TALLINN UNIVERSITY OF TECHNOLOGY
Faculty of Social Sciences
Tallinn Law School

Sebastian Suarez

Joint Criminal Enterprise and its Framing in International Criminal Law

Master Thesis

Supervisor: Aleksandr Popov, LL.B, LL.M

Tallinn 2016

I hereby declare that I am the sole author
of this Master Thesis and it has
not been presented to any other
university of examination.

Sebastian Suarez
“ ..... “ 2016

The Master Thesis meets the established requirements

Supervisor Aleksandr Popov
“ ..... “ 2016

Accepted for examination “ ..... “ 2016

Board of Examiners of Law Master’s Theses

……

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ECCC = Extraordinary Chambers in the Courts of Cambodia

JCE = Joint Criminal Enterprise

ICC = International Criminal Law

ICTR = International Criminal Tribunal for Rwanda

ICTY = International Criminal Tribunal for the Former Yugoslavia

NMT = Nuremberg Military Tribunal

POW = Prisoners of War

SCSL = Special Court for Sierra Leone

U.N. = United Nations.

U.S. = United States

WW = World War

INTRODUCTION

I. Setting the stage

I.II. International Criminal Law

Joint criminal enterprise as a doctrine of criminal liability has the peculiarity of being one of the three modes of individual liability applied to cases of defendants indicted with the commitment of core international crimes. Thus, this first line allows us to place correctly the doctrine of joint criminal enterprise, also known as JCE, within the broader framework of international criminal law,[1] a branch of specialization inside the parent root that is public international law.

The framing of this doctrine of liability within international criminal law is necessary and useful to understand the broader intricacy commonly associated with this field. Indeed, it is helpful to remember that international criminal law was influenced, evidently more than any other branch of public international law, by the domestic criminal systems, that is, the internal criminal law of the States that are part of the international regime.

And here we face the first challenge, often mentioned when discussing issues within the reach of the field. While procedures, defenses, and liability theories have been influenced, or straight up taken from domestic criminal systems, so much so that scholars like Allison Marston Danner and Jenny S. Martinez have expressed without a doubt that "International criminal law constitutes an extension of the application of domestic criminal law principles onto the international forum",[2] the acts that are most frequently considered to constitute crimes under international criminal law have sufficiently different features from those crimes under domestic systems. Indeed, as some scholars have aptly noted, international crimes are characterized by features of systemic, collectiveness and large-scale expressions, sometimes with the add-on of a political dimension.[3]

Thus, it soon becomes evident that those principles, theories of crime qualification, elements, and doctrines of individual criminal liability that are found in domestic criminal systems of liberal tradition, although still playing an important role, may prove deficient.[4] Indeed, in words of Allison Marston Danner, and Jenny S. Martinez domestic criminal system

---

[1] Jayangakule, K. Is the Doctrine of Joint Criminal Enterprise a Legitimate mode of Individual Criminal Liability? - A Study of the Khmer Rouge Trials. Master Thesis. Lund University – Faculty of Law. Sweden. Spring 2010. p.4.

[2] Danner, A., Martinez, J. Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law. California Law Review, 93 (1), 2005. p.86.

[3] Uhlířová, K. The Concept of a Joint Criminal Enterprise - International Criminal Tribunal for the Former Yugoslavia and Special War Crimes Chamber of the State Court of Bosnia and Herzegovina, Faculty of Law. Masaryk University Brno. May, 2012. p.14.

[4] Danner, A., Martinez, J. (2005), supra note 2. p.85.

"links punishment to individual wrongdoing and eschews findings of liability based simply upon association with other wrongdoers."[5] But how to reconcile with this local principle of personal responsibility when facing, for example, the prosecution of acts considered to be mass atrocities, which are frequently executed by low-level participants, but planned, and ordered, by high-ranking state officials.[6] In this situation of give-and-take, international criminal law faced the need to adapt or die, leading to the development of a series of special tools to appropriately address the issue of collective criminality.

Here, however, we are faced with one of the biggest, most controversial issues yet to be solved by scholars and practitioners' alike. Because, even though in practice there are departures from the principle of individual liability,[7] the theory behind the demarcation, the limit, and the content of those modes of criminal liability in cases of collective wrongdoings, remains, in words of some authors, one of "its most culpable neglect."[8]

And it is quite easy to understand the reasons behind such a powerful statement. We have mentioned before how, on the one hand, the domestic criminal law of liberal traditions tend to put its emphasis on the attribution of responsibility on the individual, as opposed to group responsibility, thus making the principle of individualism the cornerstone among principles of domestic criminal law.[9]

On the other hand, it is hard to assess the impact that a single individual has in the commitment of core international crimes, be it crimes against humanity, war crimes, or genocide. In an all-too-real sense, as Jayangakule states "single individuals rarely commit international crimes";[10] indeed, international crimes are the result of coordinated actions as taken by more than one person, often part of a bigger structure that implies a plurality of persons engaged in the collective criminal activity.

This thesis, thus, adopts the position that departures from domestic liberal theories of individual liability are inevitable to deal with the convergence between the collective nature of international crimes,[11] and the need for proper punishment, both from a practical and from a theoretical point of view.

It is important to note, however, that international criminal law scholars and practitioners still today hold the principle of individual criminal liability as the general rule, only making

[5] Danner, A., Martinez, J. (2005), Ibid. p.85.
[6] Uhlířová, K. (2012), supra note 3. p.14.
[7] Druml, M. Atrocity, Punishment and International Law. Cambridge University Press. 2007. p.38.
[8] Uhlířová, K. (2012), supra note 3. p.14.
[9] Druml, M. (2007), supra note 7. p.38.
[10] Uhlířová, K. (2012), supra note 3. p.14.
[11] Drumbl, M. (2007), supra note 7. p.39.

concession and compromises occasionally and on a case-by-case basis.[12]

But these departures from the principle of individual criminal liability still exist, and indeed, international criminal courts and tribunals, are practically forced to those departures,[13] for example, due to:

> "the forensic challenges presented by mass graves; difficulties in securing testimony; the complex sequencing of administrative directives that order massacre; the fact that elements of an overall crime can be committed by many different people without any person undertaking each element of the offense; diffusion of responsibility in situations of disorder; and the need to protect the rights of victims and witnesses."[14]

These possible departures from the principle of individual criminal liability in the international arena have led to the emergence of a set of doctrines to support thereof: joint criminal enterprise, command responsibility, and aiding and abetting.[15]

These three doctrines are currently used as prosecutorial tools through which liability from collective acts considered core international crimes is localized and attributed to the an individual offender. The focus of this thesis, however, is limited to joint criminal enterprise, the reasons for this is explained below.

I.II. Joint criminal enterprise

I.II.I. Relevance

As noted above, joint criminal enterprise, or JCE for short, was developed as a specific doctrine, used as a tool in the prosecution of offenders of core international crimes. Although JCE establishes individual criminal responsibility due to the participation in the commission of core international crimes,[16] it differs from other classical doctrines of individual criminal responsibility in important ways. In short, the liability under JCE can be described as the criminal liability assigned to a person that is part of a group of individuals acting according to a

[12] Drumbl, M. (2007), Ibid. p.41.
[13] Uhlířová, K. (2012), supra note 3. p.15.
[14] Drumbl, M. (2007), Ibid. p.39.
[15] International Criminal Law Services. Modes of Liability: Commission & Participation. United Nations Interregional Crime and Justice Research Institute. ca. 2010. p.4.
[16] International Criminal Law Services. (ca. 2010), Ibid. p.12.

joint plan which involves or might lead to the commission of a crime, as long as the accused participates with the intent to pursue that common plan.[17]

Interestingly enough, JCE is the only criminal liability doctrine that had no statutory existence, as the concept of joint criminal enterprise, its constitutive elements, and the three distinct categories of JCE liability nowadays recognized -"basic", "systemic", and "extended" categories of JCE-[18] were the product of the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber, as first introduced in the landmark judgment on the Duško Tadić case, back in 1999.[19] From there on, the doctrine has travelled far and wide, and it has proven an excellent tool of valuable importance for the prosecution of crimes in different international courts and tribunals, nor only in itself, but also due to the limits of command/superior responsibility[20] that imports a higher evidentiary standards, the difficulty in the application of the aiding and abetting[21] responsibility that requires the substantial contribution of the individual to the commission of the crime, and the absence of a general conspiracy concept.[22]

It happened then, that since the establishment of the ICTY, the world has witnessed a phenomenon like no other in the sudden and incredible propagation of international criminal courts such as the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the International Criminal Court (ICC), along with other so-called hybrid criminal courts, a mixture of international and domestic courts, such as the War Crimes Chamber of the Court of Bosnia and Herzegovina, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Iraqi Special Tribunal, the Special Tribunal for Lebanon, and the Special Panel for Serious Crimes in East Timor. This lead, to a resurgence in the importance of the work of the ICTY, with the doctrine of JCE as introduced in *Tadić,* travelling from The Hague to Arusha, Freetown, and Sarajevo, among others, and fast becoming a widely used tool[23] at proceedings and prosecutions before international courts and tribunals around the world. In record time, the doctrine of joint criminal enterprise has become one of the most important, yet most disputed, doctrines in contemporary international criminal law.[24]

---

[17] Prosecutor v. Duško Tadić. ICTY Case No. IT-94-1-A. Appeals Chamber, 15 July 1999. para.220.
[18] Uhlířová, K. (2012), supra note 3. p.16.
[19] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.220.
[20] Moloto, B. J. Command Responsibility in International Criminal Tribunals. Berkeley Journal of International Law Publicist. Volume 3, Fall 2009. p.13.
[21] Schabas, W. A. Enforcing International Humanitarian Law: Catching the Accomplices. International Review of the Red Cross. 83 (842), 2001. p.443.
[22] Fichtelberg, A. Conspiracy and International Criminal Justice. Criminal Law Forum. 17 (2), 2006. p.149.
[23] Danner, A., Martinez, J. (2005), supra note 2. p.149.
[24] Danner, A., Martinez, J. (2005), Ibid. p.108.

It is precisely for this reasons, both the importance that the doctrine of joint criminal enterprise has obtained in the practice of international courts and tribunals and the unprecedented amount of criticism JCE is subject to, that a deeper analysis is required, thus selecting it over other doctrines of individual criminal liability in international law.

I.II.II. International criticism

The complexity faced by the application of the JCE criminal responsibility doctrine[25] is in part because, as stated before, JCE is a judiciary innovation, introduced by the judges at the ICTY, in their interpretation of Article 7(1) of the ICTY Statute.[26] It goes without saying that the particular mode by which the doctrine of JCE came to be is the foremost reason for the amount of challenges relating to its application and interpretation. Indeed, as it has been pointed out, the issue of JCE application by prosecutors in international courts and tribunals and the question of its legality "has divided the minds of academics and practitioners alike as heavily."[27]

Thus, while the JCE doctrine has become an essential tool for prosecution, its application at courts, especially the so-called "extended" category of JCE, referred as either JCE III or "extended" form, both by the ICTY and subsequent international courts and tribunals, has been met with considerable criticism, and the doctrine remains even today under a constant attack from various scholars. To illustrate this point, some have argued that JCE is a tool to secure "discounted convictions"[28] and have re-labelled JCE as "Just Convict Everyone" doctrine,[29] while others call it a "magic weapon"[30] in the prosecution of core international crimes, and "the nuclear bomb of the international prosecutor's arsenal".[31]

The reasons behind such rigorous scholarly criticism can be summarized as follows. Scholars often argue that: (1) JCE undermines the principle of individual criminal responsibility[32] in favor of collective responsibility in general, and, with regard to "extended" category of JCE, in particular; and it should be replaced by more well-known forms of individual criminal responsibility, for example by co-perpetration,[33] or functional perpetration,[34] among

[25] Danner, A., Martinez, J. (2005), Ibid. p.103.
[26] Jayangakule, K. (2010), supra note 1. p.14.
[27] Schomburg, W. Jurisprudence on JCE – Revisiting a Never Ending Story. Cambodia Tribunal Monitor. 2010. p.1.
[28] Schabas, W. A. Mens Rea and the International Criminal Tribunal for the Former Yugoslavia. New England Law Review, 37 (4). 2002-2003. p.1034.
[29] Badar, M. E., "Just Convict Everyone!" – Joint Perpetration: From Tadić to Stakić and Back Again. International Criminal Law Review, 6. 2006. p.302.
[30] Ambos, K., Joint Criminal Enterprise and Command Responsibility. Journal of International Criminal Justice, 5 (1). 2007. p.159.
[31] Danner, A., Martinez, J. (2005), supra note 2. p.137.
[32] Danner, A., Martinez, J. (2005), supra note 2. p.98.
[33] Prosecutor v Milomir Stakić. ICTY Case No. IT-97-24-T. Trial Chamber, 31 July 2003. para.532.
[34] Wilt, H. Joint Criminal Enterprise, Possibilities and Limitations. Journal of International Criminal Justice, 5 (1),

others;[35] (2) it is difficult to differentiate JCE from aiding and abetting;[36] and (3) JCE invades the traditional ambit of liability under command responsibility, when both doctrines are applied.[37]

Here we are faced with yet another issue, as nothing really indicates that the introduction of alternative forms of individual criminal responsibility potentially more appropriate than JCE, will not be met with further criticisms, for example, due to the lack of support in international practice and *opinion juris* required to be applied at the international level.[38]

Interestingly enough, one of the main reasons for these challenges to the JCE doctrine, is the perception that the practice of criminal law at the international level is still new and, although it is considered to be one of the fastest growing area of international law -evolving rapidly in the recent years- it is still considered as Uhlířová puts it, "at the rudimentary stage of development".[39] Therefore, it is a natural consequence of this current state of the art, certain conceptual flaws and inadequacies will almost inevitably come forward into the spotlight. It also follows, admittedly, that most of the above criticism of the JCE theory are often well justified.

But, this could mean, on the other hand, that some, or all, of the challenges often made in connection with the JCE liability doctrine could still be rectified. Thus, it is exactly in hands of prosecutors and judges to address these issues[40] and propose solutions, corrections, and modifications that could keep the JCE doctrine viable.

While we agree with the criticism directed at JCE, we bolster that it is an issue of maturation and refinement, arguing that JCE should not be presented as an inoperative concept.[41]

II. Research

II.I. Thesis goals

As one can imagine, a doctrine that has been so widespread used in proceedings all around the world, and that it is at the core of the criticisms aimed at individual liability theories used at the international level, as it is JCE, has, arguably no aspect left out of the scholar spotlight. In fact, there is abundant material devoted to the examination all of the issues, as the constant application of the doctrine by both international criminal courts and tribunals, and *ad hoc* courts

---

2007. p.103.
[35] Ambos, K. (2007), supra note 30. p.170.
[36] Uhlířová, K. (2012), supra note 3. p.19.
[37] Ambos, K. (2007), supra note 30. p.171.
[38] Damgaard, C. Individual Criminal Responsibility for Core International Crimes. Selected Pertinent Issues. Springer-Verlag Berlin Heidelberg. 2008. p.162.
[39] Uhlířová, K. (2012), supra note 3. p.19.
[40] Cassese, A. The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise. Journal of International Criminal Justice 5 (1). 2007. p.133.
[41] Cassese, A. (2007), Ibid. p.133.

receive continuous attention.

The main goals of this thesis is then to briefly explore the particular features of international criminal law, as a context for the development of specific doctrines of individual liability, and then analyze the historical roots of JCE, critically examining the current court application at the international level, analyzing the issues of its legality, its relationship with other modes of individual liability often used at the international arena, and finally concluding on the relevance and basis of the doctrine in order to justify subsequent application by any court.

II.II. Methodology

From a research methodology point of view, our work in this thesis will rely on various interrelated areas of law, mainly: international criminal law, which in turn is permeated by human rights law, transitional justice, domestic criminal law, and international humanitarian law. The thesis also relies upon the more general area of public international law.

We will be using qualitative research as a method of inquiry, leading to critically analyze the application and interpretation given to JCE as a doctrine of individual criminal liability by international courts and tribunals and in so doing, we will evaluate the legal challenges faced by international judicial institutions in addressing the phenomenon of collective criminality.

But from the get-go, it should be stressed that this work is not meant to be a classical comparative study: as the title of the thesis indicates, its scope is limited to the concept of joint criminal enterprise as operated by international judicial institutions only in a general sense.

The specific choice of JCE application in ICTY, however, is justified by two reasons. First, there is no contest to the idea that JCE was a judicial innovation product of the ICTY Appeals Chamber in *Tadić*. Second, there is unique affinity between the ICTY and the rest of international courts; a relation that features extensive cooperation between legal institutions, and the reliance on the ICTY's case law in general.

Thus, although the practice of other international and *ad hoc* courts will be taken into account where relevant, they will not be treated it as an independent object of study, but rather, merely to suggest the impact that the JCE doctrine had over said courts' practice.

As regards the selection of cases itself, the scope is likewise limited and pre-determined by the research goals set up above. Among those cases, one stands high: the *Tadić* case was a seminal decision in the creation of the JCE doctrine, at which the ICTY Appeals Chamber innovated, and for the first time hinted at the three distinct categories, of JCE. *Tadić*, thus, set precedent for other ICTY chambers as well as for some other courts, both international, hybrid, and domestic.

II.III. Sources

In our research, we will use both primary and secondary sources.

Primary sources will include constitutive instruments of international judicial bodies, such as the Charter of the International Military Tribunal at Nuremberg, Annex to the London Agreement, the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, the Statute of the International Criminal Tribunal for the Former Yugoslavia, the Statute of the International Criminal Tribunal for Rwanda, the Statute of the Special Court for Sierra Leone, the Rome Statute of the International Criminal Court, and the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea, among others.

In addition to these primary sources, certain domestic criminal legislation, with a special focus on the Criminal Code of Germany, and France, will be used when describing principles of local criminal systems that might be endangered by the doctrine of JCE.

As regards to secondary sources, we will use some of the important amount of widely available scholarly literature on the topic, and cases, not mentioned at this point for the lack of space.

It should be explained, however, that due to the crucial role of case law in this study, decisions made by international courts will not necessarily be treated here as "mere" subsidiary means, as indicated by the International Court of Justice (ICJ) Statute,[42] but rather as an evidence of *opinio juris* and international practice.

II.IV Structure

The thesis is divided into three main sections or parts. Part I will look into the historical and legal backgrounds leading to joint criminal enterprise. Part II is devoted to the concept of JCE as developed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case, and the elements and types of JCE as a mode of individual liability for core international crimes. Part III will provide an explanation of common doctrinal critiques to the JCE doctrine, and offer possible solutions to justify and clarify its application.

Part I: International criminal law and historical precursors to JCE.

Part I is made of both chapter 1, that is devoted to the description of the particular features of international criminal law, as a very unique, particular field of public international law, being

[42] United Nations. Statute of the International Court of Justice. 18 April 1946. art.38.

informed by different areas of law, sometimes in clear opposition; and chapter 2, that will offer a historical overview and analysis of doctrines of individual liability at the international level as developed in the Nuremberg Military Tribunal (NMT).

Connected to this first part of the thesis is the scholarly claim that in its research of the customary status of the JCE doctrine, the ICTY Appeals Chamber relied mainly on the decisions of the military courts. Currently, any examination of the legal basis of the Nuremberg Military Tribunals and its case law is purely an academic activity, because as Heller aptly explains "uncertainty about the legal character of the NMTs has directly affected the willingness of modern courts and tribunals to rely on their judgments."[43] However, the approach of the ICTY Appeals Chamber in *Tadić* is an explicit exemption. It is not exactly clear what value has the Appeals Chamber attached to the NMTs case law. In general, relatively little publicity has been given to these "WWII-era tribunals"[44].

Surprisingly, the ICTY Appeals Chamber on its analysis of the NMTs, omitted highly relevant sources: the NMT Charter and the Control Council Law No. 10 and some other proceedings taking place both before and after the Nuremberg Military Tribunals.[45] This omission has had an impact beyond *Tadić,* since this decision was treated as canonical and set a "precedent" in reasoning for other ICTY chambers (and also for other international and *ad hoc* courts).

Part II: JCE jurisprudence, types and elements.

Part II is made up by chapter 3, and chapter 4. Chapter 3 describes the legal findings of the ICTY Appeals Chamber decision in *Tadić,* where it developed the idea of joint criminal enterprise; and the practice of other international courts and tribunals in the use of JCE.

On the other hand chapter 4 inquiries into the three distinct categories of JCE, i.e. "basic", "systemic", and "extended"; and the subjective and objective elements of each category, as developed by the ICTY and applied by other international courts and tribunals.

Therefore, the main goal of the part of the thesis is to analyze critically the approach employed by the ICTY Appeals Chamber in the *Tadić* case; and to assess, on the basis of this analysis, how the Appeals Chamber concluded that JCE in all three categories ("basic", "systemic" and "extended") was part of customary international law.

---

[43] Heller, K. J. The Nuremberg Military Tribunals and the Origins of International Criminal Law. New York: Oxford University Press. 2011. p.137.
[44] Sanders, A. New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability after Sosa. Berkeley Journal of International Law, 28 (2). 2010. p.631.
[45] Uhlířová, K. (2012), supra note 3. p.22.

Part III. Doctrinal critiques and conclusion.

Part III is composed of chapter 5 and the conclusion. Chapter 5 examines those challenges faced by the JCE doctrine from a scholar point of view, including the legality of the doctrine, and the possible conflict with two other liability theories used at the international level: command responsibility, and aiding and abetting.

Admittedly, the creation of the ICTY Appeals Chamber in *Tadić* has also been addressed elsewhere in the academic literature. However, certain lacunae in the literature were identified. This thesis attempts to respond to these gaps and in so doing, to address the identified research goals.

The conclusion offers a brief synthesis of the role and development of JCE, bringing together findings of the respective chapters and, in the light of these, we look into possible options on how to remedy the methodological inconsistencies identified.

CHAPTER I. International criminal law

1.1. The Nature of international criminal law.

Most, if not all, scholars agree that international criminal law, as a distinct field of international law, derives from yet another area; that is usually known as international humanitarian law,[46] the "law of war." It should be noted, however, that although this might convey the idea that, to some extent, international criminal law is a brand new, young field of law; in itself, the idea to create and apply a series of legal standards, principles, and rules to international armed conflicts, and later to any other kind of conflict that could potentially lead to episodes of mass atrocity -be it "genocide" or the more general "crimes against humanity"-, is not new at all.[47] Certainly, much has been done in the area of international humanitarian law, in that regards. The law of war is both complex and profound and still shapes battlefield operations today.

And yet, there still another seed, another idea, more like a cornerstone principle, that crosses over different areas of international law, and that is nothing short of a noble effort: the idea to fix responsibility[48] for international crimes -usually those considered acts of unimaginable violence- to individuals. This does represents an extraordinary, and bold, undertaking[49] that has permeated the legal and political movement of the international scene.

In that sense, and always keeping the above-mentioned goals of preventing episodes of mass atrocity or fixing individual responsibility when those episodes do, indeed occur, as the ultimate north, the modern scholars and practitioners in the field of international criminal law would try to develop a unique *corpus* from two entirely different legal systems[50] (also called "legal traditions"); combining certain aspects of the common law adversarial system with certain aspects of the civil law inquisitorial system. Just as most expected, the titanic task of merging such divergent legal regimes has invariably led to inevitable tensions in the international criminal law doctrine and procedure.[51]

But it is clear that from a genealogical-oriented perspective, international criminal law

---

[46] Clark, J. J. Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The Georgetown Law Journal. Vol.96. Issue 5. 2008. p.1687.
[47] Schabas, W. A. (2001), supra note 21. p.440.
[48] Tallgren, I. The Sensibility and Sense of International Criminal Law. European Journal of International Law. Vol.13. No.3, 2002. p.572.
[49] Danner, A., Martinez, J. (2005), supra note 2. p.77.
[50] Christensen, R. Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies between Civil and Common Legal Systems in the Formation of the International Criminal Court, 6 UCLA J. Int'l L. & Foreign Aff. 391 (2001-2002). p.391.
[51] Christensen, R. (2001-2002), Ibid, p.393.

grows directly out of international humanitarian law,[52] and it is there where scholars and practitioners direct their attention to finding the source of many of the crimes that will be later prosecuted by international courts.[53]

However, international humanitarian law is not the only root source, as the field of international criminal law also draws a lot from other legal areas: we have mentioned domestic criminal law, but we also have human rights law[54] and the so-called transitional justice.[55] Although the influences of each and every one of these areas are manifestly distinct, they do provide the field of international criminal law with essential constitutive elements, cornerstone principles, and practices.

We can quickly find the tension between the different strains in, for example the clashes between human rights aims in protecting human life from serious harms, embedded in a system which seeks to punish individuals for international crimes, and that might easily be tilted to fulfill the less laudable objectives of transitional justice trial and "scapegoating", that can undermine the whole enterprise.[56]

And yet, international criminal courts and tribunals should not ignore the human rights and transitional justice goals assigned to international criminal law. Rather all three goals need to be balanced for close adherence to the criminal liability model in the context of construing individual liability doctrines.

Thus, a more clear description of each area quickly contrasts their differences, revealing that the four legal traditions informing contemporary international criminal law are, in important ways, deeply at odds.[57]

1.1.1. Domestic criminal law

With no other place to turn, the modern system of international criminal law has adopted cornerstone philosophical principles taken almost *verbatim* from domestic criminal justice systems, and as such these local criminal law principles have played -and still play- an important, informing role in the current development of international criminal law.[58]

Of course, one could argue that different juridical systems may import the existence of different principles, and it would not be wrong. Which is why, the principles taken by

[52] Danner, A., Martinez, J. (2005), supra note 2. p.80.
[53] Uhlířová, K. (2012), supra note 3. p.35.
[54] Tallgren, I. (2002), supra note 48. p.576.
[55] Daly, E. Transformative Justice: Charting a Path to Reconciliation. International Legal Perspectives. Vol.12. No.1&2. 2001. p.76.
[56] Danner, A., Martinez, J. (2005), supra note 2. p.94.
[57] Danner, A., Martinez, J. (2005), Ibid. p.82.
[58] Tallgren, I. (2002), supra note 54. p.594.

international criminal law are, generally speaking, those shared almost across the board. Out of all those principles taken straight from domestic criminal law, the most important are focused, invariably, on individual wrongdoing as a prerequisite to the imposition of criminal punishment.[59] In that sense, both common law traditions and civil law traditions share the maximums and principles to that effect.

And so, on the one hand, as an example of the common law legal system, the Anglo-American criminal tradition requires an "act," thus precluding the State from punishing individuals based solely on bad thoughts that have not been yet translated into concrete action.[60]

Whereas, on the other hand, as an example of the civil law traditions, the French Criminal Code states in Section 121-1 that "No one is criminally liable except for his own conduct"[61], and in Section 121-4 that "The perpetrator of an offence is the person who: 1° commits the criminally prohibited act."[62] Similarly, the German Criminal Code states in Section 29 that "Each accomplice shall be liable according to the measure of his own guilt and irrespective of the guilt of the others,"[63] and then in Section 46(1) that: "The guilt of the offender is the basis for sentencing."[64]

The importance -almost universal emphasis- on the requirement of deliberate individual wrongdoing as unique basis permissible for criminal prosecution and punishment is also supported by the widespread principle of "most favorable interpretation of criminal statutes" always in regards to the accused, a principle that is typically referred to as the rule of lenity.[65]

The almost universal, cornerstone principle of individual criminal responsibility is such of fundamental importance to the way we perceive domestic criminal law that it is also traduced almost *verbatim* by international courts and tribunals. In this very sense, the ICTY Appeals Chamber has underscored the "fundamental importance of the principle of personal culpability"[66] as the foundation, or basis of criminal responsibility in international law. Furthermore, adding to the principle of individual criminal responsibility as a fundamental principle of international criminal law, the ICTY has ruled that the prohibition on *ex-post-facto* punishment and the rule of lenity "are the solid pillars on which the principle of legality stands. Without the satisfaction of these principles, no criminalization process can be accomplished and

[59] Kadish, S. H. Why Substantive Criminal Law - A Dialogue. Clev. St. L. Rev. Vol 29 (1980). p.12.
[60] Lafave, W. R. Substantive Criminal Law. 4th ed. Thomson/West. 2003. p.209.
[61] French Criminal Code. Art. 121-1.
[62] French Criminal Code, Ibid. Art. 121-4.
[63] German Penal Code. § 29.
[64] German Penal Code, Ibid. § 46.
[65] Danner, A., Martinez, J. (2005), supra note 2. p.84.
[66] Prosecutor v. Duško Tadić. (1999), supra note 17. para.186.

recognized."[67]

These two principles are so important, so universally held, that along these lines, the Statute of the ICC prohibits, on the one hand, the retroactive imposition of criminal punishment, as stated in art. 22(1); and requires, on the other hand, that criminal statutes be strictly construed and not extended by analogy, a principle sometimes known as the requirement of specificity,[68] as indicated in art. 22(2).

Each and every one of these principles, the requirement of individual responsibility, the need for an external human act, the prohibition of *ex-post-facto* punishment, the prohibition of analogy, and the rule of lenity, by themselves are essential to the criminal justice of liberal systems. But together, these principles do much more, as in conjunction, they allow domestic and international criminal justice system to distance themselves from the fear of prosecution of individuals based on guilt by association alone.

Thus, the principles taken by international criminal law from domestic criminal justice, at its most fundamental level, associates the idea of criminal prosecution and punishment to the commitment of individual wrongdoings, that is, personal responsibility, vehemently rejecting movements that try to associate individual liability based solely upon the guilt of the person due to the association with other wrongdoers.[69] As we have seen, these domestic cornerstones of criminal justice, held by most as universal principles of criminal law, have been adopted, as reflected but not limited to the statutes of the ICTY and ICC, by international criminal law as a fundamental principle of international prosecution and punishment of crimes.

In a sense, it is interesting to notice, how much international criminal law constitutes an extension of domestic criminal justice, as indicated by the extension or continuation of the application of criminal principles initially found in national justice systems, onto the international forum.[70]

1.1.2. Human rights law

Nowadays, it would prove difficult to disassociate the ideas of international criminal law and human right. It is quite clear then that, both criminal law and human rights law share the principle of deterrence of violations as an underlying principle and primary goal.[71]

However, although it is undeniable that there are overlapping areas between criminal law

[67] Prosecutor v. Zejnil Delalić et al. ICTY Case No. IT-96-21-T. Trial Chamber, 16 November 1998. para.402.
[68] U.N. Doc A/Conf. 183/9. Rome Statute of The International Criminal Court. 1998. Art.22.
[69] Sassbli, M., Olson, L.M. The Judgement of the ICTY Appeals Chamber on the Merits in the Tadic Case. International Review of the Red Cross 82 No 839. 2000, p.755.
[70] Tallgren, I. (2002), supra note 54. p.565.
[71] Danner, A., Martinez, J. (2005), supra note 2. p.88.

and human rights law, each system has its approaches in how to deal with their goals. Indeed, while human rights adopt special mechanisms like prevention, warning systems, rehabilitation,[72] public shaming, or "just satisfaction,"[73] on the other side of the fence, criminal law heavily relies on the threat of violent punishment for its deterrent effects.[74]

As traditionally understood, the norms of international human rights law are interpreted broadly to ensure recognition, and when possible redress,[75] of violations, with the clear objective of a progressively[76] greater realization, over time, of respect for worldwide human freedom and dignity,[77] embracing some contingent, all-too aspirational norms.[78] But while human rights law tends to broad interpretation, domestic criminal law prohibits any form of analogy, falling under a self-imposed mandate toward specific and absolute norms. These are some of the conflicting tensions that surface in paramount ways -and very frequently- in the jurisprudence of international criminal law.

In is precisely due to these differences that the convergence in international criminal law of both criminal law principles deeply rooted in domestic criminal systems, and the philosophical compromise of international human rights norms, establishes a line in the sand, creating two apparently opposing views with which to assess a violation.

A sign of this is the way modern international law is organized, where, typically, organizations and institutions with the responsibility to interpret and adjudicate human rights violations, do not possess an authority to directly[79] and individually punish offenders with imprisonment terms, but rather, they are limited to a series of less intrusive remedies, so-called "just satisfaction", in favor of the injured party. This "just satisfaction" tends to take the form of money damages or some other remedy.[80] And even then, in most, if not all cases, human rights international institutions rely heavily on domestic civil and administrative mechanisms of direct enforcement.[81] And although most international human rights treaties require from States to adequate their legislation to the latest rulings from human rights tribunals, this is being done at a slow rate. Thus, even today, for much human rights organizations, the most far-reaching goal of

[72] Tallgren, I. (2002), supra note 54. p.576.
[73] Danner, A., Martinez, J. (2005), supra note 2. p.86.
[74] Tallgren, I. (2002), supra note 54. p.576.
[75] Hardeo, P. Enforcing Human Rights Law – International Civil Society's Influence in Defining Rights and Responsibilities. University of Massachusetts Boston. p.3.
[76] Helfer, L.R. Overlegalizing Human Rights: International relations theory and the commonwealth caribbean backlash against human rights regimes. Columbia Law Review. Vol.102. 2002. p.1835.
[77] Helfer, L. R. (2002), Ibid. p.1887.
[78] Danner, A., Martinez, J. (2005), supra note 2. p.89.
[79] Helfer, L. R. (2002), supra note 76. p.1843.
[80] Orentlicher, D. F. Addressing Gross Human Rights Abuses: Punishment and Victim Compensation. Stud Transnat'l Legal Pol'y 26. 1994. p.454.
[81] Danner, A., Martinez, J. (2005), supra note 2. p.86.

the litigation is the mostly symbolic finding of State wrongdoing in itself.

As a direct consequence of these series of features, international human rights law has been seen for a while now as international law at its most gentle -indeed, so tender that some question whether it really is "law" at all-,[82] whereas there is no mistake regarding international criminal law as law at its most coercive.[83]

Finally, it is important to note that, even beyond the power of their distinct sanctions, one limited to "just satisfaction," the other punishing offenders with prison terms, international human rights, and criminal law differ widely in other essential respects.

On the one hand, although criminal law principal objectives are to control crime and to maintain public order, serving collective social goals such as deterrence, retribution, and rehabilitation, its central focus is still the idea of individual wrongdoing:[84] the factual and legal focus of the criminal prosecution is to determine both the past acts and the ultimate fate of an individual defendant. Thus, criminal law is perpetrator-oriented.

On the other hand, human rights law is widely seen as victim-centered, not perpetrator-centered. To that end, human right litigation often focuses on fact-finding related to broad social phenomena, avoiding, for the most part, to fix responsibility on individuals for the perpetration of these violations. Under human rights principles and standards, then, the idea of identifying a particular official actor as liable for a breach is irrelevant:[85] the nation-state as a whole is responsible for a violation of its citizens' human rights.[86] Along those lines, The Inter-American Court of Human Rights has ruled that human rights violation can be found "even if the identity of the individual perpetrator is unknown."[87] The key component is "whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government (...)."[88]

1.1.3. Transitional justice

In the words of Professor Teitel, Transitional Justice can be defined as the "conception of justice associated with periods of political change, characterized by legal responses to confront the

[82] Hathaway, O. A. Do Human Rights Treaties Make a Difference? Yale Law Journal 111. 2002. p.1943.
[83] Cover, R. M. Violence and the Word. Yale Law Journal 95, 1986. p.1608.
[84] Tallgren, I. (2002), supra note 54. p.588.
[85] Nollkaemper, A. Concurrence between Individual Responsibility and State Responsibility in International Law. The International and Comparative Law Quarterly. Vol.52. No.3. July 2003. p.616.
[86] Thomas, D. Q., Beasley, M. E. Domestic Violence as a Human Rights Issue. Human Rights Quarterly. Vol.15. No.1. February 1993. p.41.
[87] Velasquez Rodriguez Case, Inter-American Court of Human Rights. Judgement of July 29, 1988 (Ser. C). No. 4. para.173.
[88] Velasquez Rodriguez Case. (1988), Ibid. para.173.

wrongdoings of repressive predecessor regimes."[89]

The idea behind transitional justice came into widespread use in the 1990s, first used as a way to identify a series of juridical systems, all with specific legal features and components, of those States emerging from less than democratic systems, such as military dictatorships, communist regimes, and apartheid.[90]

The aim of transitional justice, as understood back then, implied the use of a series of broad legal mechanisms -such as across the board investigations, truth commissions, and criminal trials- to reinforce the underlying political transition from one regime to another. Thus, its objectives were diverse but always clear: reestablishing the rule of law, foster a democratic culture,[91] create accountable Republican institutions, promote political peace, ensure social reconciliation, discourage and criminalize future violations of the legal system, and provide a measure of redress to victims.[92]

Although transitional justice can be traced all the way back to the end of WW-I, it is usually considered that the relation with international criminal law begins in the postwar period of 1945, and the Nuremberg Military Tribunal.[93]

Indeed, in spite of all the criticisms that Nuremberg has received -the most important argues it was nothing more than an illegitimate show-trial, yet another example of the ages-old victor's justice-;[94] it is the components and elements of the model used at the NMT which distinguish it from its predecessors. And are precisely those elements, and the model used at Nuremberg, that aligns it with the modern goals of a liberal transitional justice system.[95] Indeed, the most relevant human rights treaties all postdate the Nuremberg Trials; thus making it, officially or unofficially, the starting point of the contemporary worldwide human rights movement,[96] to which transitional justice owes so much.

Granted, while the danger of victor's justice is still there, one of the essential, critical components of the so-called Nuremberg model is the idea of internationalization of justice as an adequate tool for State modernization.[97] And so, the model put together at Nuremberg diverts the responsibility to punish officials from the old regime to a *prima facie,* impartial international

[89] Teitel, R. G. Transitional Justice Genealogy. Harvard Human Rights Journal, Vol.16 (2003). p.69.
[90] Danner, A., Martinez, J. (2005), supra note 2. p.90.
[91] Daly, E. (2001), supra note 55. p.76.
[92] Teitel, R. G. Transitional Justice. USA. Oxford University Press. 2002. pp.220-221.
[93] Teitel, R. G. (2003), supra note 89. p.72.
[94] Teitel, R. G. (2003), Ibid. p.73.
[95] Daly, E. (2001), supra note 55. p.75.
[96] Steiner, H. J., Alston, P. International Human Rights in Context: Law, Politics, Morals. 2d ed. USA. Oxford University Press. 2000. p.112.
[97] Teitel, R. G. (2003), supra note 89. p.70.

entity applying law from an external, neutral source.[98] And although it might prove difficult to guarantee defendants that the international community is entirely disinterested in their fates, international judges, are considered by many (but not by all) as less interested in taking advantage of their position, especially when compared to officials of new national government, who may be seen as more interested on solidifying their share of power than in pursuing offenders, or protecting victims.[99]

Paradoxically, the Nuremberg model of international trials benefits transitional governments into achieving its goal of social peace and reconciliation, finding themselves free to get about the business of rebuilding social ties without the burden of directly addressing the past,[100] as it falls on the international trial the always controversial responsibility of putting the old regime on trial.

Finally, and always following the underlying objectives of any transitional justice model, we can find the focus on individual responsibility, as opposed to a collective responsibility,[101] as the last key component of the Nuremberg model. As former ICTY Judge Antonio Cassese has explained:

> "Trials establish individual responsibility over collective assignation of guilt, i.e., they establish that not all Germans were responsible for the Holocaust, nor all Turks for the Armenian genocide, nor all Serbs, Muslims, Croats or Hutus but individual perpetrators ... victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes; a fully reliable record is established of atrocities so that future generations can remember and be made fully cognizant of what happened."[102]

The Nuremberg model of international trials, from which the idea of transitional justice takes so much, focus on individuals as the only accountable, and is thus said to tend to a faster promotion

[98] Daly, E. (2001), supra note 55. p.105.
[99] Holding, R. How Hussein is Prosecuted Poses Difficult Choice for Bush; U.S. Leans toward Trial by Iraqi Panel-Others Prefer International Court. San Francisco Chronicle. 15 December 2003.
[100] Daly, E. (2001), supra note 55. p.109.
[101] Daly, E. (2001), Ibid. p.105.
[102] Cassese, A. Reflections on International Criminal Justice. The Modern Law Review. Volume 61, Issue 1. May 1998. p.6.

of a process of social peace and reconciliation, significantly reducing the prospect of future violations by "breaking the collective cycle of guilt that frequently fuels conflicts."[103]

However, international criminal trials are often considered blunt tools in the quest to achieve the goals typically affiliated with transitional justice,[104] especially when compared to other mechanisms frequently associated with the idea of transitional justice -like the modern "truth commissions." Among other details, this identification is because, in traditional domestic criminal trials, some people are found guilty, but more are exonerated, whereas in international criminal trials "it is more likely that many people are guilty in different ways and to different degrees."[105]

Those who criticize the increasing number of international criminal judicial bodies and trials have used this argument more often than not, to posit further truth commissions as the preferred transitional justice method, and to some, a better alternative to international criminal prosecution.[106]

But the practice has shown, however, that the benefits of criminal trials cannot be overlooked, supported by the fact that it is quite frequent to find truth commissions employed in parallel to criminal trials, rather than instead of them.[107] Indeed, as Justice Jackson, chief prosecutor for the United States, argued at the Nuremberg Military Tribunals, one of the most important objectives assigned to international criminal trials is to create a historical record for future generations.[108]

It could be said, indeed, that the idea of having criminal trials with the purpose or objective to write history is, at the very least, controversial,[109] if not dangerous, and scholars have noted this,[110] potentially creating a significant conflict with the criminal principle of individual responsibility, it being a cornerstone principle in the criminal system of liberal tradition.[111]

And here, we face yet another area of concern frequently criticized by those who support the application of truth commissions over criminal trials, as transitional criminal trials tend to adopt a political role that naturally leads to an extra concerted effort on the prosecution of high-

[103] Neier, A. War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice. Times Books. 1998. p.211.
[104] Daly, E. (2001), supra note 55. p.105.
[105] Daly, E. (2001), Ibid. p.154.
[106] Teitel, R. G. (2003), supra note 89. p.83.
[107] Miraldi, M. Overcoming Obstacles of Justice: The Special Court of Sierra Leone. New York Law School Journal of Human Rights, Volume 19, 2003. pp.854-55.
[108] Danner, A., Martinez, J. (2005), supra note 2. p.94.
[109] Alvarez, J. E. Rush to Closure: Lessons of the Tadić Judgement. Michigan Law Review. Vol.96, No.7. June 1998. pp.2100-2102.
[110] Danner, A., Martinez, J. (2005), supra note 2. p.95.
[111] Prosecutor v. Dragan Obrenović. ICTY Case No. IT-02-60/2. Trial Chamber, 10 December 2003. para.52.

level perpetrators or, in words of Teitel, the "big fish",[112] as these senior leaders come to represent, to the eyes of both society and judges, the transgressions of the "ancient regime", thus using them as "sacrificial lamb" with views to exculpate the broader society in which the crimes occurred.[113] The concerted effort in the prosecution of senior leaders is especially, and clearly, visible at the international criminal trials. In this sense, the U.N. Security Council has always supported the official ICTY and ICTR prosecutorial policy that "civilian, military and paramilitary leaders should be tried before them in preference to minor actors."[114]

As we have seen, this leads to a dangerous situation, where criminal trials might be used, first to write history, and then as a political tool to prosecute political, civilian, and military leaders; easily endangering an already delicate political transition, and preventing the establishment and maturation of democratic principles.[115] But this can also lead to an interesting paradox: the stress put on the historical aspect, and the conviction of former leaders as "sacrificial lambs", might end up preventing the creation and development of liability theories of international criminal law.

1.1.4. International humanitarian law

International law knows two chapters which respond to the threat and conduct of war: *Ius ad Bellum* and *Ius in Bello*.[116] The first set of rules aims at the prohibition of the use of force as a means to settle disputes between States, following the wording of the U.N. Charter,[117] except those circumstances which justify such use of force.

The second set of rules, commonly known as international humanitarian law, impose a limit on the conduct of States during armed conflicts, with the objective of limiting suffering and destruction. In particular, the international humanitarian law defines, for humanitarian purposes, the access of parties to different means and methods of warfare.

Thus, the existence of an international judicial system based on the law of war resonates more deeply and offers a more thorough justificatory structure,[118] as nowadays, international humanitarian law is a well-developed field of international law,[119] informed by both customary international law, and two streams or systems playing a decisive role. And so we have the

[112] Teitel, R. G. (2003), supra note 92. p.36.
[113] Danner, A., Martinez, J. (2005), supra note 2. p.95.
[114] U.N. Doc. S/RES/1329 (2000) Preamble.
[115] Teitel, R. G. (2003), supra note 89. p.93.
[116] Gasser, H., Thürer D., Humanitarian Law, International, in Wolfrum, R. (ed), The Max Planck Encyclopedia of Public International Law; Volume V, Oxford University Press, Oxford, 2012. p.59.
[117] United Nations. Charter of the United Nations. 1 UNTS XVI. 24 October 1945. art.1.
[118] Teitel, R. G. (2003), supra note 89. p.91.
[119] Gasser, H., Thürer D., (2012), supra note 116. p.60.

Geneva system, composed by four Geneva Conventions (1864, 1906, 1929, and 1949) and two Additional Protocols (1949),[120] covering the so-called humanitarian law, and motivated by the principle of humanity, it protects individuals not engaged in the conflict, including military personnel *hors de combat*, providing the basis for protection and humanitarian assistance.

The second stream is The Hague system; with two Hague Conventions (1899, and 1907), a Protocol (1925),[121] and additional specific treaties, referred to in the past as the law of war proper, determines the rights and duties of belligerent parties in the conduct of military operations, limits the available means and methods of warfare, and establishes the definition of combatants and military objectives.

From an international perspective, this has led to an effort concentrated in the creation of several institutions tending to assure parties compliance with the Convention's rules and customary law on the subject.[122]

In recent times, for example, the result has seen the U.N. increasingly taking a stand on violations of international humanitarian law, through military action,[123] the establishment of both fact-finding commissions, akin to truth commissions, and ad hoc tribunals[124] for the prosecutions of persons suspected to have committed such breaches.[125]

Along these lines, the establishment of the International Criminal Court, with jurisdiction over persons accused of violating the Geneva Conventions, and international humanitarian law in general, is an important step to reinforce individual criminal responsibility.

1.2. Legitimacy of International Criminal Law

Both scholars and practitioners agree that, even though the field of international criminal law has rapidly matured over the past ten years, it cannot be denied that it still suffers questions about its legitimacy.[126] The question of legitimacy, an issue that in fact has affected international law in its entirety,[127] is manifested in international criminal law by claims that put the stress on the lack of democratic accountability,[128] the extraordinary discretion inherent to prosecutors and judges in

[120] Gasser, H., Thürer D., (2012), Ibid. p.61.
[121] Gasser, H., Thürer D., (2012), Ibid. p.64.
[122] Teitel, R. G. (2003), supra note 89. p.91.
[123] Teitel, R. G. (2003), Ibid. p.91.
[124] Danner, A., Martinez, J. (2005), supra note 2. p.96.
[125] Gasser, H., Thürer D., (2012), supra note 116. p.68.
[126] Uhlířová, K. (2012), supra note 3. p.211.
[127] D'Amato, A. On the Legitimacy of International Institutions. Northwestern University School of Law Public Law and Legal Theory Research Paper Series No.06-35. January 8, 2007. p.5.
[128] D'Amato, A. (2007), Ibid. p.6.

the international arena,[129] and the injustice of using customary law as source of punishment.[130]

Unlike domestic criminal law systems, generally embedded in a greater, matured, political and legal system, international criminal law does not benefit from such legitimacy: barring the NMTs, contemporary international criminal processes and enforcement began only with the establishment of the ICTY and the ICTR,[131] and both these *ad hoc* tribunals remain, even to this day, controversial, to say the least. Furthermore, due to the particular focus that international criminal law theory puts on individual liability, and terms of imprisonment or criminal convictions as punishment, the field differs considerably from the rest of international law.

Thus, it is evident that establishing the legitimacy of international criminal law, and the international criminal proceedings that derive from it, at this point in the development of the field is still the most difficult, and critical, challenge that international tribunals face.[132] In effect, legitimacy is the *conditio sine qua non* for achieving not only international criminal law objectives, but also the human rights, and transitional justice ambitions of the field.

And while there are no doubts of the vitality of international criminal law, as it has been proven time and again thanks in great part to its recent, rapid expansion; this energy and development has yet to show the maturity of the field.[133]

This lack of confidence in the maturity of the field, the doctrines, and the processes has led to an "inescapable aura of arbitrariness"[134] and selectivity, which stains each international tribunal, no matter how carefully protected the defendants' right to fair process are. This unavoidable feeling of selectivity, is often represented by the number of offenses that are considered as international crimes, and the limited jurisdiction of international courts to adjudicate cases, leading to a certain arbitrariness even in regard to senior leaders: a clear example of this selectivity is what lead to the question, for instance, on why Milošević was on trial, when other heads of state have committed equal or greater crimes, and are not.[135] This defensive stance in which international courts and tribunals are placed by their critics leads to a greater need for caution in the prosecution of an offender and the application of the law to those brought before them.

Another problem faced by the field of international criminal law is that much of it is

[129] Jayangakule, K. (2010), supra note 1. p.27.
[130] Uhlířová, K. (2012), supra note 3. p.210.
[131] Gasser, H., Thürer D., (2012), supra note 116. p.68.
[132] Danner, A., Martinez, J. (2005), supra note 2. p.97.
[133] Jayangakule, K. (2010), supra note 1. p.27.
[134] Danner, A., Martinez, J. (2005), supra note 2. p.97.
[135] Drumbl, M. A. Collective Violence and Individual Punishment: The Criminality of Mass Atrocity. Northwestern University Law Review. Vol.99, No.2. 2005. p.581.

developed as a result of customary international law,[136] and by definition, there is no central legislative organ in such creation. Granted, although there are cases when an oversight body is created or attached to international criminal institutions, such as the role the Security Council has the case of both the ICTY and the ICTR, practice shows it still unlikely that said oversight body will take an active part in modifying or excluding judicial elaboration of the crimes or liability theories within the institution's jurisdiction. As an obvious example of this phenomenon, we can mention that more than ten years into the above-mentioned *ad hoc* tribunals' work, the Security Council has yet to amend any of the definitions of the substantive crimes or liability theories in the Statutes of the Tribunals.[137]

In essence, international criminal proceedings place defendants in a difficult position; not only they have to face a legal system whose crimes, procedures, and liability theories are for the most part foreign to him, and new, but these procedures and theories are themselves undergoing rapid change, and they are not always publicized.[138] This convergence of factors would be overwhelming to any defendant, but it is made worse when we consider that most, if not all, international criminal courts and tribunals hold the right to punish individuals with the deprivation of their personal liberty, such punishment being the most severe consequence held in domestic criminal proceedings, but inherently lacks the security provided by the same domestic criminal proceedings, among some of them, a clearly, articulated and time-tested penal code, familiar and longstanding criminal procedures, and the certainty that the most serious crimes will be punished.

Even though today there is significantly more court jurisprudence surrounding the field of international criminal law, up to and including the elements of international crimes, and individual liability theories, than there was in the early 1990s, when the ICTY and the ICTR were instituted, many questions remain unanswered.[139] In that sense, several of the provisions of the ICTY and the ICTR statutes have not yet been construed by the ICTY and ICTR judiciaries.[140] And certainly, the Rome Statute of the ICC is clearly far more complicated than the ICTY and the ICTR statutes, which means that its on-going application will probably present difficult, and novel, questions of legal interpretation.[141]

The ever-present sense of arbitrariness and selectivity is seen, also, in the problems

[136] Jayangakule, K. (2010), supra note 1. p.32.
[137] Danner, A., Martinez, J. (2005), supra note 2. p.98.
[138]Uhlířová, K. (2012), supra note 3. p.79.
[139] Uhlířová, K. (2012), Ibid. p.79.
[140] Danner, A., Martinez, J. (2005), supra note 2. p.99.
[141] Corell, H. Reflections on International Criminal Justice: Past, Present and Future. Washington University Global Studies Law Review. Volume 12, Issue 3. 2013. p.626.

prosecutors face with many of the definitions of the crimes, themselves calling for the exercise of prosecutorial judgment. In this line of thought, one of the war crimes proscribed under the ICC Statute, for example, is "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects (…) which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[142] While no one would contend this crime is not part of customary international law, its application in individual cases can be highly controversial, as it is up to international prosecutors, in the first instance, to decide what kinds of civilian harms are "clearly excessive."[143]

Furthermore, arbitrariness in international courts and tribunals is even more evident when we face the fact that international crimes do not have specific sentencing ranges attached to them, which basically means that international judges may impose, based on their discretion, any sentence from one day imprisonment to life imprisonment for every crime within the court's jurisdiction.[144]

Thus, it is precisely due to the wide choice often granted to international prosecutors in several critical areas, because of the novelty of international processes, and unfamiliarity of the international criminal arena, because of the political background of many of the cases prosecuted, and because of the lack of proper development and international consensus about the elements of some of the crimes in international criminal law, it is of the utmost importance that judges from international courts and tribunals protect defendants through careful attention to the individual liability principle and those doctrines that ensure defendants are convicted for their criminal acts and not as "scapegoats" for episodes of mass violence experienced in a given nation.[145]

[142] U.N. Doc A/Conf. 183/9. (1998), supra note 68. art.8(2)(b)(iv).
[143] Danner, A., Martinez, J. (2005), supra note 2. p.99.
[144] Danner, A. M. Constructing a Hierarchy of Crimes in International Criminal Law Sentencing. Virginia Law Review. Vol.87, No.3, 2001. pp.440-442.
[145] Danner, A., Martinez, J. (2005), supra note 2. p.100.

CHAPTER II. In search of customary precedents

2.1. Overview of the World War II jurisprudence

When the ICTY Appeals Chamber developed the doctrine of joint criminal enterprise as a mode of international liability and described its elements and types, it cited a series of national decisions and international judgments as the base of an international *corpus* of law applied by international courts.

In *Tadić*, the ICTY Appeals Chamber reviewed not only international treaties and documents[146] but also judicial precedents and prosecutions conducted by national military authorities that both preceded and followed the international proceedings at the International Military Tribunal at Nuremberg,[147] held between 20 November 1945 and 1 October 1946.

As we mentioned before, the existence of such extensive case law led the Appeals Chamber to hold the view that the notion of common design as a form of accomplice liability was established as customary international practice to prosecute individual offenders of collective wrongdoings.[148] This case law also showed that a doctrine such as joint criminal enterprise was implicitly upheld in the Statute of the International Tribunal.

While the success in the ICTY Appeals Chamber justification of the existence of the JCE doctrine as customary practice is still debated, however, it is considered that the case law and its outcomes do not support the "sprawling forms" of JCE, especially the "extended form."[149]

Generally speaking, the cases discussed by the judges of the ICTY Appeals Chamber in *Tadić* fall into one of two categories. The first category involves the unlawful killing of prisoners of war, either by German soldiers or by German soldiers and German townspeople.[150] The second category of cases concerns the doctrinal strategies that prevailed at the NMT, with the prosecution of criminal organizations and the charges of conspiracy.[151]

2.1.1. Essen Lynching case and another prisoner of war cases

When deciding the Duško Tadić case, the judges from the ICTY Appeals Chamber argued that the *Essen Lynching* case, decided by a British military court, contained the closest link to the

[146] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.289.
[147] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. paras.195-219.
[148] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.220.
[149] Danner, A., Martinez, J. (2005), supra note 2. p.110.
[150] McKenzie, B. The Principal Liability of Political and Military Leaders for International Crimes: Joint Criminal Enterprise versus Indirect Co-Perpetration. University of Otago, New Zealand. Bachelor Dissertation. October, 2014. p.11.
[151] Prosecutor v. Kupreškić et al. ICTY Case No. IT-95-16-T. Trial Chamber, 14 January 2000. para.611.

modern joint criminal enterprise doctrine.[152]

In that World War II related case, three British airmen who had the status of "prisoners of war" had been lynched by a mob of Germans in Essen, on 13 December 1944. Seven persons were charged with committing a war crime, included the German captain who put the prisoners under the escort of a German soldier.[153] Accounts indicate that, while the escort with the prisoners was leaving, the captain ordered in a loud voice to not interfere if German civilians molested the prisoners. The prisoners of war were then marched through one of the main streets of the city of Essen, with the crowd growing bigger. This group started hitting them and throwing stones, eventually, throwing the prisoners over the parapet of a bridge. While the fall killed one of the airmen, the other two were killed by members of the crowd.[154]

The problems with the accounts come, however, when it is taken into consideration the fact that the case, and the summary provided by the reporter from the United Nations War Crimes Commission (UNWCC), and upon which the *Tadić* court relied, provides no statement of the legal basis of the Military Court's conviction of the men,[155] nor there is any indication that the prosecutor, or the judges of the *Essen Lynching* case, explicitly relied on the concept of a common purpose, or common plan,[156] that amounted to a crime.

The ICTY Appeals Chamber, in deciding the *Tadić* case, nevertheless, cited the *Essen Lynching* case as supporting evidence for the existence of a customary international precedent for the third category of joint criminal enterprise.[157] In that sense, the ICTY Appeals Chamber held that out of the arguments proposed by prosecutors and judges of *Essen Lynching*, it could be inferred that the court found that all the defendants indeed intended to participate in crime, that being of the ill-treatment of prisoners of war, and that:

> "The convicted persons who simply struck a blow or implicitly incited the murder could have foreseen that others would kill the prisoners; hence they too were found guilty of murder."[158]

The ICTY Appeals Chamber reliance on the Essen Lynching case as an example of the existence

[152] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.207.
[153] United Nations War Crimes Commission. The Essen Lynching Case, Trial of Erich Heyer and Six Others, British Military Court for the Trial of War Criminals, in Law Reports of Trials of War Criminals Volume I. 1947. p.88.
[154] United Nations War Crimes Commission. Volume I. (1947), Ibid. p.89.
[155] Danner, A., Martinez, J. (2005), supra note 2. p.111.
[156] United Nations War Crimes Commission. Volume I (1947), supra note 153. p.91.
[157] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.208.
[158] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.209.

of an international customary practice to prosecute offenses based on a common plan, thus individual criminal liability based on collective wrongdoing, and specifically, its citation of the Essen Lynching case as support for the third category of joint criminal enterprise, lead to several scholars and practitioners alike to a position of skepticism.

Nevertheless, the facts and judicial outcome of the Essen Lynching case is a typical example how a series of prisoner of war (POW) cases were later cited, adopted, and conveniently constructed by the ICTY Appeals Chamber in the *Tadić* case.[159] Interestingly enough, some of these POW cases, although not the Essen Lynching case, do explicitly rely on arguments backed by the idea of a "common enterprise,"[160] or "common design"[161] to commit a crime. However, a particular element of the POW cases cited by the ICTY Appeals Chamber in *Tadić,* is that, while all of the defendants were present in the area where the crimes were committed, with exception of the German captain prosecuted in *Essen Lynching*, they were actually charged with the unlawful treatment of the prisoners, and not with participation in some larger common plan.[162]

Overall, however, a close reading of the POW cases, as made by the ICTY Appeals Chamber in *Tadić,* led to the judges to the confident assertion that, on the basis of cases as mentioned above, individual criminal liability based on the existence of a common plan was "firmly established in customary international law."[163]

Let's draw the attention now to the fact that these POW mob violence cases cited by the ICTY Appeals Chamber in *Tadić,* do seem to provide certain support for the views of the Appeals Chamber's regarding the existence of certain international custom on the prosecution of individuals based on a common idea to commit a crime, thus, leading to the application of the doctrine of common plan to the particular facts of *Tadić's* case. What these POW cases do not do, *prima facie*, is provide the ICTY Appeals Chamber with any legal basis for the creation of an exhaustive theory of extended joint criminal enterprise, which in some cases might span several years and extend throughout entire regions and even countries, and that might lead to the conviction of participants in a shared plan for crimes carried out by others even if the former lacks the state of mind or the *mens rea* required for the offence in question, as used in later cases at the ICTY.[164]

Thus, most scholars do share the view that, while the extended forms of joint criminal

[159] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. paras.212-213.
[160] United Nations War Crimes Commission. Volume I. (1947), supra note 153. p.40.
[161] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.210.
[162] United Nations War Crimes Commission. Trial of Franz Schonfeld and Nine Others, British Military Court for the Trial of War Criminals, in Law Reports of Trials of War Criminals Volume XI. 1949. p.68.
[163] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para. 220.
[164] Badar, M. E. (2006), supra note 29. p.301.

enterprise do not have a clear precedent as customary law in POW cases, it does resemble two other controversial doctrinal strategies used at the NMT: prosecution of criminal organizations, and the inclusion of the crime of conspiracy.

2.1.2. Criminal organizations

Already before the end of WW-II, there were fierce debates among the Allied Powers on how to treat Nazis in the event of an Allied victory, with United States (U.S.) officials successfully pressing for criminal trials to adjudicate Nazi guilt.[165]

But it took some time and many drafts before the U.S. War Department, through the work of lawyer Murray C. Bernays, first proposed the strategy that ultimately prevailed at Nuremberg.[166] Under Bernays' strategy, Nazis would be prosecuted by Allied judges in an International Military Tribunal, based on the criminality of the organizations themselves, in addition to the individual defendants indicted at Nuremberg.[167] Thus, the idea was first to use the Military Tribunal to convict the organization in itself as a criminal enterprise, binding subsequent criminal courts to prosecute individuals based on their membership in these criminal organizations.[168] The result of this logic would likely lead to the imposition of punishment upon hundreds of thousands of individuals based on the membership of criminal organizations.[169]

The latter issue, however, is that neither the London Charter, which was the document governing the Nuremberg Trials, nor the prosecution's strategy, not even the actual proceedings, provided a definition of the meaning, or elements, of the crime of "criminal organization", or association,[170] which lead, alas maybe even forced, the judges to eventually create a high standard of proof, concluding that the prosecution must demonstrate that the organization, in order to be considered a criminal association, must have real existence as an entity, in such a way that individuals considering membership would understand beyond reasonable doubt, that they are about to participate in a collective organization with criminal purposes.[171] Ultimately, this higher standard of proof led judges to find only three criminal organization: the Leadership Corps, the Gestapo, and the SS,[172] acquitting the other four agencies that had also been indicted with charges on criminal organizations.

---

[165] Danner, A., Martinez, J. (2005), supra note 2. p.112.
[166] Danner, A., Martinez, J. (2005), Ibid. p.113.
[167] Pomorski, S. Conspiracy and Criminal Organizations, in Ginsburgs G. & Kudriavtsev V.N. (eds), The Nuremberg Trial and International Law. Martinus Nijhoff Publishers, 1990. p.216.
[168] Pomorski, S. (1990), Ibid. p.220.
[169] Danner, A., Martinez, J. (2005), supra note 2. p.113.
[170] Danner, A., Martinez, J. (2005), Ibid. p.113.
[171] International Military Tribunal. Trial of the Major War Criminal Before the International Military Tribunal: Nuremberg, 14 November 1945 - 1 October 1946. Vol. I, 1947. p.278.
[172] International Military Tribunal. (1947), Ibid. p.268.

Finally, the judges of the NMT ruled that, as a direct result of the higher standard of proof required for the indictment of criminal organizations, and the logical burden of evidence on shoulders of the prosecution, subsequent proceedings within the jurisdiction of the London Charter, would require prosecutors to prove, beyond doubts, that those individuals prosecuted for membership in a criminal organization fulfilled two criteria, first that they joined such organization voluntarily, and second, that they had personal knowledge that said group was engaged in acts considered international crimes.[173]

With this ruling, the judges of the Military Tribunal imposed such a high standard of proof that it effectively negated the procedural benefits of the prosecution of organizations that the U.S. War Department anticipated. Ultimately, Bernays' idea of thousands of summary trials for membership in criminal organizations did not materialize, being in turn replaced by the administrative denazification program instituted by the Allies.[174]

2.1.3. Conspiracy

If the first strategy used by the U.S. War Department was to prosecute criminal organizations, and then prosecute individuals due to membership in such organizations, concurrently, Bernays' strategy counted with the prosecution of the crime of conspiracy,[175] as explicitly submitted in the original proposal that described conspiracy as the legal vehicle through which the Allied Powers would achieve mass convictions of Nazis. In Bernays' words:

> "The Nazi Government and its Party and State agencies ... should be charged before an appropriately constituted international court with conspiracy to commit murder, terrorism, and the destruction of peaceful populations in violation of the laws of war.... [O]nce the conspiracy is established, each act of every member thereof during its continuance and in furtherance of its purposes would be imputable to all other members thereof."[176]

Interestingly enough, in their decision, the judges of the Nuremberg Military Tribunal explicitly stated that "criminal organization is analogous to a criminal conspiracy in that the essence of

[173] International Military Tribunal. (1947), Ibid. p.278.
[174] Danner, A., Martinez, J. (2005), supra note 2. p.114.
[175] McKenzie, B. (October, 2014), supra note 150. p.9.
[176] Danner, A., Martinez, J. (2005), supra note 2. p.114.

both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose."[177] And yet, the idea of the crime of conspiracy was controversial at Nuremberg; the first reason was that back then, the crime of conspiracy was mostly absent in continental criminal systems, the second reason is that it was perceived a certain malleability of the definition of conspiracy, that would lead to aggressive prosecutorial strategies.[178]

Although this lead to a series of objections to the inclusion of the crime of conspiracy,[179] just as it had been with the inclusion of the crime of criminal associations, especially from the French and Soviet parties, ultimately, both crimes were prosecuted at Nuremberg, with the Nuremberg Charter defining conspiracy to commit a crime against peace in article 6, when states that "leaders, organizers, instigators and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes [Crimes Against Peace, War Crimes, and Crimes Against Humanity] are responsible for all acts performed by any persons in execution of such plan."[180]

As mentioned before, this kind of individual liability based on conspiracy was well known in common law criminal jurisdictions at the time, especially in the U.S.,[181] but had not been considered by continental criminal systems, being mostly absent in civil law jurisdictions.[182]

The Nuremberg indictment, in its count one, illustrates the way Allied prosecutors used the charges of conspiracy. The indictment stated, in its count one, that all of the defendants:

> "During a period of years preceding 8 May 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit... Crimes against Peace, War Crimes, and Crimes against Humanity... and, in accordance with the provisions of the Charter, are individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy."[183]

[177] International Military Tribunal. (1947), supra note 171. p.256.
[178] Pomorski, S. (1990), supra note 167. p.220.
[179] McKenzie, B. (October, 2014), supra note 150. p.9.
[180] International Military Tribunal. (1947), supra note 171. p.11.
[181] Pinkerton v. United States. 328 U.S. 640 (1946).
[182] Danner, A., Martinez, J. (2005), supra note 2. p.115.
[183] International Military Tribunal. (1947), supra note 171. p.29.

Thus, the crime of conspiracy as held in Nuremberg constituted a sharp double-edged sword, both becoming a substantive crime in itself (i.e. conspiracy to commit crimes against peace), but also becoming a theory of individual liability, in the sense that each defendant could be convicted for any acts committed by others "in the execution of such plan or conspiracy."

But just as it was with the crime of criminal organization, the final judgment as handed down by the judges of Nuremberg supported a restrictive concept of conspiracy[184] and outright rejected the application of conspiracy to Crimes against Humanity, and War Crimes.[185] Again, the restrictive nature of the concept of conspiracy ultimately led to a finite number of convictions of conspiracy to commit aggressive war, mostly limited to those considered to be Hitler's most senior leadership, who had active participation and control in the planning of the war.[186]

Two fine distinctions come out of the analysis done. First, although the term "common plan", which is used currently as a synonymous of joint criminal enterprise, does indeed appears in the Charter of the Nuremberg Tribunal, the prosecutorial indictment, and the final judgment, in itself the charge was not discussed as a separate entity from the crime of conspiracy. Second, has we have seen, ultimately, the scope of the conspiracy crimes and indictments done at the Nuremberg Tribunal was narrowed significantly by the judges, imposing such a restrictive concept of conspiracy, that played only a prominent role only in the prosecution of those closest to Hitler.

2.2. Contemporary JCE, conspiracy, and criminal organization liability

Interestingly enough, current international criminal law scholars understand that both Bernays' strategy of a charge against criminal organization, and the NMT's endorsement, although lukewarm, of said concept, do share a direct relationship with the theory of joint criminal enterprise,[187] in the sense that all these doctrines are potentially used to expand the liability of individual defendants far beyond the physical participation in the perpetration of crimes.

Thus, essentially, the idea behind charges of criminal organizations, conspiracy, and joint criminal enterprise is to extend the criminal liability of the defendants to acts committed by others, but within the scope of the criminal enterprise and, in the case of the "extended form" of joint criminal enterprise, to those beyond the reach of the criminal purpose.

Indeed, the United Nations War Crimes Commission, when analyzed all of the post-WW-

[184] International Military Tribunal. (1947), Ibid. p.225.
[185] Pomorski, S. (1990), supra note 167. p.233.
[186] Pomorski, S. (1990), Ibid. p.233.
[187] United Nations War Crimes Commission. Law Reports of Trials of War Criminals Volume XV. 1949. p.98.

II war crimes trials, as published in 1949, describes the charges of criminal organizations as seen at the Nuremberg Tribunal, in wordings similar to the way the doctrine of joint criminal enterprise is defined nowadays when it stated:

> "[T]he history of the development of the concept of membership [in a criminal organization] suggests strongly that what it was to punish was no mere conspiracy to commit crimes but a knowing and voluntary membership of organization which did in fact commit crimes, and those on a wide scale. Viewed in this light, membership resembles more the crime of acting in pursuance of a common design than it does that of conspiracy."[188]

And here the plot thickens, because has stated, while there is indeed a close doctrinal relationship between the Nuremberg Tribunal's charges of criminal organization, and the modern concept of joint criminal enterprise, notably the ICTY Appeals Chamber in *Tadić,* or in any subsequent case, has refused to rely too much, if not at all, on either the concept of criminal organization, or on charges of conspiracy as developed by the Nuremberg Trial, to justify the existence of joint criminal enterprise and its status as customary international law.[189] This is especially interesting because contemporary international criminal courts and tribunals do tend to treat the Nuremberg Tribunal, indictments, and judgments typically, with its high and low points, as canonical precedents, and the crime of conspiracy as part of customary international law.[190]

In this regard, the ICTY Appeals Chamber has stated that:

> "Criminal liability pursuant to a joint criminal enterprise is not liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter."[191]

---

[188] United Nations War Crimes Commission. Volume XV. (1949), Ibid. pp.98-99.
[189] Prosecutor v Milan Milutinović et al. ICTY Case No. IT-99-37-AR72. Appeals Chamber, 21 May 2003. Separate Opinion of Judge David Hunt. para.30.
[190] Prosecutor v Dražen Erdemović. ICTY Case No. IT-96-22-A. Appeals Chamber, 7 October 1997. Joint Separate Opinion of Judge McDonald and Judge Vohrah. para.51.
[191] Prosecutor v Milan Milutinović et al. ICTY Case No. IT-99-37-AR72. Appeals Chamber, 21 May 2003. Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise. para.26.

It should be noted, then, that the liability doctrine of joint criminal enterprise and the crime of conspiracy are, in the words of the ICTY Appeals Chamber itself, two distinct sets of tools in the prosecutorial strategy. And it is with the latest statement that we notice the most notable feature of the doctrine of joint criminal enterprise, which is that it never constitutes a substantive crime in itself.[192] Thus, there is no crime of joint criminal enterprise, whereas conspiracy may indeed be considered a double-edged sword, acting both as a substantive offense and as a doctrine of individual liability.[193]

And in the argument on the differences between the two, the ICTY Appeals Chamber has stated that while conspiracy and joint criminal enterprise both require an agreement among individuals to commit a crime, as an essential element, the ICTY jurisprudence does not precisely determines what the agreement must entail. It is presumed that the agreement between individuals must amount to the execution of a "common criminal plan."[194] But the ICTY Appeals Chamber has stated in its judgment, that the requirement of joint criminal enterprise calls for "the commission of criminal acts in furtherance of that enterprise," thus distinguishing it from liability under conspiracy, which requires a mere agreement.[195] In these terms, it should be said that it is yet not sufficiently clear whether this formal distinction made by the ICTY Appeals Chamber between joint criminal enterprise and conspiracy carries much practical weight.

In fact, this confusion between the limits of conspiracy and joint criminal enterprise, the relation between the two, and the constitutive elements of each doctrine, has led to modern international judges failing to acknowledge that conspiracy is not only a substantive crime but also a principle of individual criminal liability in its right. Case in point, Judge Hunt of Australia, member of the ICTY Appeals Chamber in his separate opinion offered as part of the judgment of *Milutinović*, argued against the argument that joint criminal enterprise could be a form of conspiracy, because "conspiracy is not a mode of individual criminal responsibility for the commission of a crime."[196]

It should be noted that the ICTY's efforts to distance itself from the Nuremberg Tribunal, in what regards to the elaboration of the concepts of criminal organization and conspiracy are hardly surprising, as both charges were, already during the drafting of the NMT Charter, object

[192] McKenzie, B. (October, 2014), supra note 150. p.17.
[193] International Military Tribunal. (1947), supra note 171. p.29.
[194] Prosecutor v Milomir Stakić. (31 July 2003), supra note 33. para.435.
[195] Prosecutor v Milan Milutinović et al. (21 May 2003), supra note 191. para.23.
[196] Prosecutor v Milan Milutinović et al. (21 May 2003), supra note 189. para.23.

of much of the criticism.[197] Significantly, this is also true in modern international criminal law.

In the end, the judgments made at the NMT avoided altogether those considered the most controversial points in both charges of criminal organization, and conspiracy, by applying a narrow definition of said doctrines and imposing such a burden of proof on shoulders on the prosecution, that now required to prove the existence of voluntary membership in the organization, and individual knowledge of its criminal objective, in subsequent prosecutions of members of criminal organizations. Back then, the judges from the NMT justified these limitations, narrow views, and the higher burden of proof, by indicating that such acts were "in accordance with well settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishment should be avoided."[198] But this critical insight seems to have been lost, or at least, it has not been given enough attention, if we follow the recent development of joint criminal enterprise, especially in its third category.

[197] Pomorski, S. (1990), supra note 167. p.218.
[198] International Military Tribunal. (1947), supra note 171. p.256.

CHAPTER III. The ICTY jurisprudence and other courts practice

3.1. The ICTY and *Tadić*

As mentioned in the previous chapter, joint criminal enterprise as a mode of liability, although not directly, does relate closely to the older concept of conspiracy, as seeing during the post-world war II military trials. However, as a doctrine of individual criminal liability, joint criminal enterprise was first coined by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, commonly known as the International Criminal Tribunal for the former Yugoslavia, or ICTY.[199]

The ICTY is an *ad hoc* international court established by Resolution 827 of the U.N. Security Council, as passed on 25 May 1993, whose aim is to prosecute serious crimes committed during the Yugoslav Wars, and to try their perpetrators.[200] Currently, it has jurisdiction over four clusters of crimes committed on the territory of the former Yugoslavia since 1991, as limited by its Statute: grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity.[201]

Thus, everyone agrees that the emergence of the term joint criminal enterprise, as well as the definition, elements, and the scope of the liability theory, was created and introduced by the judges of the ICTY Appeal Chamber. But, surprisingly enough, although it is traditionally considered that JCE came to be in the *Tadić* case,[202] the first judicial pronouncement from this *ad hoc* tribunal to hint at the existence of joint criminal enterprise as a mode of liability was the *Furundžija* Trial Judgment at the ICTY.[203]

3.1.1. The Furundžija case

3.1.1.1. Background

During the Yugoslav Wars, Anto Furundžija was a commander of the "Jokers", a special anti-terrorist police unit of the Croatian Defense Council (HVO), in the Vitez municipality in central Bosnia and Herzegovina.[204]

---

[199] Danner, A., Martinez, J. (2005), supra note 2. p.103.
[200] Clark, J. (2008), supra note 46. p.1687.
[201] Statute of the International Criminal Tribunal for the Former Yugoslavia. U.N. S.C. Res.827. 1993. Amended by U.N. Resolution 1877. 7 July 2009. Articles 2-5.
[202] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.191.
[203] Prosecutor v. Anto Furundžija. ICTY Case No. IT-95-17/1-T. Trial Chamber, 10 December 1998.
[204] Prosecutor v. Anto Furundžija. (10 December 1998), Ibid. para.39.

During the armed conflict, he was an active combatant and had engaged in hostilities against the Muslim community in the Lašva Valley area, including the attack on the village of Ahmići, where he participated in expelling Muslims from their homes.[205]

3.1.1.2. The ICTY decision

After his capture and trial, Anto Furundžija was found guilty by the ICTY Trial Chamber on the charges of "torture", and "outrages upon personal dignity", both as violations of the laws or customs of war, based on events that occurred in the "Jokers" headquarters in Nadioci, in mid-May 1993.[206]

Interestingly enough, the ICTY Trial Chamber found Anto Furundžija guilty of torture not as the direct perpetrator of the act, but rather as a co-perpetrator for his failure to stop or reduce the attacks upon the witness, by a subordinate soldier.[207] In regards to the charges of "torture", it was enough that Anto Furundžija was present in the room. The ICTY Trial Chamber concluded that the interrogation by Anto Furundžija and the acts carried out by a second accused became one, as his intention was to obtain information from the witness by causing her severe physical and mental suffering.[208]

The same logic can be seen applied by the ICTY Trial Chamber in regards to the count of "outrages upon personal dignity," including rape. The judges considered that the rapes committed by the second accused, but not Furundžija, on the witness were not disputed in any of the details described. Thus, the ICTY Trial Chamber knew that the witness suffered severe physical and mental pain, along with public humiliation, at the hands of the second accused, in what amounted to outrages upon her personal dignity and sexual integrity.[209]

What was contested, was the actual presence of Anto Furundžija at the scene, and, to some extent, whether he played any part in the commission of the rape. Following its logic, the ICTY Trial Chamber found that, although Anto Furundžija did not personally rape the witness, his presence and continued interrogation of her encouraged the other accused and substantially contributed to the criminal acts committed by him.[210] Thus, Furundžija was found to be an aider and abettor of the crime of "outrages upon personal dignity," including rape.

On 10 December 1998, the ICTY Trial Chamber rendered its judgement, convicting Anto Furundžija, on the basis of individual criminal responsibility (Article 7(1) of the Statute of the

[205] Prosecutor v. Anto Furundžija. (10 December 1998), Ibid. para.262.
[206] Prosecutor v. Anto Furundžija. (10 December 1998), Ibid. para.276.
[207] Prosecutor v. Anto Furundžija. (10 December 1998), Ibid. para.256.
[208] Prosecutor v. Anto Furundžija. (10 December 1998), Ibid. para.257.
[209] Prosecutor v. Anto Furundžija. (10 December 1998), Ibid. para.270.
[210] Prosecutor v. Anto Furundžija. (10 December 1998), Ibid. para.274.

Tribunal) with torture, and outrages upon personal dignity including rape (violations of the laws or customs of war, Article 3).[211]

In its judgment, the ICTY Trial Chamber later held that it was "empowered and obligated... to convict the accused under the appropriate head of criminal responsibility."[212] In doing so, the Trial Chamber analyzed several judgments to determine the elements of liability under aiding and abetting in customary international law and engaged in a detailed analysis of some post-world War II cases.[213] After this task was completed, the Trial Chamber concluded in the existence of two categories of liability for criminal participation, "co-perpetrators who participate in a joint criminal enterprise, on the one hand; and aiders and abettors, on the other hand."[214]

3.1.2. The *Tadić* case

3.1.2.1. Background

On the early hours of 30 April 1992, the Serb Democratic Party (SDS) took over the town of Prijedor with the aid of the military, and police forces[215] that set up checkpoints throughout the city and obtained control of the main buildings. Military posts were erected, and the Serbian flag with four Cyrillic S's was flown from the City Hall. Yugoslav People's Army (JNA) soldiers occupied the radio station, medical center, and bank,[216] renaming the city as Serb Municipality of Prijedor.

Less than a month later, the Bosnian Serb forces stationed in Prijedor attacked the nearby town of Kozarac, by 24 May 1992, which included two days of artillery barrage and assault by a mechanized brigade of troops, and resulted in the killing of some 800 civilians out of a population of around 4,000.[217] Later, the Bosnian Serb forces drove out of the area the entire non-Serb population, with many of them murdered by Bosnian Serb paramilitary and military forces.[218] Among the participants of the forced relocation was Duško Tadić.

As the refugees were taken in the direction of Kozaruša, many were singled out and, once removed from the column, shot by Bosnian Serb forces.[219]

After the takeover of Prijedor and the outlying areas, the Serb forces confined these

[211] Prosecutor v. Anto Furundžija. (10 December 1998), Ibid. para.276.
[212] Prosecutor v. Anto Furundžija. (10 December 1998), Ibid. para.189.
[213] Prosecutor v. Anto Furundžija. (10 December 1998), Ibid. para.191.
[214] Prosecutor v. Anto Furundžija. (10 December 1998), Ibid. para.216.
[215] Prosecutor v. Duško Tadić. ICTY Case No. IT-94-1-T. Trial Chamber, 7 May 1997. para.93.
[216] Prosecutor v. Duško Tadić. (7 May 1997), Ibid. para.137.
[217] Prosecutor v. Duško Tadić. (7 May 1997), Ibid. para.145.
[218] Prosecutor v. Duško Tadić. (7 May 1997), Ibid. para.578.
[219] Prosecutor v. Duško Tadić. (7 May 1997), Ibid. para.330.

Muslim and Croat civilians into camps, as part of the "Greater Serbia plan" to expel non-Serbs from the Prijedor Municipality.[220]

3.1.2.2. The ICTY decision

On 7 May 1997, the ICTY Trial Chamber rendered its judgment. Initially, the judges found Duško Tadić, former president of the Local Board of the SDS in Kozarac, guilty of the crimes of "persecution on political, racial or religious grounds, and inhumane acts as crimes against humanity, and cruel treatment as violations of the laws or customs of war."[221]

However, the prosecution appealed such decisions, and on 15 July 1999, the ICTY Appeals Chamber reversed the judgement made by the Trial Chamber, finding Tadić guilty of willful killing; torture or inhuman treatment; willfully causing great suffering or serious injury to body or health as a grave breach of the 1949 Geneva Conventions, murder as a crime against humanity, and murder as a violations of the laws or customs of war.[222] Thus, the judicial innovation of joint criminal enterprise is explained by the particular context of the *Tadić* case.

Indeed, at the time, the ICTY was suffering from both a lack of individuals to try and a surfeit of judges with no cases to adjudicate. Enter Duško Tadić, an enthusiastic, albeit relatively low-level participant in the crimes that occurred in Bosnia in the early 1990s.[223]

In 1995, Tadić had been indicted by the ICTY prosecutor on a variety of charges, and at his trial, as was noted before, the ICTY Trial Chamber convicted him on counts of war crimes and crimes against humanity.

But the ICTY Trial Chamber determined that it could not "on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part in the killing of five men"[224] thus acquitting Tadić of the charges crime against humanity for the murder of five men in Jaskici.[225]

Indeed, the ICTY Trial Chamber was convinced that Tadić entered Jaskici with a group of armed men, and the five victims, who were alive when the armed group entered the town, were found shot to death after the group's departure. Nevertheless, the Trial Chamber also found that concurrently to the death of the five men, an ethnic cleansing operation was taking place in a neighboring village.[226] It followed then, the application of a test of reasonable doubt that

[220] Prosecutor v. Duško Tadić. (7 May 1997), Ibid. para.154.
[221] Prosecutor v. Duško Tadić. (7 May 1997), Ibid. Judgment.
[222] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.327.
[223] Danner, A., Martinez, J. (2005), supra note 2. p.104.
[224] Prosecutor v. Duško Tadić. (7 May 1997), supra note 215. para.373.
[225] Prosecutor v. Duško Tadić. (7 May 1997), Ibid. para.397.
[226] Prosecutor v. Duško Tadić. (7 May 1997), Ibid. para.373.

benefited Tadić.

The prosecution appealed Tadić's acquittal of this charge, and the Appeals Chamber agreed, concluding that "the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which [Tadić] belonged killed the five men."[227] The ICTY Appeals Chamber then considered the absence of proof that Tadić had personally shot the men.

The ICTY Appeals Chamber then found that those crimes within the jurisdiction of the Tribunal "might also occur through participation in the realization of a common design or purpose."[228] To determine the relevant elements required for this "common purpose liability," the ICTY Appeals Chamber delved into customary international law, which in this situation, derived from the case law of military courts set up after WW-II. After a lengthy analysis, the ICTY Appeals Chamber identified several cases in which military courts had convicted individuals by participating in a common plan.

After a review of this jurisprudence, the ICTY Appeals Chamber concluded that "broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality."[229]

In the first category, the perpetrators act under a common design and share the same criminal intention.[230]

To be found guilty of a crime, such as murder for example, under the first category of JCE liability, the prosecution needs to prove that the defendants shared a common plan, such as to kill the victim, and that the particular defendant willingly participated in at least one aspect of the common scheme, as long as he intended to assist in the commission of the crime, even if he did not himself committed the *actus reus* required for the act of killing.[231]

The second category of JCE relates to the existence or institutionalization of "systems of ill-treatment."[232]

To be found guilty of a crime under JCE liability in its second category, the prosecution must not prove any kind of agreement or common purpose between participants, be it formal or informal, but the prosecution still must prove that the particular defendant adhered or complied with an organized system of repression,[233] taking active participation in the enforcement of this system, with knowledge of the nature of the system; and with intent to further the system of

[227] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.183.
[228] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.188.
[229] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.195.
[230] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.196.
[231] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.196.
[232] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.202.
[233] Prosecutor v. Milorad Krnojelac. ICTY Case No. IT-97-25-A. Appeals Chamber, 17 September 2003. para.96.

oppression.[234]

Lastly, the third category of liability under joint criminal enterprise is currently considered to be the most far-reaching, as it includes criminal liability for acts that would fall outside the common plan.

The *Tadić* Appeals Chamber concluded that a defendant may be found guilty of criminal acts that fall outside the common plan or design if such acts are a "natural and foreseeable consequence of the effecting of that common purpose."[235]

As an example of the kind of acts that would fall within the reach of "category three" of joint criminal enterprise, the ICTY Appeals Chamber concluded:

> "a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region ... with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of these civilians."[236]

In such scenario, all the participants in the common design would be found guilty of this murder, even if murder was not part of the original common design, as long as the possibility of death fell within the margins of a predictable consequence of the execution of the common design, and if the co-perpetrators were "reckless or indifferent" to that risk.[237]

Following that logic, the ICTY Appeals Chamber stated that indeed Tadić had participated in the common "criminal purpose to rid the Prijedor region of the non-Serb population,"[238] and later finding that both the killing of non-Serbs was foreseeable, or, at least, predictable, in the execution of the common plan, and that Tadić being aware[239] of this possibility, and that the actions of his associates were likely to lead to such killing, nevertheless participated willingly in the common plan.[240]

---

[234] Prosecutor v. Milorad Krnojelac. (2003), Ibid. para.203.
[235] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.204.
[236] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.204.
[237] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.204.
[238] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.232.
[239] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.232.
[240] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.232.

Subsequently, at the end of the appeal, the ICTY Appeals Chamber overturned Tadić acquittal, set out the understanding of his criminal liability by virtue of participation in a joint criminal enterprise in the ambit of commission in Article 7(1) of the Statute of the ICTY, and held Duško Tadić responsible for the murder of the five men at Jaskići pursuant to the "third category" of joint criminal enterprise.[241]

3.2. Post-*Tadić* jurisprudence

Since Tadić's judicial innovation, the ICTY Appeals Chambers has held time and again that the idea of "committing" a crime implicitly includes participation in a "joint criminal enterprise," although it is not expressly conveyed anywhere in the ICTY Statute.[242]

Also, the doctrine of joint criminal enterprise liability has often been reaffirmed, upheld and criticized by the jurisprudence of other international criminal courts and tribunals, such as the ICTR, the SCSL, and the ICC. As a result, the concept of joint criminal enterprise has been further refined by those judicial pronouncements.

3.2.1. The ICTY

As one could assume, ever since the *Tadić* judgment, and the Appeal Judgment innovation in the area of individual liability, the joint criminal enterprise liability mode has been used time and again as a prosecutorial tool in the indictments of individuals prosecuted for the perpetration of serious international crimes during the Yugoslav wars. Indeed, the ICTY prosecution also relied on this mode of liability to indict Slobodan Milošević,[243] first president of Serbia and third president of the Federal Republic of Yugoslavia.

The convenience of the imposition of responsibility under this doctrine, even if JCE is not expressly considered under the Statute of the ICTY, has been reaffirmed by the ICTY jurisprudence in many occasions, and through the years, after the *Tadić* case.[244] Indeed, the customary status of JCE in the practice of international criminal courts and tribunals has been reasserted, with the judicial conclusion that JCE falls within the ambit of "commission" under Article 7(1) of the Statute of the ICTY.[245]

---

[241] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. paras.235-237.
[242] Boas, G. The Difficulty with Individual Criminal Responsibility in International Criminal Law in Stahn, C. and van den Herik, L. (eds.), Future Perspectives on International Criminal Justice; TMC Asser Press, The Hague, The Netherlands, 2010. p.510.
[243] Prosecutor v. Slobodan Milošević et al,. ICTY Case No. IT-99-37-PT. Second Amended Indictment, 16 October 2001. para.16.
[244] Prosecutor v Milan Milutinović et al. (21 May 2003), supra note 191. para.36.
[245] Prosecutor v. Milan Milutinović, Nikola Šainović & Dragoljub Ojdanić. ICTY Case No. IT-99-37-1, 5 September

This has led to further and substantial refinement and expansion of the physical and mental elements required for JCE liability outlined in *Tadić* case.[246]

3.2.2. The ICTR

Following events in Rwanda during the year 1994, and the mass slaughter that took place therein, the United Nations Security Council decided to establish an International Criminal Tribunal for Rwanda (ICTR), with the power to prosecute persons responsible for serious violations of international humanitarian law,[247] with the Statute of this Tribunal, as annexed to the body of the U.N. Security Council, bearing many similarities to the Statute of the Yugoslavia Tribunal.[248]

In that sense, ICTR Statute Article 6 provides for individual criminal liability with regards to persons planning, ordering, committing or aiding a series of crimes listed in Articles 2 to 4, those being: Genocide, Crimes against humanity, and Violations to art. 3 common to the Geneva Conventions and of Additional Protocol II.[249]

While this might lead us to believe that the doctrine of joint criminal enterprise is fully accepted and applied by the ICTR, as William Schabas describes, the prosecution has still been reluctantly slow to produce charges that explicitly incorporate JCE participation into the indictments.[250] Thus, this has led some to say that the role of joint criminal enterprise is not as significant at the ICTR as it is in the ICTY.

There are, however, at least, three cases where the ICTR has successfully applied the doctrine of joint criminal enterprise liability.

In *Rwamakuba,* the Chamber recognized that the practice of indictment under a joint criminal enterprise for the crime of Genocide existed in customary international law before 1992.[251] Therefore, it concluded that the ICTR had jurisdiction over a charge of Genocide perpetrated through a common plan that falls under joint criminal enterprise liability.

Furthermore, in *Karemera,* the Chamber discussed liability under joint criminal enterprise in both international and internal armed conflicts, and if JCE breaches the principle of *nullum crimen sine lege*.[252]

2002. Third Amended Indictment. para.16.

[246] Prosecutor v. Milomir Stakić. ICTY Case No. IT-97-24-A. Appeals Chamber, 22 March 2006. paras.64-65

[247] Statute of the International Criminal Tribunal for Rwanda. U.N. S.C. Res. 955. Nov. 8, 1994. art.1.

[248] Shaw, M. International Law (7th Edition). UK, Cambridge University Press. 2014. p.407.

[249] Statute of the International Criminal Tribunal for Rwanda. (1994), supra note 247. arts.2-4.

[250] Schabas, W. A. (2002-2003), supra note 28. p.1034.

[251] Prosecutor v. André Rwamakuba. ICTR Case No. ICTR-98-44-AR72.4, 22 October 2004. Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide. para.31.

[252] Prosecutor v. Édourad Karemera et al. ICTR Case No. ICTR-98-44-T, 11 May 2004 Decision on the Preliminary

Finally, in *Ntakirutimana and Ntakirutimana*, the ICTR Chamber examined the elements of liability under joint criminal enterprise in terms identical to those set forth in *Vasilijevic* by the Appeal Judgment of the ICTY, coming to the ultimate conclusion that the jurisprudence of the ICTY should be applied to the interpretation of Article 6(1) of the ICTR Statute.[253]

3.2.3. The International Criminal Court

After the NMT, clearly an *ad hoc* tribunal set out to judge Nazi leadership after WW-II, a worldwide intention towards the creation of a permanent international judicial body was next expressed in Article VI of the Genocide Convention (1948), that provided for persons charged with the crime of Genocide to be tried either by a court in the territory where the act had been committed or by an international penal tribunal to be established.[254]

However, due primarily to the Cold War, among other political reasons, no progress on the establishment of such an international court was made, until the developing Yugoslav situation in early 1990.[255]

This prompted international action and by 1994, the International Law Commission (ILC) adopted a Draft Statute for an International Court, proposing the creation of an international criminal court with jurisdiction not only over genocide, war crimes, crimes against humanity and aggression, but also over certain crimes, such as terrorism and drug offences found in several U.N. conventions. The ILC draft proved very influential, and a Preparatory Committee led to the Rome Conference in 1998, which produced the Rome Statute on the International Criminal Court (ICC), on 17 July 1998.

Interestingly, the Rome Statute of the ICC is the first international instrument that explicitly regulates the joint criminal enterprise doctrine, when in Article 25(3)(d) it is stated that:

> "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person…
> (d) In any other way contributes to the commission or

Motions by the Defence of Joseph Nzirorera, Édourad Karemera, Andre Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise,. paras.1-30.

[253] Prosecutor v. Ntakirutimana and Ntakirutimana, ICTR Case No. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004. Judgment. para.468.

[254] Convention on the Prevention and Punishment of the Crime of Genocide. Resolution 260 (III) General assembly (9 December 1948). art.6.

[255] Shaw, M. (2014), supra note 248. p.410.

> attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> i) Be 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) Be made in the knowledge of the intention of the group to commit the crime…"[256]

This has led to some exciting developments of the doctrine of joint criminal enterprise in the practice of the ICC, at least, in the first case against Lubanga Dyilo, where the Pre-Trial Chamber decided that Article 25(3) (d) denotes a co-perpetration that requires a "joint control" over the crime.[257]

Thus, it is evident there is a significant difference between the ICC Chamber's concept of joint control and joint criminal enterprise as used by the ICTY and subsequent international courts, because "joint control" requires the accused to make an essential contribution,[258] an element that is not necessary for the traditional use of JCE.

3.2.4. SCSL

Following a particularly violent civil war in Sierra Leone, an agreement between the United Nations and the Government in January 2002, led to the establishment of the Special Court for Sierra Leone (SCSL), pursuant to Security Council resolution 1315 (2000), in order to prosecute those who had "the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[259]

Although the SCSL is not bind to the jurisprudence of the ICTY and ICTR, it could be argued it does so for the authority and relevance those Tribunals have, given that it is considered that the SCSL and the other *ad hoc* international criminal tribunals are all part of the same

[256] U.N. Doc A/Conf. 183/9. (1998), supra note 68. Art.25(3)(d).
[257] Prosecutor v. Thomas Lubanga Dyilo. ICC Case No. ICC-01/04-01/06-803, 29 January 2007. Decision on the Confirmation of Charges. paras.317-367.
[258] Cassese, A. (ed.) The Oxford Companion to International Criminal Justice. Oxford University Press, New York, 2009. p.393.
[259] Shaw, M. (2014), supra note 248. p.418.

system of international criminal justice.[260]

Thus, Article 6(1) of the SCSL Statute contains provisions which are clearly modeled on the Article 7(1) of the Statute of the ICTY and Article 6(1) of the Statute of the ICTR. And even though the SCSL Statute does not expressly provide for the doctrine of joint criminal enterprise liability, the Court has determined that the term "commit" as is expressed in the Statute is mutable enough to include participation in a joint criminal enterprise to commit a crime.[261]

In fact, recently, in *Sesay et al.*,[262] the SCSL Appeals Chamber held that liability under joint criminal enterprise does not preclude the possibility of an accused with intent that is different from those of his co-participants in the common plan to commit the crimes.[263] According to the court decision, thus, with or without the specific intent, a defendant charged under joint criminal enterprise liability may be held criminally responsible for all the natural and foreseeable consequences of that common plan, "however remote they might have been from the defendant's own intentions."[264]

3.2.5. ECCC

In 1997, the Cambodian authorities requested the United Nations to assist in establishing a trial process to prosecute the senior leaders of the Khmer Rouge regime, that had taken power in 1975 following a civil war and proceeded to commit wide-scale atrocities until 1979.

It was in 2001, that the Cambodian National Assembly finally passed a law to create a court to try serious crimes committed during the Khmer Rouge regime,[265] and by 2003, the United Nations General Assembly approved a Draft Agreement between the U.N. and Cambodia providing for Extraordinary Chambers in the Court of Cambodia, with the aim of bringing to trial those who were "most responsible for the crimes and serious violations of Cambodia penal law, international humanitarian law and custom, and international conventions recognized by Cambodia."[266]

Regarding individual liability under the doctrine of joint criminal enterprise, although the ECCC Law does not explicitly provide for it, the ECCC fundamental law employs terms similar

[260] Damgaard, C. (2008), supra note 38. pp.51-55.
[261] Prosecutor v. Moinina Fofana and Allieu Kondewa. SCSL Case No. SCSL-04-14-T, 2 August 2007. Judgment. para.208.
[262] Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao. SCSL Case No. SCSL-04-15-A, 26 October 2009. Appeal Judgment.
[263] Mettraux, G. "Joint Criminal Enterprise" has Grown Another Tentacle! International Criminal Law Bureau. 18 November 2009.
[264] Prosecutor v. Issa Hassan Sesay. (26 October 2009), supra note 262. para.492.
[265] Reach Kram No. NS/RKM/0801/12. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of crimes committed during the period of democratic Kampuchea. 10 August 2001. As ammended on 27 October 2004 by NS/RKM/1004/006.
[266] U.N. A/Res/57/228A, 27 February 2003; U.N. A/57/806, 6 May 2003; and U.N. A/Res757/228B, 22 May 2003.

to those found in Article 7(1) of the ICTY Statute. In that regards, Article 29 of the ECCC Law, defines that:

> "Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime…"[267]

Until now, the question of indictments using criminal liability under joint criminal enterprise against accused at the ECCC is controversial, with international criminal experts expressing concerns over the legality and legitimacy of the application of JCE.

3.2.6. JCE in other hybrid courts

Individual criminal liability under joint criminal enterprise also plays a role as a prosecutorial tool in the Statutes of several hybrid courts. Case in point, Article 15(2)(d) of the Law of the Supreme Iraqi Criminal Tribunal (SICT) explicitly recognizes the doctrine of JCE as a separate mode of liability, in terms similar to that of Article 25(3)(d) of the Rome Statute of the ICC.[268] Indeed, Saddam Hussein and six co-accused were convicted of crimes through principle forms of responsibility, including common purpose liability.[269]

Similarly, section 14 of the Regulation No. 2000/15 of the Special Panels for Serious Crimes, promulgated by the United Nations Transitional Administration in East Timor (UNTAET) mirrors Article 25 of the Rome Statute of the ICC, with subsequent submissions expanding upon the notion of participation in common purpose based on the jurisprudence of the ICTY and the ICTR.[270]

[267] Reach Kram No. NS/RKM/0801/12. (10 August 2001), supra note 265. art.29.
[268] Law of the Supreme Iraqi Criminal Tribunal, No. 10 of 1005. Official Gazette of the Republic of Iraq, No. 4006, 47th year, 18 October 2005.
[269] Boas, G., Bischoff, J. L., Reid, N. L. International Criminal Law Practitioner Library Volume I: Forms of Responsibility in International Criminal Law. Cambridge University Press, New York, 2007. p.139-140.
[270] Boas, G., Bischoff, J. L., Reid, N. L. (2007), Ibid. pp.133-135.

CHAPTER IV. Categories and elements of JCE

4. Introduction

After the decisions reached in *Furundžija* and *Tadić*, The ICTY Appeals Chamber concluded that individual responsibility for international crimes must include liability for both individual actions, and actions perpetrated collectively by other persons, as part of a common criminal plan, or design.[271]

Following the ICTY Appeals Chamber jurisprudence in the *Tadić* case, judges in the international *fora* have identified different configurations under the joint criminal enterprise liability, thus frequently distinguishing between three different categories or "types" of JCE liability. These categories of JCE liability are called "basic," "systemic" and "extended."[272]

In *Tadić,* the ICTY Appeals Chamber not only identified the three unique categories or configurations of liability under joint criminal enterprise, but it also categorized both the subjective and objective elements of the liability accorded to each category.

Thus, in this chapter, we will first explore and analyze the characteristics assigned to each category of the joint criminal enterprise doctrine as the ICTY Appeals Chamber defined them. Later, we will also proceed to review the *actus reus* element, and the *mens rea* element of each category of joint criminal enterprise, as expressed by the jurisprudence of the international criminal courts and tribunals.

4.1. Categories

In the judicial development of the doctrine of joint criminal enterprise, the judges of the ICTY Appeals Chamber immediately identified different possibilities when arguing on the extension that individual liability under this doctrine could have, in regards to several of its elements.[273] Out of this discussion arose the three different categories or "types" of joint criminal enterprise liability. These categories are nowadays called "basic," "systemic" and "extended."

4.1.1. The basic form

Alternatively known as joint criminal enterprise I or "basic form," as it is also called, criminal liability under this category encompass the individual liability that arises from participation in a

[271] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.193.
[272] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.111.
[273] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.195.

common criminal plan or purpose. In this "basic form", all co-perpetrators act by a "common design" and with a "common criminal intention".[274]

Thus, this mode of criminal liability falls upon all co-perpetrators of a plan to kill, where, in the implementation of the "common plan", and even if each co-perpetrator fulfills a different role in it, they nevertheless all-purpose the intent to kill.[275] Alas, although only one individual committed the *actus reus*, all co-perpetrators shared the same *mens rea*.[276]

Following the ICTY Appeals Chamber jurisprudence in *Tadić,* the accused must be part of the "common design", and "participate voluntarily" in at least one aspect of the joint design. This requirement is met, for instance, by aiding in the violence against the victim, providing material assistance, or facilitating the activities of the co-perpetrators.[277]

When examining the customary court practices taken from the post-world War II jurisprudence, the ICTY Appeals Chamber discussed a series of cases referred to prisoners of war, chief among them the Trial of Otto Sandrock and three others, known as the "*Almeno Trial*", in which three Germans were found guilty by a British Military Court under the doctrine of "common enterprise", as an example of the customary existence of joint criminal enterprise liability in international law.[278]

Also, the ICTY Appeals Chamber also mentioned *Hoelzer et al*., as judged by a Canadian Military court, where once again, the judge stated the existence of a "common enterprise" between three Germans about the murder of a Canadian POW.[279]

4.1.2. The systemic form

Responsibility under joint criminal enterprise II or "systemic form" is the individual liability for participation in a common criminal plan that has been institutionalized, or has elements of institutionalization,[280] and has elements of a penal system.[281]

The "systemic form" covers, for example, the liability that falls upon the perpetrators of crimes that took place in concentration camps, and that were committed by members of military

[274] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.196.
[275] Jayangakule, K. (2010), supra note 1. p.20.
[276] Zgonec-Rožej, M. International Criminal Law Manual. International Bar Association. United Kingdom. 2010. p.266.
[277] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.196.
[278] Lord, S. Joint Criminal Enterprise and the International Criminal Court - A Comparison between Joint Criminal Enterprise and the Modes of Liability in Joint Commission in Crime under the Rome Statute; Can the International Criminal Court Apply Joint Criminal Enterprise as a Mode of Liability? Faculty of Law. Stockholm University. 2013. p.17.
[279] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.197.
[280] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.202.
[281] Zgonec-Rožej, M. (2010), supra note 276. p.266.

or administrative units, acting pursuant to a "concerted plan",[282] to mistreat or kill detainees, when the accused was aware of the existence of this system; and he actively participated in the enforcement of said system.[283]

When examining the customary court practices taken from the post-WW-II cases, the ICTY Appeals Chamber referred to two well-known cases: the trial of Martin Gottfried Weiss and thirty-nine others, also known as "*the Dachau Concentration Camp case*", as decided by a United States Military Court, and the trial of Jose Kramer and forty-four other, also known as "*Belsen case*", decided by a British Military Court,[284] as an example of joint criminal enterprise liability under its "systemic form".

Indeed, the ICTY Appeals Chamber argued that, in both cases, the accused held positions of authority in the concentration camps where they worked, and were accused of acting in pursuance of a "common design" to mistreat or kill detainees. The ICTY Appeals Chamber then elaborated that, in order to prove the guilt of the accused via joint criminal enterprise liability under its "systemic form", however, three requirements must be fulfilled: (i) the existence of an organized system in furtherance of a crime, and the committing of the alleged crime; (ii) the accused's awareness of the existence of this system; and (iii) the active participation of the defendant in the enforcement of such system, or in any case, in the realization of the "common criminal design".[285]

4.1.3. The extended form

Known alternatively as joint criminal enterprise III, or "extended form," this is the most criticized form the JCE doctrine can adopt, devolving into a sort of incidental criminal liability that is based on the individual foresight, and the voluntary assumption of risks.[286]

The "extended form" is the liability that falls upon co-perpetrators when one of them engages in an act that actually goes beyond the "common design" as initially agreed by the co-perpetrators, but this act nevertheless constitutes a "natural and foreseeable consequence" of said plan, and the co-perpetrators willingly took the risk that such predictable consequence would occur.[287] For example, a group-shared intention to forcibly remove ethnic members from a town, with the result that, in the course of doing so, one is killed.[288]

---

[282] Jayangakule, K. (2010), supra note 1. p.20.
[283] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.202.
[284] Lord, S. (2013), supra note 278. p.17.
[285] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.202.
[286] Jayangakule, K. (2010), supra note 1. p.21.
[287] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.204.
[288] Zgonec-Rožej, M. (2010), supra note 276. p.267.

When examining the customary court practices taken from the post-world War II cases, the ICTY Appeals Chamber referred to two important cases: the Essen Lynching Heyer and six others, case known as the "*Essen Lynching case* or *Essen West case*", before a British military court, and the Kurt Goebel et al. case, referred to as the "*Borkum Island case*", before a United States military court, as an example of liability under joint criminal enterprise in its "extended form".

The ICTY Appeals Chamber argued that, in both cases, all the accused found guilty were held responsibility for pursuing a "criminal common design," the intent being to assault the POWs; thus they were later convicted because they had to have been "concerned in the killing" of the prisoners.[289]

4.2. Elements of JCE

As we have mentioned before, in *Tadić* the ICTY Appeals Chamber classified the subjective and objective elements of each category or type of joint criminal enterprise liability.

Moreover, all of these elements have repeatedly been reasserted by the jurisprudence of international *ad hoc* tribunals, especially the ICTY, and the ICTR.

In this part of the chapter, we will advance over the *actus reus* element, and the *mens rea* element required for each category of liability under joint criminal enterprise.

4.2.1. Objective elements: the actus reus

In the aftermath of *Tadić,* both the ICTY and the ICTR, among other courts and tribunals, have followed the jurisprudence first established in *Tadić* itself, in articulating three broad external or objective elements as part of the *actus reus*, common to all categories of the joint criminal enterprise liability. These three elements of the *actus reus* are:

a) A plurality of persons;

b) The existence of a "common plan", "design" or "purpose" which amount to or involves the commission of a crime; and

c) The participation of the accused in the common design involving the perpetration of the crimes.[290]

While indeed, the *actus reus* element of all three categories of joint criminal enterprise are the same, each of these elements has some difference in the way they appear in each category. These

[289] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.209.
[290] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.227.

differences of *actus reus* in each category are addressed in the following part.

4.2.1.1. A plurality of persons

According to the ICTY Appeals Chamber in its *Tadić* decision, the first *actus reus* element required for all categories of joint criminal enterprise liability is the existence of a "plurality of persons."[291]

However, it should be said that the ICTY Appeals Chamber did not impose any other requirement on the "plurality of persons" element. That is to say, the element of "plurality of persons" does not require of an organization of military, political or administrative nature or structure,[292] and any "plurality of persons" suffice.

The post-*Tadić* jurisprudence of other *ad hoc* courts and tribunals has reaffirmed this element, thus making it an essential condition for the application of joint criminal enterprise liability, that the accused is required to act with a number of other persons.

The answer to the question of what exactly encompass "a number of other persons" was explained in *Ntakirutimana and Ntakirutimana*, alternatively known as *Ntakirutimana et al.*, by the ICTR Appeals Chamber, when it concluded that the "plurality of persons" element requires the existence of many people.[293] Moreover, several other trial judgments are of the opinion that two individuals are already a "plurality of persons", and thus, it is sufficient to fulfill the requirement of the element in any category of joint criminal enterprise liability.[294]

4.2.1.2. Common plan, design or purpose

Furthermore, in *Tadić*, the ICTY Appeal Chamber set out the requisite that, in order for joint criminal enterprise liability to meet all requirements, the prosecution ought to prove the existence of a "common plan," "design" or "purpose", which amounts to or involves the commission of a crime,[295] with post-*Tadić* decisions restating the importance of this requirement by using, time and again, one or more of these three seemingly interchangeable terms.[296]

Moreover, in the decision that the judges of the ICTY Appeals Chamber rendered in *Tadić,* they held that it is not of fundamental necessity for this "common plan," "design" or "purpose" to have been pre-arranged before the crime, as it is entirely possible, and still within

[291] Jayangakule, K. (2010), supra note 1. p.22.
[292] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.227.
[293] Prosecutor v. Ntakirutimana and Ntakirutimana. (13 December 2004), supra note 253. para.466.
[294] Prosecutor v. Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlaño Radić & Zoran Žigić, ICTY Case No. IT-98-30/1-T, 2 November 2001. Judgment. para.307.
[295] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.227.
[296] Boas, G., Bischoff, J. L., Reid, N. L. (2007), supra note 269. p.37.

the realm of joint criminal enterprise liability, that this "common plan" may materialize extemporaneously, to be inferred from the fact that a "plurality of persons" act in unison, putting in effect a joint criminal enterprise".[297]

The interpretation that a "common plan," "design" or "purpose" need not exist beforehand, nor does it has to be express, and that it can still be realized if correctly inferred from all the circumstances, has been held in many post-*Tadić* decisions.[298]

4.2.1.3. The participation of the accused

The third *actus reus* element of the joint criminal enterprise liability, as set forth by the ICTY Appeals Chamber in *Tadić,* and held many other times in post-*Tadić* judgments, is the requirement of "participation" of the accused in the "common plan," "design" or "purpose" that amounts to the perpetration of a crime.[299]

Interestingly enough, in *Tadić* the ICTY Appeals Chamber held that the "participation" element does not require that the defendant participated in the commission of the specific crime, or a specific crime, such an extermination, torture, rape, etc.; as we had seen when we analyzed the *Furundžija* precedent.

Moreover, the element of "participation" may manifest itself in the form of assistance in, or contribution to, the execution of the "common plan," "design" or "purpose".[300]

4.2.2. Subjective elements: the mens rea

We have seen above that the *actus reus* elements of all three categories of joint criminal enterprise are the same, only presenting some difference in the way they appear in each category.

However, the *mens rea* elements of each category of joint criminal enterprise", the subjective elements, present differences of varying degrees, being able to be easily distinguished. Thus, while joint criminal enterprise liability in its "basic form" requires a "shared intent" of the co-perpetrators to participate in a "common plan", "design" or "purpose", joint criminal enterprise liability in its "systemic form" requires the perpetrator's "personal knowledge" of the existence of a system of ill-treatment, and joint criminal enterprise liability in its "extended form" requires the perpetrator's "intention to participate" in a criminal plan, with foreseeable consequences, and assumption of risks.[301]

---

[297] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.227.
[298] Boas, G., Bischoff, J. L., Reid, N. L. (2007), supra note 269. p.37.
[299] Jayangakule, K. (2010), supra note 1. p.22.
[300] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.227.
[301] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.196.

4.2.2.1. Mens rea element of the basic form

The ICTY Appeals Chamber held in *Tadić* that the *mens rea* element required for liability under joint criminal enterprise in its "basic form" is the accused intent to perpetrate a certain crime.[302]

Moreover, the post-*Tadić* jurisprudence of *ad hoc* courts and tribunals have identified two sub-types of subjective elements as part of the "basic form," that is, "voluntary participation" on one side, and a "shared intent" on the other.

Regarding the first element, that is the defendant "voluntary participation", most jurisprudence on the issue states that the accused must voluntarily participate in at least one aspect of the "common plan," "design" or "purpose", and intended the criminal result.[303]

Regarding the second element, that of "shared intent", it is held that it is not required to have been pre-arranged before the committing of the crime, as it is entirely possible, and still within the realm of joint criminal enterprise liability, that the "shared intent" is inferred from the facts.[304]

4.2.2.2. Mens rea element of the systemic form

According to the ICTY Appeals Chamber in *Tadić,* the *mens rea* element of the liability under joint criminal enterprise in its "systemic form", which relates to the existence of a "system of ill-treatment" such as it was the concentration or detention camps during WW-II, is the accused personal knowledge of this system of abuse, as well as his intention to further this "common plan" through such system.[305]

4.2.2.3. Mens rea element of the extended form

Finally, in *Tadić,* the ICTY Appeals Chamber stated that the *mens rea* element of joint criminal enterprise liability in its "extended form" is two-fold, composed by the existence of a "common plan", and a resulting act that falls in the realm of the possibilities of the effecting of the plan,[306] even if it was not the specific intent.[307]

Although, it is usually held that the "extended form" assigns liability for crimes that fall outside the "common plan", responsibility for crimes other than the one agreed upon in the "common plan", would arise, in words of Jayangakule, only if "(i) it was foreseeable that such a

[302] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.228.
[303] Boas, G., Bischoff, J. L., Reid, N. L. (2007), supra note 269. p.51.
[304] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.228.
[305] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.228.
[306] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.228.
[307] Zgonec-Rožej, M. (2010), supra note 276. p.188.

crime might be perpetrated by one or other members of the group, and (ii) the accused willingly took that risk".[308]

[308] Jayangakule, K. (2010), supra note 1. p.23.

CHAPTER V. Scholarly Critiques

5.1. The problems faced by the doctrine

Notable, as it was mentioned in the Introduction section of this thesis, there are at least three major areas of concerns usually associated to criticisms that are constantly being on the forefront of the discussion, whenever joint criminal enterprise individual liability for international collective wrongdoings is discussed.

The first major critique is that joint criminal enterprise may affect, in part or whole, the cornerstone domestic criminal principle of individual criminal liability, especially in when working with JCE in the "extended form".[309] Thus, the discussion on the legality of joint criminal enterprise applicability in proceedings will be addressed, in particular, when it faces the questions of violation of a fundamental principle of human rights law, and domestic criminal justice.

The second and third critiques are derivatives, arising out of the confusion surrounding the joint criminal enterprise concept, and its relation to other modes of individual liability. This is mostly due to its, prima facie, similarity to other types of liability of international criminal law, in particular, those that try and allocate individual responsibility arising out of collective wrongdoings, such as it is the case with aiding and abetting, and command responsibility.[310]

Thus, this section aims first answer the question regarding the convergence between joint criminal enterprise liability and the principle of individual criminal liability, and then distinguish joint criminal enterprise liability from the aiding and abetting mode of individual criminal responsibility, first, and from command responsibility, later.

5.1.1. Joint criminal enterprise and individual criminal liability

As we have noted before, commentators have questioned the joint criminal enterprise doctrine's conformity with fundamental principles of both human rights law, and domestic criminal law, some even arguing that the expansion of the doctrine might lead to some form of "guilt by association"; in particular in the application of JCE liability in its "extended form".[311]

Indeed, in this sense, the innovative process by which joint criminal enterprise was judicially introduced faces its first challenge regarding the principle of individual criminal responsibility. Along those lines, it is feared that the doctrine of joint criminal enterprise liability

[309] Danner, A., Martinez, J. (2005), supra note 2. p.98.
[310] Damgaard, C. (2008), supra note 38. p.182.
[311] Badar, M. E., (2006), supra note 29. pp.293-302.

is used to circumvent certain difficulties in finding evidence that can prove beyond reasonable doubt that the accused participated in a crime, thus leading to secure convictions for the participation in core international crime.[312] Also, liability under joint criminal enterprise deems not only the accused but all members of the group to be equally guilty of the crimes regardless of the part played by each one of them in its commission;[313] a contribution that does not need to amount to physical participation in any element of a crime.[314] After all, the application of joint criminal enterprise liability leads to the prosecution of any person who becomes involved in any respect in a crime committed by another, and thus someone may be held responsible for the action of others, regardless of whether the principal offender is prosecuted or not.[315]

Thus, it is not difficult to see how joint criminal enterprise liability might contradict the fundamental principle of individual responsibility in several ways; in particular, when trying to limit judicial and prosecutorial power over defendants as they try to punish individuals for their acts. As a result, the continuous application of joint criminal enterprise has been criticized by commentators because it contradicts the rationale for the traditional, strict, and well-known principle of personal guilt of the individual.

According to most domestic criminal systems, or at least in those of liberal tradition, the fundamental, and basic principle that must be respected at all times in the prosecution of all individuals is the principle of individual criminal liability, alternatively known as the principle of personal guilt,[316] which requires that a person may only be found criminally guilty in respect of acts deemed as violation of the law, when committed only by himself.

And so, on the one hand, as an example of the common law legal system, the Anglo-American criminal tradition requires an *actus reus*, or "act," thus preventing the State from prosecuting individuals based solely on thoughts that have not been yet translated into concrete action.[317] Whereas, on the other hand, as an example of the civil law traditions, the French criminal code states in section 121-1 that "No one is criminally liable except for his own conduct",[318] and in Section 121-4 that "The perpetrator of an offence is the person who: 1° commits the criminally prohibited act." Similarly, the German criminal code states in Section 46(1) that: "The guilt of the offender is the basis for sentencing"[319] and then in section 29 that

[312] Damgaard, C. (2008), supra note 38. p.235.
[313] Prosecutor v. Milan Milutinović et al. (21 May 2003) Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise, supra note 191. para.20.
[314] Prosecutor v. Miroslav Kvočka et al. ICTY Case No. IT-98-30/1-A. Appeal Judgment, 28 February 2005, para.99.
[315] Jayangakule, K. (2010), supra note 1. p.25.
[316] Kadish, S. H. (1980), supra note 59. pp.11-12.
[317] Lafave, W. R. (4th de. 2003), supra note 60. p.209.
[318] French Criminal Code, supra note 61. Art. 121-1.
[319] German Penal Code, supra note 63. § 46.

"Each accomplice shall be liable according to the measure of his own guilt and irrespective of the guilt of the others."

The stress -almost universal emphasis- on the requirement of deliberate individual wrongdoing as exclusive basis permissible for criminal prosecution and punishment is such of fundamental importance that it is traduced *verbatim* by international courts and tribunals. In this very sense, the ICTY Appeals Chamber has underscored the "fundamental importance of the principle of personal culpability."[320]

This principle derives in part from the realization of the consequences on the individual which is assigned to the criminal process, and thus on the need to protect them from the interference of the State.[321] Along these lines, settled jurisprudence of *ad hoc* tribunals have held time and again that the principle should be applied not only to specific international crimes but also to the various modes of individual criminal responsibility.[322] Thus, the application of joint criminal enterprise liability before the tribunals must fully respect this principle.

Moreover, according to international *ad hoc* courts and tribunals jurisprudence post-*Tadić,* the rationale of the joint criminal enterprise liability in the prosecution has been acknowledged:

> "To hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility."[323]

In this respect, one can directly appreciate the underlying desire to punish as many of the co-perpetrators as possible, a goal that might come out of the aspects of transitional justice that inform international criminal law, indeed.

---

[320] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.186.
[321] Lamb, S. Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law, in Cassese, A., Gaeta, P. & Jones J.R.W.D. (eds.), The Rome Statute of International Criminal Court: A Commentary. Oxford University Press, New York, 2002. pp.733-734.
[322] Swart, B. Modes of International Criminal Liability, in Cassese, A. (ed.), The Oxford Companion to International Criminal Justice. Oxford University Press, New York, 2009. pp.91-92.
[323] Prosecutor v. Édourad Karemera et al. (11 May 2004), supra note 252. para.36.

However, it is to be said that the possible violation of domestic cornerstone principles of criminal law, among them the principle of personal guilt, have been brought in various proceedings.[324]

Accordingly, the jurisprudence of international criminal courts and tribunals, have presented the doctrine of liability under joint criminal enterprise not as a necessary exemption in the prosecution of core international crimes, but rather, as a prosecutorial tool entirely consistent with, and its applications respecting, the fundamental principles that inform international criminal law, such as the right to fair trial, the presumption of innocent, and the punishment of personal guilt of the individual.[325]

It is to be said, then that the legitimacy of the application of joint criminal enterprise liability should be examined on a case-by-case basis by balancing the goals of international criminal law, and human rights law paradigms.

The problems have led to many international criminal courts and tribunals, including the ICC, to engage in a tough balancing act.[326] On the one side, the fundamental objective of the international criminal law system is to bring perpetrators to justice and to punish those who commit core international crimes, such as massive killings, genocide, war crimes, etc. But on the other side, if the fundamental rights, chief among those the right to personal guilt of the individual as opposed to a mere form of "guilt by association", of those accused are in any way disrespected, it could lead to substantial damage to the international criminal law system in the long run.

5.1.2. Distinguishing JCE liability and aiding and abetting

We have mentioned before that, although the term is not sufficiently clear, generally speaking by aiding and abetting we refer to a form of complicity in criminal activity that amounts to some assistance granted to the principal perpetrator of a criminal act.[327]

The existence of liability for this mode is mostly uncontroversial; as aiding and abetting is recognized, for example in Article 7(1) of the ICTY Statute, Article 6(1) of the ICTR Statute, and Article 6(1) of the SCSL Statute, among others, all of which criminalize "a person... who aided and abetted in the planning, preparation or execution..."[328] of an international crime.

---

[324] Prosecutor v. Miroslav Kvočka et al. (28 February 2005), supra note 314. para.99.
[325] Damgaard, C. (2008), supra note 38. p.235.
[326] Damgaard, C. (2008), Ibid. p.235-236.
[327] International Criminal Law Services. Modes of Liability: Commission & Participation. (ca. 2010), supra note 15. p.9.
[328] Statute of the International Criminal Tribunal for the Former Yugoslavia. (Amended 7 July 2009), supra note 201. Art.7(1).

Also, the ICC Statute also contains provisions on aiding and abetting, in Article 25(3)(c), which covers liability for persons who "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its attempted commission, including providing the means for its commission."[329] This provision makes a proper use of limiting the liability that falls upon an aider and abettor, as he would be only liable for complicity in crimes that are consummated in either a completed crime or, at the very least, an attempt.[330]

The law of aiding and abetting as it is applied in international *ad hoc* tribunals has been mostly explained in the *Furundžija* case, and the follow-up *Tadić* case,[331] as decided by the ICTY Appeals Chamber. The jurisprudence from its Chambers set out the requirements for aiding and abetting, establishing that to meet the prerequisite, the prosecution ought to prove an objective element, and a subjective element quite different from those that the prosecution must prove for the joint criminal enterprise liability.[332]

Thus, the ICTY Chambers have stated that the aiding and abetting *actus reus*, or objective element, is made up of the practical assistance, encouragement, or moral support, that provides a substantial effect on the perpetration of the crimes.[333]

On the other hand, the ICTY chambers have held that the *mens rea*, or subjective element, required for liability under aiding and abetting, is the defendant knowledge that these acts of "practical assistance, encouragement, or moral support" assist the commission of the offense.[334]

It is easily, then, to notice the differences that this element of the concept of aiding and abetting has with regards the notion of joint criminal enterprise, that requires a very different *actus reus*, in the participation in a "common plan", and a very different *mens rea*, in the shared intent to participate in a crime.

Even though these differences are enough to make a clear line between aiding and abetting on the one side, and joint criminal enterprise, on the other, it has to be granted that they do look similar, or, at least, related concepts, and that's why it might lead to confusion.

The issue of similarities and differences were further discussed by the ICTY Appeals Chamber in *Tadić,* and *Kvočka.* At that point, it was said that the main difference between the two liabilities is that an aider or abettor does not need to be aware of the existence of any "common plan," "design" or "purpose", but the assistance he provides must be substantial in

[329] U.N. Doc A/Conf. 183/9. (1998), supra note 68. Art.25.
[330] Cassese, A. (ed.) (2009), supra note 258. p.231.
[331] Prosecutor v. Anto Furundžija. (10 December 1998), supra note 203. para.249.
[332] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. paras.227-228.
[333] Prosecutor v. Zejnil Delalić et al. (16 November 1998), supra note 67. para.327.
[334] Prosecutor v. Mitar Vasiljević. ICTY case No. IT-98-32-A. Appeal Judgment, 25 Feb. 2004. para.102.

furtherance of the crime.[335] Thus, in principle, an aider or abettor is only responsible for those crimes he has knowledge of.

On the other hand, we have already seen how, under joint criminal enterprise liability in the "extended form", foresight of a crime by the defendant is enough to make him liable for such offences committed not only pursuant to a "common design", but also by acts that actually go beyond the "common design", but constitutes a "natural and foreseeable consequence" of the realization of the plan.[336] Indeed, the accused not only knows that his assistance supports the crimes of a "group of persons" that are part of a joint criminal enterprise", but also shares that intent, and as a result of that he then may be found criminally liable for the crimes committed in furtherance of that "common purpose" as a co-perpetrator.[337]

Moreover, it would be apparent that under certain circumstances the aiding and abetting mode of liability, and the joint criminal enterprise mode of liability could overlap. In that line of thought, it has also been positioned that arguably, in some cases liability under joint criminal enterprise could "fit" within liability under aiding and abetting, as articulated in the ICTY, and ICTR Statutes.[338] Nevertheless, there are clear differences between those two modes of responsibility.

5.1.3. Distinguishing JCE and command responsibility

As stated before, we have seen a considerable amount of observations among legal scholars about the problems commonly associated with the concept of joint criminal enterprise".[339] There are similar problems with the doctrine of command responsibility, suffering opposition since it was famously applied to hang Japanese General Yamashita in 1945.[340]

In simple terms, command responsibility is a form of strict criminal liability which falls on military superiors for acts they did not commit or order, but that were committed by his subordinates, "if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[341]

From statutory terms, command responsibility is on a much firmer ground that joint criminal enterprise". It exists in the ICTY Statute under Article 7.3, and under Article 6.3 of the

[335] Prosecutor v. Zlatko Aleksovski. ICTY case No. IT-95-14/1-A. Appeal Judgement, 24 March 2000. para.162.
[336] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. paras.204.
[337] Prosecutor v. Anto Furundžija. (10 December 1998), supra note 203. para.249.
[338] Ambos, K. (2007), supra note 30. p.171.
[339] Danner, A., Martinez, J. (2005), supra note 2. p.137.
[340] Moloto, B. J. (2009), supra note 20. pp.14-15.
[341] Statute of the International Criminal Tribunal for the Former Yugoslavia. (Amended 7 July 2009), supra note 201. Art.7(3).

ICTR Statute. On the other hand, we have already seen that joint criminal enterprise has no statutory basis, and it is nowhere to be found in the Statute of the ICTY or the ICTR, diverging considerably from the classifications of liability laid down in the Statutes, as both Article 7 of the ICTY Statute and Article 6 of the ICTR Statute mentions the planning, instigating, ordering, committing or otherwise aiding and abetting.

But any examination of joint criminal enterprise and command responsibility should keep in mind the different modes in the attribution of liability, as developed since International Military Tribunal at Nuremberg. It is said that liability of the individual may fall within either: (i) Direct: as a principal or secondary party to an offence, as the common law understands it, or as a substantive or participating offender on the civil law approach; or (ii) Superior: that is to say, command responsibility.[342]

We have seen that under joint criminal enterprise liability, a person is liable for any or all crimes committed as part of a "common plan," "design" or "purpose." In contrast, command responsibility liability applies, as the name suggests, when a person with command responsibility or authority, whether a civilian or a member of the military, has failed to prevent a crime (or failed to punish a crime that has already taken place) committed by one of his subordinates.

It comes as no surprise, then, that there are circumstances where liability could fall under either joint criminal enterprise, or command responsibility, and would, therefore, be appropriate to consider them together.

In principle, it is to be said that command responsibility is made up of two different bases of liability: (i) Direct, or active, where the commander takes an active step to bring about a crime (by, for instance, ordering a subordinate to carry out an unlawful act), as reflected in direct liability provisions (such as Article 7(1) of the ICTY Statute; Article 6(1) of the ICTR; Article 28(a) of the ICC Statute);[343] and (ii) Indirect, or passive, if the superior "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[344] Along those lines, Article 28(b) of the ICC Statute provides that "a superior shall be criminally responsible for crimes… committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such

[342] Joint Criminal Enterprise & Command Responsibility. A quick guide to understanding the basis of liability. Amicus. Legal Consultants White Papers. United Kingdom. p.2.
[343] International Criminal Law Services. Modes of Liability: Commission & Participation. (ca. 2010), supra note 15. p.7.
[344] Statute of the International Criminal Tribunal for the Former Yugoslavia. (Amended 7 July 2009), supra note 201. Art.7(3).

subordinates…"[345]

It is in the analysis of the elements of the command responsibility mode of liability that we notice the differences with liability under joint criminal enterprise.

The subjective element for command responsibility liability as stated in the ICTY, and ICTR statutes, and under the ICC Statute, is knowledge or constructive knowledge on the part of the commander of the unlawful act(s) of the subordinate. There has been some debate in this area, prompting some to argue whether negligence, gross negligence or recklessness would suffice to meet the *mens rea*,[346] but this is rejected by both the ICTY and the ICTR.[347]

On the other hand, there is an objective element of command responsibility too, and that is a: failure by the commander to take necessary action to prevent, suppress or punish the unlawful act(s) of the subordinate.[348]

There is another element required, for a commander to be liable, he must have effective command; in other words, he must have the power and authority to control his subordinates and the capacity to issue orders. This existence of a commander/subordinate relationship is usually known as "effective control."[349] Thus, it is this element of "effective control", and perhaps the *mens rea* to a degree, which is, almost inevitably, going to be the subject of contention in any prosecution under command responsibility liability.

On the *mens rea* element of the liability, there is likely to be not just factual/evidential dispute, but also an argument as to the scope of the crime committed by a subordinate. On this line of thought, the ICTY Trial Chamber in *Orić* favored a broad approach as to the range of acts of a subordinate that a commander would be liable for and included not just commission offenses, but all forms of participation (including aiding and abetting) and omissions and both inchoate and particular crimes.[350]

Although liability under command responsibility is often misunderstood, the analysis made above leads us to affirm that it is not a mode of strict liability upon which a superior could be held criminally responsible for crimes committed by subordinates, irrespective of his conduct and regardless of what his knowledge of these crimes was.[351] Nor is it a mode of complicity

---

[345] U.N. Doc A/Conf. 183/9. (1998), supra note 68. art.28(b).
[346] Joint Criminal Enterprise & Command Responsibility. A quick guide to understanding the basis of liability, supra note 342. p.6.
[347] International Criminal Law Services. Modes of Liability: Superior Responsibility. United Nations Interregional Crime and Justice Research Institute. ca. 2010. p.17.
[348] Prosecutor v. Zejnil Delalić et al. (16 November 1998), supra note 67. para.346.
[349] International Criminal Law Services. Modes of Liability: Superior Responsibility. (ca. 2010), supra note 347. p.6.
[350] Prosecutor v. Naser Orić. ICTY Case No. IT-03-68-T. Trial Judgment, 30 June 2006. para.273.
[351] International Criminal Law Services. Modes of Liability: Superior Responsibility. (ca. 2010), supra note 347. p.36.

where a superior is considered co-perpetrator responsible for some "assistance that he has given to the principal perpetrators."[352] Instead, command responsibility is a form of liability for an omission to act: a superior may be held criminally liable under that doctrine when, despite knowing of the crimes of subordinates, he culpably fails to fulfill his duties to prevent or punish such offenses.[353]

This is far different from liability under joint criminal enterprise that requires from the defendant, at least in the "basic" form, an act of a "common design" and with a "common criminal intention."[354] Indeed under joint criminal enterprise liability, the accused not only knows of a "common plan", "design" or "purpose", he also knows this "common design" amounts to a criminal activity, and he willingly provides assistance in furtherance of the crimes of the "group of persons" that are part of a joint criminal enterprise.[355]

[352] Joint Criminal Enterprise & Command Responsibility. A quick guide to understanding the basis of liability, supra note 342. p.6.
[353] McKenzie, B. (October, 2014), supra note 150. p.17.
[354] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. paras.228.
[355] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. paras.227.

CONCLUSION. The importance of the doctrine

We have seen that, over the past decade, a particular branch of public international law has emerged, evolving from its original, obscure, status into a significant body of law, its objective to punish those individuals guilty of core international crimes, providing accountability for episodes of mass atrocity, genocide, etc.[356]

It took a change in the global landscape, political pressure, and humanitarian tragedy for this revitalization, and those involved in this transformation deserve much credit for their achievement, especially given the pressures and constraints under which most of these international *ad hoc* courts and tribunals operate.

From a genealogical-oriented perspective, international criminal law has been influenced by international humanitarian law[357] that studies many of the crimes that typically fall under *ad hoc* courts' Statutes.[358] But this is not the only root source, as international criminal law also draws a lot from other legal areas: it has been greatly influenced by domestic criminal law, human rights law, and the so-called transitional justice.[359] Although the influences of each and every one of these areas are manifestly distinct, they do provide international criminal law with essential constitutive elements, cornerstone principles, and practices.

And although scholars agree that international criminal law has rapidly matured over the past ten years, it cannot be denied that it still suffers questions about its legitimacy, an issue that in fact has affected public international law in its entirety.[360] Thus, it is claimed that international criminal law lacks democratic accountability, and provides extraordinary discretion to both prosecutors and judges in the international arena.[361]

But when thousands of people are killed, raped, or tortured, providing room for limitations on prosecution and punishment feels like unaffordable luxuries. A discordant note in the punishment of those who commit heinous crimes.

Moreover, the moral justification and viability of international criminal law depend on judges, prosecutors, and scholars' careful use, especially due to its power to deprive defendants of their liberty. The culpability principle represents one of the most significant limits on prosecutorial discretion and judge powers -one that could be easily sacrificed. Enter joint

[356] Jayangakule, K. (2010), supra note 1. p.27.
[357] Green, L. C. The Contemporary Law of Armed Conflict (2d ed.). Juris Publishing, Inc. 1 February 2000. pp.17-19.
[358] Danner, A., Martinez, J. (2005), supra note 2. p.81.
[359] Zgonec-Rožej, M. (2010), supra note 276. p.36.
[360] Jayangakule, K. (2010), supra note 1. p.27.
[361] Danner, A., Martinez, J. (2005), supra note 2. p.96.

criminal enterprise.

We have seen how, contrary to most common liability doctrines, joint criminal enterprise is not a product of a Statute, but rather, the ICTY Appeals Chamber judicially created it after reviewing customary practice in international courts. Thus, when in *Tadić* the ICTY Appeals Chamber justified the doctrine's existence as a mode of liability and described its elements and types, it cited a series of cases and prosecutions conducted by national military authorities after WW-II.[362] The ICTY Appeals Chamber rejected arguments that JCE corresponded with conspiracy or with organizational liability, both extensively used at the NMT, and arguing for the existence of joint criminal enterprise as a matter of customary international law.[363]

While the success in said task is still subject to debate, however, it is considered that the WW II jurisprudence does not support the sprawling types of JCE liability, particularly the "extended form" as used nowadays.[364] Moreover, the reading of the POW cases, as made by the ICTY Appeals Chamber in *Tadić,* led to the judges to be confident in the assertion that indeed, individual criminal liability based on the existence of a common plan was "firmly established in customary international law."[365]

And, as we have mentioned time and again, joint criminal enterprise is fast becoming the prosecutorial tool of choice in the investigation and punishment of perpetrators of core international crimes, not only as evidenced by the practice in the International Criminal Tribunal for the former Yugoslavia, the first international *ad hoc* court to rely on JCE, but by the frequency it is also used by other international courts and tribunals, such as the International Criminal Tribunal for Rwanda, in *Rwamakuba, Karemera,* and *Ntakirutimana and Ntakirutimana*; or the Special Court for Sierra Leone, in *Sesay et al*. Consistent with that approach, the International Criminal Court has adopted the spirit, albeit with some modifications, of the JCE doctrine, when in *Lubanga Dylio*, the Pre-Trial Chamber decided that Article 25(3)(d) of the Statute includes a concept of co-perpetration that requires "joint control" over the crime.[366]

Even more, joint criminal enterprise also plays an important prosecutorial role in the Statutes of other hybrid courts, such as the Law of the Supreme Iraqi Criminal Tribunal, that, for instance, explicitly recognizes the doctrine of JCE as a separate mode of liability in Article 15(2)(d),[367] the Special Panels of the Dili District Court (also called the East Timor Tribunals) that mirrors the experience and jurisprudence of other international ad hoc tribunals, or the

[362] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. paras.227-228.
[363] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.194.
[364] Danner, A., Martinez, J. (2005), supra note 2. p.110.
[365] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.220.
[366] Prosecutor v. Thomas Lubanga Dyilo. (29 January 2007), supra note 257. paras.317-367.
[367] Law of the Supreme Iraqi Criminal Tribunal. (18 October 2005), supra note 268. art.15(2)(d).

Extraordinary Chambers in the Court of Cambodia whose fundamental law in Article 29 employs terms similar to Article 7(1) of the ICTY Statute.[368]

It is at this point, that it should be noted that the importance of the doctrine cannot be measured in the number of indictments explicitly referring to the JCE doctrine since, prior to July 2001, Trial Chambers had ruled that a defendant could be convicted on a JCE liability even if his indictment did not explicitly refer to JCE,[369] and that phrases like acting "in concert" may be read as implicit references to JCE doctrine,[370] just as the words "plan", "design" or "purpose" are synonyms.

One way or another, it is easy to agree on the fact that JCE is at least, widely established in international criminal proceedings, and it is slowly making its way to hybrid courts as the method of choice for targeting senior military and political leaders of regimes indicted with the commission of grave crimes. While this might lead us to believe that joint criminal enterprise is fully accepted by scholars and practitioners alike, prosecutorial practice has shown some caution to produce charges that explicitly incorporate JCE participation into the indictments,[371] as the use of JCE is still a controversial issue among international criminal experts, with the questions on the legality of the application of joint criminal enterprise still ambiguous.

Granted, much can be said about the decision by the ICTY Appeals Chamber to create this wide-ranging form of liability. Since JCE in the "basic form" covers individual liability falling upon all co-perpetrators on the grounds of a "common design" and a "common criminal intention",[372] the "systemic form" covers the liability that falls upon the co-perpetrators of crimes that took within the framework of a common criminal plan that has been institutionalized, or has elements of institutionalization, such as those running concentration or detention camps on the basis of a "common plan",[373] and, under JCE liability in the "extended form" any co-perpetrator may be found guilty of foreseeable crimes committed outside the scope of the JCE;[374] most scholars wonder if whether there is a *de minimis* contribution to a JCE that is enough to place an individual within the criminal enterprise,[375] and whether there are any limits on the prosecution's discretion to define the scope of the enterprise. The answers to these and other

[368] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of crimes committed during the period of democratic Kampuchea. (Ammended on 27 October 2004), supra note 265. art.29.
[369] Prosecutor v. Radislav Krstid. ICTY Case No. IT-98-33-T. Trial Chamber, Aug. 2, 2001. Judgement. para.602.
[370] Prosecutor v. Simić et al. ICTY Case No. IT-95-9-T. Trial Chamber, 17 October 2003. Judgement. para.149.
[371] Schabas, W. A. (2002-2003), supra note 28. p.1032.
[372] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.195.
[373] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.202.
[374] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.204.
[375] Danner, A., Martinez, J. (2005), supra note 2. p.108.

controversies are of considerable practical importance.

Indeed, liability under the "extended form" is the broadest aspect of JCE, and the one subject to the most controversies. Alternatively known as JCE III, it is a contingent criminal liability that is based on the individual foresight, and the voluntary assumption of risks.[376] This "extended form" covers the criminal liability that falls upon co-perpetrators when one of them participates in a crime that actually goes beyond the "common design", but this act constitutes a "natural and foreseeable consequence" of the realization of the plan, and the accused willingly taking the risk that such natural and foreseeable consequence would occur.[377] Thus, if the prosecution demonstrates that the defendant participates or intended to take part in the JCE, that defendant will be liable for crimes committed by others that he did not intend, as long as those crimes were foreseeable. Some have argued that this effectively lowers the mental state, the *mens rea*, required for certain core international crimes to negligence.[378]

These and other issues remain in the dark, many arising out of the confusion surrounding the concept joint criminal enterprise, and its relation to other modes of individual liability. The confusion is in no small part, due to the similarities that exist between the liability doctrines that try to allocate individual responsibility arising out of collective wrongdoings, such as it is the case with aiding and abetting, and command responsibility.[379]

Moreover, even if under certain circumstances the aiding and abetting mode of liability, and the joint criminal enterprise mode of responsibility could overlap,[380] nevertheless, there are clear differences not only in the types but also in the *mens rea* and *actus reus* requirements, between these two modes of liability.

The same can be said of the relationship between command responsibility and joint criminal enterprise. Although command responsibility is usually misunderstood, an analysis of its *actus reus* and *mens rea* requirements led us to affirm that it is not a form of objective liability nor is it a form of complicity, but rather a form of liability for omission to act: a superior is held criminally responsible under command responsibility when, despite his awareness of the crimes of subordinates, he culpably fails to fulfill his duties to prevent or punish these crimes.[381] This is far different from liability under joint criminal enterprise, which requires from the defendant a voluntary act in furtherance of a "common plan" that amounts to a criminal act, in support of a

[376] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.205.
[377] Prosecutor v. Duško Tadić. (15 July 1999), Ibid. para.220.
[378] Prosecutor v. Clément Kayishema et al. ICTR Case No. ICTR-95-1-T. Trial Chamber, 21 May 1999. Judgement. paras.203-204.
[379] Damgaard, C. (2008), supra note 38. p.182.
[380] Ambos, K. (2007), supra note 30. p.171.
[381] International Criminal Law Services. Modes of Liability: Superior Responsibility. (ca. 2010), supra note 347. p.5.

"group of persons" that are part of a "joint criminal enterprise."[382]

In light of the unanswered questions that still linger, some have argued that the application of JCE in a process would be unfair to the defendant, due to the innate complexities of the doctrine that leads to a poor defense, as it tends to be that defendants do not have sufficient information about this form of liability.[383] Indeed, recent jurisprudence to come out of international tribunals such as the ICTY, the ICTR, the SCSL and the ECCC still evidences some problematic issues regarding the application of the JCE liability doctrine. [384]

Considerations of its fairness or unfairness apart, we argue that the application of joint criminal enterprise liability should be more sensitive to the dictates of the culpability principle, among other domestic criminal principles taking a decisively cautious stance in the case of the "extended form," the most dangerous aspect of the doctrine.

That been said, we do endorse the remaining forms of joint criminal enterprise, as we deem it appropriate for those crimes where the senior leadership may be involved. However, two concerns are raised at this point. The first concern is that high rank alone should not be a basis for conviction as co-perpetrator. The second concern is special consideration for low-level perpetrators that may be charged with large-scale atrocities, after playing only a minor role in the crime.

To conclude, as we have noted above, joint criminal enterprise is an important tool in the prosecution and punishment of individuals who commit core international crimes, and proof of this is the continuous use of the doctrine of JCE in international criminal courts and tribunals, and its integration into domestic law by way of its use in hybrid courts.

Although there are still serious concerns with regards to the limit of JCE applicability, ultimately, the employment of the doctrine of joint criminal enterprise as a mode of individual criminal responsibility is mostly uncontested.

Certainly, although the application of JCE might put enough stress on the principle of individual liability to be considered controversial, in particular in its "extended form", we argue, as other scholars have done before,[385] that the best way to answer the questions on the legality of its application should be through a case-by-case balancing act that takes in considerations the legal, moral, and political stakes at hand.

This balancing act seems to be a requirement if we take into account the important role that international criminal courts play in the achievement of objectives normally associated with

[382] Prosecutor v. Duško Tadić. (15 July 1999), supra note 17. para.220.
[383] Uhlířová, K. (2012), supra note 3. p.214.
[384] Jayangakule, K. (2010), supra note 1. p.58.
[385] Danner, A., Martinez, J. (2005), supra note 2. p.101.

transitional justice and human rights.[386] In particular, the narrative construction and social peace objectives of transitional justice add a measure of delicacy to the production of an accurate record. Thus, a liability doctrine that might mislead the responsibility of the defendants for their crimes conveys the risk of perceiving trials as inaccurate and unfair, in turn producing a record that fails to capture how and why the crimes occurred and ultimately impairing the process of national reconciliation.[387]

On those lines, we also argue that the human rights orientation informing international criminal law should not automatically prevail over the domestic criminal law elements and the transitional justice objectives.

While there is no easy way out in this fine-tuning balancing act, it is our hope that judges and prosecutors remain convinced that faithful adherence to the principle of individual culpability is the safest path in the quest to achieve the human rights and transitional justice aims.

Finally, it should be said that, while we recognize the ICTY's influence over other international *ad hoc* courts and tribunals, its Appeals Chamber being the creator and first user of the joint criminal enterprise doctrine, it is yet to see how domestic courts will apply international criminal law jurisprudence, and how the joint criminal enterprise doctrine will affect the domestic prosecution of international crimes.

Indeed, time will tell if this judicial innovation in the area of criminal responsibility grows to play a major role in the prosecution of those indicted with the commitment of core international crimes, or if it's conveniently set aside. But one thing is clear, still being one of the difficult legal doctrines to have emerged from the ICTY over the years, and controversial as it is, the doctrine of joint criminal enterprise is considered by prosecutors one of the most effective tools at their disposal.

In this thesis, we have tried to provide a framework that might help those who develop this branch of law in understanding some of its central challenges and resolving its most important questions. Therefore, it is of the author's view that the questions posed, the analysis provided, and the conclusions in this thesis, should not be limited to one court or one country, but should be useful in the general discussion about joint criminal enterprise doctrine, the role it plays in the prosecution of crimes, its effectiveness in court, and theories of individual liability in general.

[386] Zgonec-Rožej, M. (2010), supra note 276. p.36.
[387] Danner, A., Martinez, J. (2005), supra note 2. p.167.

BIBLIOGRAPHY

Statutes, Codes and Charters

1. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal at Nuremberg, Annex to the London Agreement. 82 U.N.T.S. 279. August 8, 1945.
2. United Nations. Charter of the United Nations. 1 UNTS XVI. October 24, 1945.
3. United Nations. Statute of the International Court of Justice. April 18, 1946.
4. Convention on the Prevention and Punishment of the Crime of Genocide. Resolution 260 (III) General assembly. December 9, 1948.
5. U.N. S/Res/827 (1993). Statute of the International Criminal Tribunal for the Former Yugoslavia. May 25, 1993.
6. U.N. S/Res/955 (1994). Statute of the International Criminal Tribunal for Rwanda. November 8, 1994.
7. U.N. Doc A/Conf. 183/9. Rome Statute of the International Criminal Court. November 10, 1998.
8. U.N. S/Res/1329 (2000). On the enlargement of Appeals Chambers at the International Criminal Tribunal for Rwanda, and the International Criminal Tribunal for the Former Yugoslavia. 30 November 2000.
9. U.N. A/Res/57/228A (2003). Khmer Rouge Trials. February 27, 2003.
10. U.N. A/57/806 (2003). Khmer Rouge Trials. May 6, 2003.
11. U.N. A/Res/57/228B (2003). Khmer Rouge Trials. May 22, 2003.
12. Reach Kram No. NS/RKM/0801/12. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of crimes committed during the period of democratic Kampuchea. August 10, 2001. (As amended on 27 October 2004 by NS/RKM/1004/006).
13. Law No. 10 of 1005 of the Supreme Iraqi Criminal Tribunal. Official Gazette of the Republic of Iraq, No. 4006, 47th year. October 18, 2005.
14. French Criminal Code.
15. German Penal Code.

Books

1. Boas, G., Bischoff, J. L., Reid, N. L. International Criminal Law Practitioner Library Volume I: Forms of Responsibility in International Criminal Law. Cambridge University Press, New York, 2007.
2. Brownlie, I. Principles of Public International Law (7th Ed). USA, Oxford University Press. 2012.
3. Cassese, A. Cassese's International Criminal Law (3rd Edition). USA, Oxford University Press. 2013.
4. Cassese, A. (ed.) The Oxford Companion to International Criminal Justice. Oxford University Press, New York, 2009.
5. Druml, M. Atrocity, Punishment and International Law. Cambridge University Press. 2007.
6. Green, L. C. The Contemporary Law of Armed Conflict (2d ed.). Juris Publishing, Inc. 1 February 2000.
7. Heller, K. J. The Nuremberg Military Tribunals and the Origins of International Criminal Law. New York: Oxford University Press. 2011.
8. International Military Tribunal. Trial of the Major War Criminal Before the International Military Tribunal: Nuremberg, 14 November 1945 - 1 October 1946. Vol. I, 1947.
9. Lafave, W. R. Substantive Criminal Law. 4th ed. Thomson/West. 2003.
10. Neier, A. War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice. Times Books. 1998.
11. Rüdiger Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law (10 vols, USA, Oxford University Press. 2012)
12. Shaw, M. International Law (7th Edition). UK, Cambridge University Press. 2014.
13. Teitel, R. G. Transitional Justice. USA. Oxford University Press. 2002.
14. United Nations War Crimes Commission. Law Reports of Trials of War Criminals Volume I. 1947.
15. United Nations War Crimes Commission. Law Reports of Trials of War Criminals Volume XV. 1949.
16. United Nations War Crimes Commission. Law Reports of Trials of War Criminals Volume XI. 1949.
17. Zgonec-Rožej, M. International Criminal Law Manual. International Bar Association. United Kingdom. 2010.

Theses

1. Jayangakule, K. Is the Doctrine of Joint Criminal Enterprise a Legitimate mode of Individual Criminal Liability? - A Study of the Khmer Rouge Trials. Master Thesis. Lund University – Faculty of Law. Sweden. Spring 2010.
2. Lord, S. Joint Criminal Enterprise and the International Criminal Court - A Comparison between Joint Criminal Enterprise and the Modes of Liability in Joint Commission in Crime under the Rome Statute; Can the International Criminal Court Apply Joint Criminal Enterprise as a Mode of Liability? Faculty of Law. Stockholm University. 2013.
3. McKenzie, B. The Principal Liability of Political and Military Leaders for International Crimes: Joint Criminal Enterprise versus Indirect Co-Perpetration. University of Otago, New Zealand. Bachelor Dissertation. October, 2014.
4. Uhlířová, K. The Concept of a Joint Criminal Enterprise - International Criminal Tribunal for the Former Yugoslavia and Special War Crimes Chamber of the State Court of Bosnia and Herzegovina, Faculty of Law. Masaryk University Brno. May, 2012.

Peer-Reviewed Resources

1. Alvarez, J. E. Rush to Closure: Lessons of the Tadić Judgement. Michigan Law Review. Vol.96, No.7. June 1998.
2. Ambos, K., Joint Criminal Enterprise and Command Responsibility. Journal of International Criminal Justice, 5 (1). 2007.
3. Badar, M. E., "Just Convict Everyone!" – Joint Perpetration: From Tadić to Stakić and Back Again. International Criminal Law Review, 6. 2006.
4. Boas, G. The Difficulty with Individual Criminal Responsibility in International Criminal Law in Stahn, C. and van den Herik, L. (eds.), Future Perspectives on International Criminal Justice; TMC Asser Press, The Hague, The Netherlands, 2010.
5. Cassese, A. Reflections on International Criminal Justice. The Modern Law Review. Volume 61, Issue 1. May 1998.
6. Cassese, A. The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise. Journal of International Criminal Justice 5 (1). 2007.
7. Christensen, R. Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies between Civil and Common Legal Systems in the Formation of the International Criminal Court, 6 UCLA J. Int'l L. & Foreign Aff. 391 (2001-2002).
8. Clark, J. J. Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The Georgetown Law Journal. Vol.96. Issue 5. 2008.

9. Corell, H. Reflections on International Criminal Justice: Past, Present and Future. Washington University Global Studies Law Review. Volume 12, Issue 3. 2013.
10. Cover, R. M. Violence and the Word. Yale Law Journal 95, 1986.
11. Daly, E. Transformative Justice: Charting a Path to Reconciliation. International Legal Perspectives. Vol.12. No.1&2. 2001.
12. D'Amato, A. On the Legitimacy of International Institutions. Northwestern University School of Law Public Law and Legal Theory Research Paper Series No.06-35. January 8, 2007.
13. Damgaard, C. Individual Criminal Responsibility for Core International Crimes. Selected Pertinent Issues. Springer-Verlag Berlin Heidelberg. 2008.
14. Danner, A. M. Constructing a Hierarchy of Crimes in International Criminal Law Sentencing. Virginia Law Review. Vol.87, No.3, 2001.
15. Danner, A., Martinez, J. Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law. California Law Review, 93 (1), 2005.
16. Drumbl, M. A. Collective Violence and Individual Punishment: The Criminality of Mass Atrocity. Northwestern University Law Review. Vol.99, No.2. 2005.
17. Fichtelberg, A. Conspiracy and International Criminal Justice. Criminal Law Forum. 17 (2), 2006.
18. Gasser, H., Thürer D., Humanitarian Law, International, in Wolfrum, R. (ed), The Max Planck Encyclopedia of Public International Law; Volume V, Oxford University Press, Oxford, 2012.
19. Hathaway, O. A. Do Human Rights Treaties Make a Difference? Yale Law Journal 111. 2002.
20. Helfer, L.R. Overlegalizing Human Rights: International relations theory and the commonwealth caribbean backlash against human rights regimes. Columbia Law Review. Vol.102. 2002.
21. Kadish, S. H. Why Substantive Criminal Law - A Dialogue. Clev. St. L. Rev. Vol 29. 1980.
22. Lamb, S. Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law, in Cassese, A., Gaeta, P. & Jones J.R.W.D. (eds.), The Rome Statute of International Criminal Court: A Commentary. Oxford University Press, New York, 2002.
23. Miraldi, M. Overcoming Obstacles of Justice: The Special Court of Sierra Leone. New York Law School Journal of Human Rights, Volume 19, 2003.

24. Moloto, B. J. Command Responsibility in International Criminal Tribunals. Berkeley Journal of International Law Publicist. Volume 3, Fall 2009.
25. Nollkaemper, A. Concurrence between Individual Responsibility and State Responsibility in International Law. The International and Comparative Law Quarterly. Vol.52. No.3. July 2003.
26. Orentlicher, D. F. Addressing Gross Human Rights Abuses: Punishment and Victim Compensation. Stud Transnat'l Legal Pol'y 26. 1994.
27. Pomorski, S. Conspiracy and Criminal Organizations, in Ginsburgs G. & Kudriavtsev V.N. (eds), The Nuremberg Trial and International Law. Martinus Nijhoff Publishers, 1990.
28. Sanders, A. New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability after Sosa. Berkeley Journal of International Law, 28 (2). 2010.
29. Sassbli, M., Olson, L.M. The Judgement of the ICTY Appeals Chamber on the Merits in the Tadic Case. International Review of the Red Cross 82 No 839. 2000.
30. Schabas, W. A. Enforcing International Humanitarian Law: Catching the Accomplices. International Review of the Red Cross. 83 (842), 2001.
31. Schabas, W. A. Mens Rea and the International Criminal Tribunal for the Former Yugoslavia. New England Law Review, 37 (4). 2002-2003.
32. Steiner, H. J., Alston, P. International Human Rights in Context: Law, Politics, Morals. 2d ed. USA. Oxford University Press. 2000.
33. Swart, B. Modes of International Criminal Liability, in Cassese, A. (ed.), The Oxford Companion to International Criminal Justice. Oxford University Press, New York, 2009.
34. Tallgren, I. The Sensibility and Sense of International Criminal Law. European Journal of International Law. Vol.13. No.3, 2002.
35. Teitel, R. G. Transitional Justice Genealogy. Harvard Human Rights Journal, Vol.16 (2003).
36. Thomas, D. Q., Beasley, M. E. Domestic Violence as a Human Rights Issue. Human Rights Quarterly. Vol.15. No.1. February 1993.
37. Wilt, H. Joint Criminal Enterprise, Possibilities and Limitations. Journal of International Criminal Justice, 5 (1), 2007.

Opinion Articles

1. Hardeo, P. Enforcing Human Rights Law – International Civil Society's Influence in Defining Rights and Responsibilities. University of Massachusetts Boston.

2. Holding, R. How Hussein is Prosecuted Poses Difficult Choice for Bush; U.S. Leans toward Trial by Iraqi Panel-Others Prefer International Court. San Francisco Chronicle. 15 December 2003.
3. Mettraux, G. "Joint Criminal Enterprise" has Grown Another Tentacle! International Criminal Law Bureau. 18 November 2009.
4. Schomburg, W. Jurisprudence on JCE – Revisiting a Never Ending Story. Cambodia Tribunal Monitor. 2010.

Online Resources

1. Joint Criminal Enterprise & Command Responsibility. A quick guide to understanding the basis of liability. Amicus. Legal Consultants White Papers. United Kingdom.
2. International Criminal Law Services. Modes of Liability: Commission & Participation. United Nations Interregional Crime and Justice Research Institute. ca. 2010.
3. International Criminal Law Services. Modes of Liability: Superior Responsibility. United Nations Interregional Crime and Justice Research Institute. ca. 2010.

Cases

Miscellanea

1. Pinkerton v. United States. 328 U.S. 640 (1946).
2. Velasquez Rodriguez Case, Inter-American Court of Human Rights. Judgement of July 29, 1988 (Ser. C). No. 4.

ICTR Cases

3. Prosecutor v. Clément Kayishema et al. ICTR Case No. ICTR-95-1-T. Trial Chamber, 21 May 1999. Judgement.
4. Prosecutor v. Édourad Karemera et al. ICTR Case No. ICTR-98-44-T, 11 May 2004 Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édourad Karemera, Andre Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise.
5. Prosecutor v. André Rwamakuba. ICTR Case No. ICTR-98-44-AR72.4, 22 October 2004. Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide.
6. Prosecutor v. Ntakirutimana and Ntakirutimana, ICTR Case No. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004. Judgment.

SCSL Cases

7. Prosecutor v. Moinina Fofana and Allieu Kondewa. SCSL Case No. SCSL-04-14-T, 2 August 2007. Judgment.
8. Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao. SCSL Case No. SCSL-04-15-A, 26 October 2009. Appeal Judgment.
9. Prosecution v Charles Ghankay Taylor, SCSL, Case No. SCSL-03-1-T, 26 April 2012.

ICC Cases

10. Prosecutor v. Thomas Lubanga Dyilo. ICC Case No. ICC-01/04-01/06-803, 29 January 2007. Decision on the Confirmation of Charges.

ICTY Cases

11. Prosecutor v. Duško Tadić. ICTY Case No. IT-94-1-T. Trial Chamber, 7 May 1997.
12. Prosecutor v Dražen Erdemović. ICTY Case No. IT-96-22-A. Appeals Chamber, 7 October 1997. Joint Separate Opinion of Judge McDonald and Judge Vohrah.
13. Prosecutor v. Zejnil Delalić et al. ICTY Case No. IT-96-21-T. Trial Chamber, 16 November 1998.
14. Prosecutor v. Anto Furundžija. ICTY Case No. IT-95-17/1-T. Trial Chamber, 10 December 1998.
15. Prosecutor v. Duško Tadić. ICTY Case No. IT-94-1-A. Appeals Chamber, 15 July 1999.
16. Prosecutor v. Kupreškić et al. ICTY Case No. IT-95-16-T. Trial Chamber, 14 January 2000.
17. Prosecutor v. Zlatko Aleksovski. ICTY case No. IT-95-14/1-A. Appeal Judgement, 24 March 2000.
18. Prosecutor v. Radislav Krstid. ICTY Case No. IT-98-33-T. Trial Chamber, Aug. 2, 2001. Judgement.
19. Prosecutor v. Slobodan Milošević et al,. ICTY Case No. IT-99-37-PT. Second Amended Indictment, 16 October 2001.
20. Prosecutor v. Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlaño Radić & Zoran Žigić, ICTY Case No. IT-98-30/1-T, 2 November 2001. Judgment.
21. Prosecutor v. Slobodan Milošević, ICTY, Case No. IT-02-54-T, 22 November 2001.
22. Prosecutor v. Milan Milutinović, Nikola Šainović & Dragoljub Ojdanić. ICTY Case No. IT-99-37-1, 5 September 2002. Third Amended Indictment.
23. Prosecutor v. Slobodan Milošević, ICTY, Case No. IT-01-50-I, 23 October 2002.
24. Prosecutor v Milan Milutinović et al. ICTY Case No. IT-99-37-AR72. Appeals Chamber, 21 May 2003. Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise.

25. Prosecutor v Milan Milutinović et al. ICTY Case No. IT-99-37-AR72. Appeals Chamber, 21 May 2003. Separate Opinion of Judge David Hunt.
26. Prosecutor v Milomir Stakić. ICTY Case No. IT-97-24-T. Trial Chamber, 31 July 2003.
27. Prosecutor v. Milorad Krnojelac. ICTY Case No. IT-97-25-A. Appeals Chamber, 17 September 2003.
28. Prosecutor v. Simić et al. ICTY Case No. IT-95-9-T. Trial Chamber, 17 October 2003. Judgement.
29. Prosecutor v. Dragan Obrenović. ICTY Case No. IT-02-60/2. Trial Chamber, 10 December 2003.
30. Prosecutor v. Mitar Vasiljević. ICTY case No. IT-98-32-A. Appeal Judgment, 25 Feb. 2004.
31. Prosecutor v. Miroslav Kvočka et al. ICTY Case No. IT-98-30/1-A. Appeal Judgment, 28 February 2005.
32. Prosecutor v. Milomir Stakić. ICTY Case No. IT-97-24-A. Appeals Chamber, 22 March 2006.
33. Prosecutor v. Naser Orić. ICTY Case No. IT-03-68-T. Trial Judgment, 30 June 2006.