens Rea Issues

### a. 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 genocide and persecution as a crime against humanity, and the mens rea requirements of JCE. The compatibility of the mens rea requirements of JCE versus 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.<sup>373</sup> 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

371. *Id.* ¶ 1081.

372. *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 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).

373. 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. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 227 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

“act with knowledge” rather than “intent” mens rea standard, systemic JCE becomes somewhat problematic when applied to specific intent crimes. The ICTY Appeals Chamber in its Judgment in *Kvočka* 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 be considered co-perpetrators rather than mere aiders and abettors.<sup>374</sup> Therefore, according to *Kvočka et al.*, the specific intent of the accused must always be proven for specific intent crime convictions via basic or systemic JCE liability.

#### b. 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.<sup>375</sup> 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.<sup>376</sup> The second group, consisting of various commentators and scholars, espouses the view that at least in regards to extended JCE, liability should not attach for specific intent crimes.<sup>377</sup>

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374. *Kvočka*, Case No. IT-98-30/1-A, Judgment, ¶ 110 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005) (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 *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶¶ 111 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003) (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).

375. See Cassese, *supra* note 283, at 121-22 (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).

376. 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. Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶¶ 2-3 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 19, 2004).

377. See, e.g., Cassese, *supra* note 283, at 121 (“Resorting to [extended JCE] would be intrinsically ill-founded when the crime committed by the ‘primary offender’

Despite the controversy, international courts have consistently held that liability may impute for specific intent crimes through all forms of JCE.<sup>378</sup> However, application of JCE to specific intent crimes has yet to result in a 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.<sup>379</sup> The ICTY Appeals Chamber has stated that JCE is solely a mechanism for imputing liability and is completely divorced from the substantive crime.<sup>380</sup> Therefore, liability for any crime may theoretically attach via JCE without an additional showing of the accused's subjective *dolus specialis*.<sup>381</sup> In making this determination, in a Decision on Appeal in *Brđanin*, 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."<sup>382</sup> The Chamber then opined:

The 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].<sup>383</sup>

The *Brđanin* decision thus clearly holds that the inquiry into whether the elements of JCE liability are met is completely divorced

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requires a special or specific intent (*dolus specialis*)."); accord Danner & Martinez, *supra* note 79, at 151.

378. *Rwamakuba* JCE Genocide Appeals Decision, *supra* note 96, ¶ 29-31 (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. Karemera, Case No. ICTR-98-44-T, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, ¶ 5 (May 18, 2006) (stating that it is "well established that [JCE] can apply to the crime of genocide") (citing *Rwamakuba* JCE Genocide Appeals Decision, *supra* note 96); Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶¶ 63-69 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 134, 144 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

379. See, e.g., *Krstić*, IT-98-33-A, Judgment, ¶ 137-39. *Krstić* was not a "supporter" of the second genocidal JCE according to the Appeals Chamber however, the Chamber appears to reason the genocide portion of the judgment solely in terms of basic JCE, as genocide was committed pursuant to a second, separate JCE. *Id.*

380. See *Brđanin*, IT-99-36-A, Decision on Interlocutory Appeal, ¶ 9.

381. *Id.*

382. *Id.* ¶ 10.

383. *Id.* ¶ 9 (emphasis added).



(aside from issues of foreseeability in extended JCE) from the inquiry into the commission of the substantive crime.<sup>384</sup> The *Brđanin* 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.<sup>385</sup>

### c. 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.<sup>386</sup> The ICTY Appeals Chamber

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384. *Id.*

385. *Rwamakuba* JCE Genocide Appeals Decision, *supra* note 96, ¶¶ 6 n.12, 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 to try the [accused] on a charge of genocide through the mode of liability of joint criminal enterprise”) (citing *Brđanin*, IT-99-36-A, Decision on Interlocutory Appeal, ¶¶ 5-10).

386. For example, the Trial Chamber acquitted Brđanin of genocide via JCE liability. *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, ¶ 1152 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004). Brđanin 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 Brđanin 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.* ¶ 263. 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. *Brđanin*, IT-99-36-A, Judgment, ¶ 436, 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 (Sept. 20, 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 Milošević died before he could go to trial on charges of, *inter alia*, genocide via extended JCE. Before Milošević's death, however, the Trial Chamber dismissed a challenge to the validity of the extended JCE genocide charge, citing the *Brđanin* 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. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 291 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004).

reversed a conviction in *Prosecutor v. Krstić* that had inferred the accused's genocidal intent from his role in an underlying JCE.<sup>387</sup> 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.<sup>388</sup> However, the Chamber was unable to pinpoint when this evolution occurred.<sup>389</sup> In reversing the Trial Chamber, the Appeals Chamber found that "all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of *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."<sup>390</sup>

The Appeals Chamber found that while some members of the Bosnian Serb Army's Main Staff possessed genocidal intent and Krstić was aware of such intent, "[t]his knowledge on his part alone cannot support an inference of genocidal intent."<sup>391</sup> 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, separate genocidal JCE.<sup>392</sup> The prosecution chose to allege a second, autonomous genocidal JCE in *Krstić*, rather than alleging that genocide was the foreseeable consequence of the original JCE, which Krstić was found to have been a member of, leaving the state of the law unclear.<sup>393</sup> However, the Chamber did state that because "[g]enocide is one of the worst crimes known to humankind . . . [c]onvictions for genocide can be entered only where [specific] intent has been unequivocally established."<sup>394</sup>

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

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387. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

388. *Id.* ¶¶ 19-21.

389. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 573 (Aug. 2, 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").

390. *Krstić*, IT-98-33-A, Judgment, ¶ 134 (emphasis added).

391. *Id.*

392. *Id.* ¶ 144 ("All the evidence can establish is that he knew that those murders were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them. In these circumstances the criminal responsibility of Radislav Krstić is that of an aider and abettor to the murders, extermination and persecution, and not of a principal co-perpetrator.").

393. *See id.* ¶ 134.

394. *Id.*

than all those charged with the crime via extended JCE.<sup>395</sup> These JCE member(s) must only be shown to possess the common intent and *dolus eventualis* for liability to attach.<sup>396</sup>

#### 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 reflecting the culpability of top officials for mass atrocities. While JCE has also been criticized as a license for prosecutorial overreaching,<sup>397</sup> the doctrine has numerous safeguards that prevent it from creating mere organizational liability. JCE liability is flexible, but when extended to mid and low-level officials of criminal organizations, it becomes increasingly difficult to prove.

When applied to ECCC Case 002, the usefulness of JCE becomes apparent. The doctrine could establish individual responsibility for former senior officials of the DK regime responsible for bringing about the unspeakable crimes committed between 1975 and 1979 without 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. Moreover, in some cases, JCE may be the *only* mode of liability that can hold the charged persons in ECCC Case 002 directly (rather than vicariously<sup>398</sup>) liable for some or all of these

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395. See Prosecutor v. Brđanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶¶ 5-10 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 19, 2004).

396. 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 members 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.

397. See, e.g., Schomburg, *supra* note 13, at 1-2.

398. For example, via the doctrine of superior responsibility, a form of derivative liability predicated on crimes committed by individuals under the effective command/control of the accused. For an overview of the superior responsibility

crimes. As such, the ECCC's final determination on the general applicability and form of JCE under its jurisdiction is amongst the most critical decisions the Court will make, possibly affecting fundamental issues of guilt or innocence.

#### IV. *NULLUM CRIMEN SINE LEGE* AND COMMON PLAN/JCE LIABILITY

##### A. *Existing JCE-Specific Nullum Crimen Jurisprudence*

The defense of *nullum crimen* has been raised repeatedly before international criminal courts and tribunals.<sup>399</sup> International fair trial rights require that a challenged law satisfy three elements in order to survive a *nullum crimen* challenge: (1) existence; (2) specificity creating foreseeability; and (3) accessibility of the law, all at the time the accused acted.<sup>400</sup> *Nullum crimen* challenges to the application of JCE have thus turned on when JCE: (1) 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.<sup>401</sup>

The ICTY addressed the issue of *nullum crimen* specifically related to JCE in an Decision on Appeal in *Prosecutor v. Milutinović et al.*<sup>402</sup> In *Milutinović et al.*, the Appeals Chamber held that the use of JCE to impute liability to the accused Odžanić for his participation in a criminal enterprise in 1999 did not violate the principle of *nullum crimen*.<sup>403</sup> In support of its holding, the Chamber found that: (1) JCE existed as customary international law prior to 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.<sup>404</sup>

##### 1. Existence of JCE at the Relevant Time

The Appeals Chamber in *Milutinović et al.* did not go into depth in its analysis of whether JCE existed as a mode of liability under

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doctrine, see Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573 (1999).

399. *E.g.*, *Milutinović* JCE Decision, *supra* note 32, ¶¶ 25-51 (dismissing *nullum crimen* challenge to JCE); *Norman*, *supra* note 36 (dismissing *nullum crimen* challenge to the criminality of the recruitment of children into the military as of November 1996).

400. *E.g.*, *Streletz v. Germany*, 33 Eur. Ct. H.R. 31 at ¶ 91 (2001); *Milutinović* JCE Decision, *supra* note 32, ¶ 21.

401. *See, e.g.*, *Milutinović* JCE Decision, *supra* note 32, ¶¶ 21-30.

402. *Id.*

403. *See id.* ¶¶ 43-45.

404. *Id.*

international law as of 1999. This is because the Judgment on Appeal in *Tadić* firmly established that JCE existed under customary international law as of at least 1992.<sup>405</sup> In *Stakić*, the Appeals Chamber addressed a narrower *nullum crimen* challenge to the use of the *dolus eventualis* mens rea standard under extended JCE.<sup>406</sup> 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,” and 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*.”<sup>407</sup> Furthermore, in *Milutinović et al.*, the Appeals Chamber also stated that JCE and common plan liability are two different names for the same doctrine, suggesting that JCE existed well before 1992.<sup>408</sup>

## 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*.<sup>409</sup> The Chamber in *Milutinović 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.<sup>410</sup>

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405. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 227-28 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (summarizing the elements of common plan/JCE, modes of liability that are available under the jurisdiction of the ICTY, which began in 1992); accord *Milutinović* JCE Decision, *supra* note 32, ¶ 30 (“In sum, the Defence 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 *Tadić* 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.”).

406. Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶¶ 99-103 (Int. Crim. Trib. for the Former Yugoslavia Mar. 22, 2006). (concluding at paragraph 103 “that, in the instant case, the use of *dolus eventualis* within the context of the third category of joint criminal enterprise does not violate the principles of *nullum crimen sine lege*”).

407. *Id.* ¶¶ 101, 103.

408. *Milutinović* JCE Decision, *supra* note 32, ¶ 36; accord *Stakić*, IT-97-24-A, Judgment, ¶ 67. 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 common enterprise, a criminal enterprise, and a joint criminal enterprise.” Prosecutor v. Brdanin & Talić, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, ¶ 24 (Int. Crim. Trib. for the Former Yugoslavia June 26, 2001).

409. See, e.g., *Milutinović* JCE Decision, *supra* note 32, ¶ 43.

410. *Id.*

### a. Parallel Modes of Liability in Domestic Law

The Appeals Chamber in *Milutinović et al.* stated that domestic legal parallels to JCE, although not necessarily conclusive of foreseeability or accessibility, are highly probative.<sup>411</sup> 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.”<sup>412</sup> Of particular importance is whether the domestic jurisdiction of the accused provides for liability similar to JCE.<sup>413</sup> In *Milutinović et al.* the Chamber found that Article 26 of the Criminal Code of the Federal Republic of Yugoslavia (“Criminal Code”) “in force at the [relevant] time did provide for criminal liability for the foreseeable acts of others in terms strikingly similar to those used to define [JCE].”<sup>414</sup> This segment of the Criminal Code and 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.<sup>415</sup>

### b. State Practice and Other Sources of International Law

As the Chamber recognized in *Milutinović et al.*, “rules of customary law may provide sufficient guidance as to . . . standard[s,] the violation of which could entail criminal liability.”<sup>416</sup> Thus, if there is sufficient evidence of a rule of customary international law

411. *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.”).

412. *Id.* ¶ 43.

413. *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 the offence committed in the way charged in the indictment was prohibited and punishable”).

414. *Id.* The portion of the Code quoted by the Chamber states:

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 those acts.

*Id.* (internal citations omitted).

415. *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 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.” *Id.*

416. *Id.* (citing *X Ltd. and Y v. United Kingdom*, App. No. 8710/79, 28 Eur. Comm’n H.R. Dec. & Rep. 77, 80-81(1982)).

available to the accused, there need not be any parallel domestic legislation. For example, in *Milutinović 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 *Tadić*, 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.<sup>417</sup>

### 3. The Inherent Culpability of the Acts of the Accused

Due to the “lack of any written norms or standards,” international criminal courts and 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.”<sup>418</sup> As stated in *Milutinović et al.*:

[Although] the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.<sup>419</sup>

While JCE is simply a mode of liability for imputing separate, substantive crimes, the Appeals Chamber in *Tadić* noted that liability via participation in a JCE does nothing to lessen or even modify the moral culpability of the accused.<sup>420</sup> Therefore, although JCE is not an offense in itself, actively participating in a criminal enterprise associated with the commission of international crimes may be inherently culpable enough to put an accused on notice of the illegality of his actions at the relevant time.<sup>421</sup>

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

As discussed *supra*, JCE liability has already been strenuously

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417. *Id.* (citing Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 195-225 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999)).

418. *Milutinović JCE Decision*, *supra* note 322, ¶ 42.

419. *Id.*

420. *Tadić*, IT-94-1-A, Judgment, ¶ 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”).

421. The Appeals Chamber took this tack in *Milutinović* discussing the substantive crimes the accused was charged with as evidence that the accused must have known that he was committing a crime when he acted. *Milutinović JCE Decision*, *supra* note 32, ¶¶ 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).

challenged by the defense teams at the ECCC and triggered controversial decisions by the Co-Investigation Judges, PTC, and Trial Chamber.<sup>422</sup> JCE is an especially contentious issue at the ECCC because of the Court's unique temporal jurisdiction, which covers a period of time well before that of any other modern international criminal court.<sup>423</sup> This temporal jurisdiction has made *nullum crimen* challenges especially provocative in regards to the availability and form of common plan/JCE liability.

### 1. Existence of Common Plan/JCE Liability

While JCE as a mode of liability under international law is now well-established,<sup>424</sup> no modern jurisprudence has declared the moment at which 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 *Tadić* formulation of JCE reflects post-WWII jurisprudence.

If the ECCC Supreme Court Chamber accepts the central holdings of the *Tadić* line of JCE jurisprudence and its interpretation of post-WWII jurisprudence, it follows that the Chamber will likely hold that JCE existed in a form substantially similar to its modern incarnation, as virtually all of the legal precedent cited by the ICTY Appeals Chamber in *Tadić* existed well before 1975.<sup>425</sup> The only legal sources cited in *Tadić* that postdate 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*.<sup>426</sup>

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

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422. See *supra* pp. 194-98.

423. ECCC Law, *supra* note 2, art. 2.

424. See, e.g., Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 62 (Int. Crim. Trib. for the Former Yugoslavia Mar. 22, 2006) (quoting *Tadić*, IT-94-1-A, Judgment, ¶ 220) (noting that "[JCE] is a mode of liability which is 'firmly established in customary international law'").

425. *Tadić*, IT-94-1-A, Judgment, ¶¶ 172-73.

426. *Id.* ¶¶ 224-225 (citing domestic penal codes with modes of liability similar to JCE, while noting that "[i]t should be emphasised 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 pages 196-98, sources of law promulgated after the relevant time may still be probative as codifications or restatements of previously existing custom.



sometime during or shortly after the immediate post-WWII era.<sup>427</sup> Therefore, if the ECCC Supreme Court Chamber follows the lead of the PTC JCE Decision and holds that JCE existed in some form significantly distinct from its modern version, the Chamber will be implicitly disagreeing with the ICTY, ICTR and SCSL's reading of the post-WWII jurisprudence.<sup>428</sup>

## 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.

### a. The 1956 Cambodian Penal Code & Other Domestic Jurisdictions

Many domestic criminal codes provided indirect support for JCE as a legal concept by 1975.<sup>429</sup> 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").<sup>430</sup> The Code is based on French criminal law<sup>431</sup> and employs three separate terms when outlining group liability: (1) co-action; (2) complicity; and (3) co-authorship.<sup>432</sup> The Code is rather opaque

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427. *Milutinović* JCE Decision, *supra* note 322, ¶ 36.

428. It is worthy of note that, according to the Statement of the Co-Prosecutors, 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 248, 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.*, Brđanin & Talić, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, ¶ 24 (Int. Crim. Trib. for the Former Yugoslavia April 3, 2007). 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. *See, e.g., id.*

429. For an overview of domestic legislation generally supporting the concepts imbedded in JCE, *see* Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 224 (Int. Crim. Trib. for the Former Yugoslavia July 15, 1999).

430. ECCC Law, *supra* note 2, arts. 2-3.

431. The Code was a vestige of Cambodia's colonial period under French rule. *See* KAING Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 510 (July 26, 2010) ("[T]he 1956 Penal Code [of Cambodia] was modelled on the French criminal code.").

432. CODE PÉNAL ET LOIS PÉNALES, Royaume Du Cambodge, Ministère de la Justice, Livre II, arts. 82 (1956) (hard copy on file at DC-Cam) [hereinafter 1956 Code] ("la participation direct constitue la coaction [co-action], la participation indirecte constitue la complicité [complicity]"); *id.* art. 145 (stating that there exists a "pluralité d'auteurs [plurality of authors]" whenever it is established that two or more persons

however, regarding how to differentiate between these interrelated concepts.<sup>433</sup>

i. General Liability and Article 82 – Co-Action and Complicity

Chapter two of the Code describes the general characteristics of persons punishable for crimes.<sup>434</sup> Article 82 divides criminal violations involving more than one perpetrator into two categories: “co-action” and “complicity.”<sup>435</sup> To qualify as a co-actor, an accused must voluntarily and directly participate in the commission of a crime.<sup>436</sup> Conversely, voluntary but indirect participation in the commission of a crime creates complicity rather than co-action.<sup>437</sup>

ii. 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.<sup>438</sup> When the actions of a second person amount only to aid or assistance, such person is considered an accomplice rather than a co-author.<sup>439</sup>

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“*se concertèrent* [confer]” in order to commit an infraction) (Translated from the French and Khmer with the assistance of DC-Cam. All transliteration based on the French text.).

433. 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. *Id.* art. 139. 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.*

434. *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. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.* art. 145. The original text in French uses the term “*se concerter*” which translates as both 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.

439. *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

### iii. Article 82 - Complicity

The Code provides a more detailed definition of complicity liability, helping to clarify the differences between the three concepts and 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;<sup>440</sup> (2) instruction;<sup>441</sup> (3) provision of means;<sup>442</sup> or (4) aiding or assisting<sup>443</sup> the principal to commit the substantive crime.

### iv. 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.”<sup>444</sup> Nonetheless, the Code does clearly provide for liability predicated on collective criminality and thus provides some form of general notice of the basic concepts upon which JCE is predicated.

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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.

440. *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. *Id.*

441. *Id.* art. 85. “Instruction” consists of the accused providing information to the principal perpetrator with a view to bringing 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.

442. *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. *Id.*

443. *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.

444. *See supra* Part IV.B.2.a.i-ii.

### b. International Jurisprudence

In addition to domestic law, the post-WWII jurisprudence also served the accused persons with some general notice that collective criminality may trigger individual accountability.<sup>445</sup> Furthermore, as discussed *supra* there exists a myriad of sources of international law that now generally provide for such liability.

### c. The Inherent Culpability of the Acts of the Accused

Finally, the serious nature of the crimes under the ECCC's jurisdiction will likely preclude any *nullum crimen* defense predicated on ignorance of the law. According to the ECCC Co-Investigating Judges, 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 order . . ." <sup>446</sup> 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."<sup>447</sup> This averment is supported by the findings of the Co-Investigating Judges in the Case 002 Closing Order.<sup>448</sup> If these documents accurately depict the underlying actions of 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

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445. For an overview of the post-WWII jurisprudence relied upon by the ICTY Appeals Chamber in *Tadić*, see *supra* Part II. 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, Ieng Thirith and Khieu Samphan pursued advanced degrees in France prior to 1975. See RAMJI-NOGALES & HEINDEL, *supra* note 4, at 6-14.

446. Case of IENG Thirith alias "Phea," Case File No. 002/14-08-2006, Provisional Detention Order of Ieng Thirith, Office of the ECCC Co-Investigating Judges, ¶ 6 (Oct. 27, 2007).

447. Statement of the Co-Prosecutors, *supra* note 248, at 3-4.

448. Case 002 Closing Order, *supra* note 17, ¶¶ 156-220 (outlining the factual findings supporting JCE-based allegations against all four accused in ECCC case 002).

the judges of the ECCC's Supreme Court Chamber 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 Supreme Court Chamber could follow the lead of the PTC and modify or refine the doctrine to some degree, premised on the argument that common plan liability evolved into modern JCE sometime after 1979. However, given the dearth of relevant case law between the *Eichmann* judgment and the judgment by the Appeals Chamber in *Tadić*, such a holding would be fairly arbitrary.

Despite the considerable controversy surrounding the issue, any reasonable form of common plan/JCE liability the ECCC adopts is likely to survive a *nullum crimen* challenge. 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 charged persons are alleged to have participated in, combine to render it difficult to believe that the charged persons genuinely believed their actions during the DK period were legal at the 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 form of common plan/JCE liability would implicitly state that in April of 1975, the charged persons could have reasonably believed that participating in the *formulation and implementation* of a plan to radically alter Cambodian society by committing numerous, egregious crimes against Cambodian citizens was not criminal. Respect for the substantive justice foundation on which the defense of *nullum crimen* is built commands that such a conclusion be rejected.

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