

The Pre-Trial Chamber’s Significant Decision on Joint Criminal Enterprise For Individual Responsibility

by

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Introduction

International criminal law represents the challenge of assigning individual responsibility for acts of massive violence which no single person can directly perpetrate in their entirety. In the words of one commentator, the idea of applying legal rules “to the complex and chaotic backdrop of contemporary armed conflicts and episodes of mass atrocity is a bold—some would say futile—effort to fix individual responsibility for history’s violent march.”¹

The doctrine of joint criminal enterprise (JCE) is an example of this effort to establish individual responsibility for complex atrocity crimes (namely, genocide, crimes against humanity, and serious war crimes). Under this doctrine, a person is individually liable for crimes committed through a common criminal plan. JCE obviates the need to show that the person physically perpetrated the crime in order to hold him/her responsible for the crime. It allows for the assignment of liability to individuals who contribute to the execution of a criminal plan but who do not physically perpetrate the possibly millions of killings, torture, and rapes. JCE therefore provides a means of assigning responsibility to senior leaders who do not pull the trigger but who may bear the greatest culpability for international crimes.

On 20 May 2010, the Pre-Trial Chamber (PTC) determined that the doctrine of JCE is applicable at the ECCC (PTC Decision).² The PTC Decision is the most significant ruling on JCE thus far at the ECCC. It is in response to an appeal from three of the defendants against an

¹ A. Danner and J. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75, 77 (2005).

² Ieng Thirith, Ieng Sary, Khieu Samphan, PTC, Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010. (“PTC Decision”)

order of the Co-Investigating Judges in which the Co-Investigating Judges adopted all three forms of JCE. In the modern articulation of the doctrine, JCE 1 (basic) applies where a group of people, sharing the same intent to commit a crime, act according to a common plan to perpetrate that crime. The distinguishing feature of this form is that all participants share a common intent to commit a crime. JCE 2 (institutional form) holds individuals liable for their participation in an institutional framework such as an internment camp where such a criminal plan is enacted. JCE 3 (extended form) allows a person to be convicted for crimes that are not part of the plan but that are foreseeable and that result nonetheless in the process of executing the crime.

The PTC found that JCE 1 and JCE 2 were customary in international law and applicable before the ECCC. It declined to adopt JCE 3.

Path of Least Resistance or Path of Most Resistance?

A previous commentator on this website stated that the “path of least political resistance” would be for the PTC to simply adopt JCE.³ There is truth in this statement in that JCE has been widely adopted in the community of atrocity crimes litigation—the ICTY, ICTR, and SCSL all apply robust versions of the doctrine.

This practice however, belies the recent and highly vocal trend opposing the doctrine of JCE. The last ruling on JCE was at the International Criminal Court (ICC) where a pre-trial chamber specifically rejected JCE despite the near uniform acceptance in the *ad hoc* tribunals that it is indeed customary law.⁴ In the ICTY, where the applicability of the doctrine is seemingly settled law, a trial chamber in the case of *Stakic* openly rejected JCE as invalid.⁵ These decision are accompanied by legal criticism of JCE that had been rising ever since the ICTY applied JCE in the first place. At the ECCC, the PTC Judges themselves seemed torn on whether or not to apply JCE. They avoided the question the first time the issue came up⁶ (Appeal against the Duch Closing Order) and independently solicited *amicus* on the subject of their own accord.

The debate on JCE has become a referendum on the legitimacy of the laws being applied at the ad hoc tribunals. The issue is fought tooth and nail even at the ICTY and the other tribunals where the doctrine seems firmly established. Considering that the ECCC has been dogged by criticism of corruption and bias since the court’s inauguration, the perception that the court is applying dubious law would only compound the ECCC’s political problems. Hence, the recent trend against JCE actually indicates that the path of least resistance would be for the PTC not to apply the doctrine of JCE.

³ J. Ciorciari, *Joint Criminal Enterprise and the Khmer Rouge Prosecutions*, Cambodia Tribunal Monitor, available at: <http://cambodiatribunal.org/commentary.html>.

⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on Confirmation of Charges, 29 January 2007, paras. 322-340.

⁵ *Prosecutor v. Stakic*, ICTY, Case no. IT-97-24-T, Trial Judgement, 29 October 2003, para. 438.

⁶ *Kaing Guek Eav*, PTC, Decision on the Appeal Against the Closing Order, 5 December 2008.

A Long Overdue Review: The PTC Decision Re-Examines the Jurisprudential Bases of JCE

In its 20 May decision, the PTC provided the most comprehensive review of the history and jurisprudential bases for JCE since the *Tadic* appeals decision. Though the modern ad hoc tribunals have widely adopted JCE, these courts have relied almost entirely on the *Tadic* court's analysis. Neither the ICTR nor the SCSL re-examined the jurisprudence upon which *Tadic* is based. These courts essentially adopted the *Tadic* decision in whole by virtue of the fact that the situations before those courts occurred after the events in *Tadic* and by virtue of the convenience that their statutes were modeled on the ICTY Statute almost word for word. This alleviated the need for the ICTR and SCSL to determine whether JCE was customary law when the events in Rwanda and Sierra Leone had occurred and whether their governing statutes permit the application of JCE.

The events at issue before the ECCC present the unique challenge of having occurred two decades before the events in Yugoslavia, thus placing the situation well outside the scope of *Tadic*. In addition, the hybrid nature of the ECCC presented the added challenge of having to reconcile Cambodian ECCC Law with international law. The PTC was forced to examine *de novo* the original bases for recognizing the doctrine of JCE and to determine the extent to which such jurisprudence was applicable before the ECCC. The PTC Decision therefore includes a detailed examination of the post-World War II statutes establishing the first international criminal tribunals, the case law of the tribunals acting pursuant to these statutes, the work of the United Nations' International Law Commission which represents the practice of the international community, and the legal practices in Cambodia and relevant states in 1975.

From this review, the PTC Decision actually goes further than the *Tadic* decision and says what *Tadic* was reluctant to say. The PTC held that the core principles of JCE had been customary in international law since the 1940s at latest. In addition, the manner in which that the PTC came to this conclusion also suggests that courts need not look much beyond the post-WWII jurisprudence itself to find that JCE is customary international law. The PTC determined that there was no need to consider the draft Rome Statute nor the International Covenant for the Suppression of Terrorist Bombing, which *Tadic* relied on and for which it was criticized. The PTC decision based its decision on the governing statutes of the post-World War II tribunals and the case law of those tribunals. It essentially found that this jurisprudence alone were sufficient to establish JCE as customary international law and the PTC back-dated JCE all the way to the 1940s.

The PTC erred in its interpretation of JCE 3

The PTC, however, erred in its interpretation of the third form of JCE (extended form). JCE 3 is the most contested form of JCE. It holds individuals responsible for extraneous crimes that were unplanned but that nonetheless resulted when those individuals enacted their criminal plan. It requires that the extraneous crimes be foreseeable and is akin to the *mens rea* of recklessness in domestic criminal law. All of the other ad hoc international criminal tribunals

have found JCE 3 to be customary in international law and it was the form of JCE in focus when the *Tadic* court first recognized JCE to be customary law.

The PTC's decision not to recognize JCE 3 derives from a failure to consider a relevant international criminal law treaty and the court's imputation of a dubious distinction in the JCE 3 jurisprudence. The PTC did not reject JCE 3 outright in the manner that the Pre-Trial Chamber in the ICC did. Rather, the PTC framed its dissent as a disagreement regarding what inferences are certain and what remain uncertain. At the outset, the PTC at the ECCC noted that the post-World War II case law "may indeed be directly relevant to JCE III."⁷ It recognized that the facts and judgments of the post-World War II courts were indeed consistent with an application of JCE 3, but it declined to accept this doctrine because, unlike the other *ad hoc* tribunals, the PTC felt that the lack of a definitive court record prevented it from being "certain" that these cases indeed applied JCE 3. The PTC also noted that the Nuremberg Charter and Control Council Law No. 10 do not offer specific support for the extended form of JCE.

As an initial matter, the PTC overlooks a prominent international criminal statute that comprised one part of the post-World War II trials. The PTC failed to consider the Tokyo Charter governing the war crimes tribunal in Asia. This tribunal tried individuals for international crimes in Asia and operated concurrently with the war crimes tribunals in Europe. Article 5 (c) of the International Military Tribunal Charter for the Far East (Tokyo Charter) provides:

"Leaders, organizers, instigators and accomplices participating in the formulation or execution of a *common plan* or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."⁸

This provision of the Tokyo Charter provides specific and unambiguous textual support for JCE 3 liability in international criminal prosecution. By ignoring this charter, the PTC either failed to consider a relevant source of international criminal law or failed to provide appropriate reasons for dismissing the Tokyo Charter while giving hallowed regard to the European-based charters.

With regard to the post-World War II jurisprudence, the chamber failed to judge the facts of the cases relevant to JCE 3. The PTC cited the *Tadic* court's language in claiming that uncertainty existed. But the PTC did not discuss the *Borkum Island and Essen Lynching* cases. These cases do not include an authoritative court judgment, but they do include a record of the facts at issue, the evidence presented, and the outcomes determined.⁹ Though 'certainty' is surely preferred, it is a mischaracterization to say that certainty is the standard by which courts are bound when interpreting relevant jurisprudence. The facts and judgments in *Borkum* and *Essen* produce the inescapable inference that the defendants were convicted of crimes of which

⁷ PTC Decision, para. 79.

⁸ Art. 5(c), Charter of the International Military Tribunal for the Far East (Tokyo Charter), available at: <http://www.isabelle-walther.de/texts/IMT%20Far%20East.htm>, (emphasis added)

⁹ *Trial of Erich Heyer et al.*, British Military Courts, 22 December 1945, United Nations War Crimes Commission, 1 Law Reports of Trials of War Criminals 88 ("*Essen Lynching Case*"), available at: http://www.loc.gov/r/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf; *Trial of Kurt Goebell et al.*, U.S. Military Courts, Feb. 6 - Mar. 21, 1946 ("*Borkum Island Case*"), available via microfilm at <http://www.archives.gov/research/captured-german-records/war-crimes-trials.html#international>.

they did not have specific intent but that nonetheless resulted from their actions in a common criminal plan. In *Borkum* and *Essen*, there was no claim that several of the defendants specifically intended to kill the victims. Yet, the court levied the harshest penalties possible (death by hanging) on those defendants who did not physically perpetrate the killings, but were the individuals who unquestionably led the criminal plan to abuse the victims.

Moreover, it is dubious whether the jurisprudence above involves significantly more inference than the other post-World War II jurisprudence that led the PTC to find “without a doubt” that JCE 1 and JCE 2 were customary law. Like the set of cases above, the basis for JCE 2 involved only two cases. In addition, many of the cases for JCE 1 and JCE 2 were not actual records of the court judgment but were selective summations by a separate Judge Advocate. In addition, the PTC laments the lack of specific reference to JCE 3 in the IMT and Control Council 10 laws, but there is also no mention of JCE 2 (the institutional form) in either law as well. The recognition of JCE 2 was likewise inferred by analogy to JCE 1 common plan liability. Moreover, in JCE 2, there is a disconnect similar to JCE 3 between the perpetrator’s intent to participate in a concentration camp and whether or not that person specifically intended to commit the criminal acts that nonetheless resulted in the camp. Hence, the PTC’s attempt to distinguish the JCE 1 and JCE 2 jurisprudence from the JCE 3 jurisprudence is dubious at best. Whereas the chamber found JCE 1 and 2 to be customary “without a doubt,” the jurisprudence that led the chamber to this conclusion required inferences of little (if any) substantial difference as those required in JCE 3.

Applying the doctrine of JCE advances the core purposes of the ECCC and of international criminal justice

In addition to determining whether JCE is customary, the PTC also had the task of determining whether JCE is applicable under the ECCC’s constitutive purposes. Article 2 of the ECCC Law and Article 1 of the Agreement set forth the court’s purposes. The ECCC Law provides:

Article 2: “Extraordinary Chambers shall be established [...] to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”¹⁰

The Agreement in turn provides:

Article 1: “The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia [...]”¹¹

¹⁰ Art. 2, Law on the Establishment of the ECCC (“ECCC Law”).

¹¹ Art. 1, Agreement between the UN and the RGC on the Establishment of the ECCC (“Agreement”).

According to these documents, the object and purposes of the ECCC are two-fold: 1) To bring to trial senior leaders of Democratic Kampuchea and those most responsible for the commission of crimes in Cambodia in the period 1975-79; and 2) To hold individuals individually responsible for the commission of any crimes to which they contributed.¹² The drafters' broader interest in the ECCC enhancing "the pursuit of justice and national reconciliation, stability, peace and security" further supplements these purposes.¹³ These purposes correspond with the goals discussed in the National Assembly during the drafting of the ECCC Law.¹⁴

The drafters, who included co-author David Scheffer, did not expressly consider JCE in particular. There was no effort to articulate JCE in either the ECCC Law or the Agreement. Nonetheless, the court's goal to prosecute only senior leaders of Democratic Kampuchea and those most responsible points logically to JCE as applicable to prosecutions before the ECCC. The court's unique personal jurisdiction presumes that individuals were organized in a common enterprise and presumes the likelihood that crimes were committed via that structure. By singling out those in leadership roles, the governing laws preclude the possibility of holding anyone but those persons individually responsible for the crimes committed. The public statements of officials of the Cambodian government as well as the debates in the Cambodian National Assembly express the drafters' view that the senior leaders and those with influence in the organization are culpable for any violations committed.¹⁵ Thus, in order to fully prosecute suspects for the culpability envisioned by the drafters, the court must be able to hold responsible those who perpetrated crimes via a common criminal enterprise.

None of the modes of liability listed in the ECCC Law are capable of fully expressing the culpability that this form of commission entails.¹⁶ In contrast, the culpability contemplated in the ECCC Law correlates with the perpetration of crimes under the doctrine of JCE. JCE accounts for the commission of crimes through a criminal enterprise. It recognizes that those contributing to the crime but not pulling the actual trigger may be equally culpable or more culpable than the physical perpetrator. This corresponds with the object and purpose of the ECCC to hold the senior leaders individually responsible for the commission of any crimes in which they contributed. Without JCE, the court cannot fully prosecute individuals for the degree of culpability that their actions entailed. Hence, it is only through employing a doctrine such as JCE that the court is able to effectuate the object and purposes of the ECCC.

¹² See the statements of Sok An, Deputy Prime Minister and Chairman of the Task Force on the Khmer Rouge Trials, and the debates of the National Assembly (Sok An Statements). Available at: <http://www.cambodia.gov.kh/krt/english/index.htm>

¹³ Preamble, Agreement, para. 2; David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in INTERNATIONAL CRIMINAL LAW, vol. III, 3rd ed., 224 (Cherif Bassiouni, ed. 2008); K. Whitley, *History of the Khmer Rouge Tribunal: Origins, Negotiations, and Establishment*, in THE KHMER ROUGE TRIBUNAL 46 (J. Ciorciari ed. 2006).

¹⁴ See the statements of Sok An in the transcripts of the debates on the ECCC Law in the Cambodian National Assembly, *supra* note 12.

¹⁵ See the statements of Sok An, Deputy Prime Minister and Chairman of the Task Force on the Khmer Rouge Trials, *supra* note 12.

¹⁶ Art. 29, ECCC Law; *Tadic Appeals Judgment*, para. 192. Though many commentators advocate the use of the command responsibility doctrine over JCE, the complexity of the criminal operations and the Khmer Rouge's obsessive efforts to mask the chain of command exemplify the problem that the command responsibility is inadequate as a means for expressing the appropriate culpability involved in atrocity crimes.

Moreover, the language of Articles 3-8 of the ECCC Law setting forth the substantive crimes under the jurisdiction of the court also indicates that the court must consider the different forms of perpetration through which the crimes in Cambodia may have been committed. Articles 3-6 provide that the court's purpose is to prosecute "all suspects" of genocide, crimes against humanity, and grave breaches of the Geneva Conventions. Articles 7-8 provide that the court shall prosecute "all suspects most responsible" for the destruction of cultural property and crimes against internationally protected persons.¹⁷ Even if the statute limits the court's personal jurisdiction to only senior leaders and those most responsible, these suspects may have perpetrated the crimes above through the execution of a common criminal plan. Therefore, in order for the ECCC to fulfill its mandate, it is necessary for the court to be able to prosecute these suspects regardless of the form in which they may have perpetrated or participated in the perpetration of the crimes.

The PTC Decision is Ambiguous in Effect

The uniqueness of the ECCC that forced the PTC to re-examine the doctrine of JCE also makes the PTC's decision ambiguous in effect. Because of the ECCC's hybrid civil and common law structure, the PTC Decision only applies to pre-trial phase. It does not bind the Trial Chamber. The PTC Decision is binding on the Office of the Co-Investigating Judges and restricts the scope of action that the Co-Investigating Judges can take in their investigation. In this sense, the PTC Decision fulfills the Pre-Trial Chamber's duty as the guardian of fair trial rights in the investigatory stage. The PTC Decision delimits the extent to which the Co-Investigating Judges can exercise their investigatory powers and burden suspected persons. However, this restriction is temporary at best. The Trial Chamber can order investigative action of its own accord once the case is forwarded to trial. At trial, the Trial Chamber can also depart from the PTC's finding entirely and find that all three forms of JCE are applicable or that none are applicable.

This ruling creates a potential inefficiency that will not be resolved until the Trial Chamber renders its own decision on JCE. Should the Trial Chamber adopt some or all of the forms of JCE, however, the PTC Decision provides a significant stepping stone by which the Trial Chamber can do so. The PTC Decision on JCE is a decision of first impression for all significant purposes. The fact that the chamber adopted JCE helps overcome the initial hurdle that the recent opposition to JCE presents. Moreover, among the situations before the modern *ad hoc* tribunals, the circumstances before the ECCC presented the strongest challenge to how far back JCE has been customary international law. The PTC Decision essentially pushes the origination date for JCE back to the 1940s at least. Thus, the PTC Decision provides a preliminary imprimatur for applying JCE at the ECCC should the Trial Chamber choose to do so.

Conclusion

The Trial Chamber in the ECCC should consider the reasons above when they inevitably face the question of whether or how to apply the doctrine of JCE. The original jurisprudence of

¹⁷ Arts. 3-8, ECCC Law.

the post-World War II tribunals, the jurisprudence relating to JCE 3, and the object and purpose of the ECCC all indicate that it is appropriate to apply all three forms of JCE in the cases before the ECCC. Meeting individual responsibility for atrocity crimes is a difficult enterprise. The PTC is not the first to take up this effort. Nor were the ICTY, ICTY, or SCSL the first to have struggled to bring to justice those accused of atrocity crimes. Atrocity crimes litigation extends back to the 1940s with the post-WWII tribunals (and earlier) and as these courts found, the doctrine of JCE is an established means of bringing to justice those most responsible for international crimes. The violence wrought in Cambodia between 1975-79 left an estimated 1.7 million dead in its wake. The ECCC needs as many tools as is legally available to make sure that those most culpable are held accountable. The doctrine of JCE, as reasoned above, is one of those tools.