

JOINT CRIMINAL ENTERPRISE IN ECCC

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ABSTRACT

From 17th April 1975 to 7th January 1979 Cambodia was under the power of Khmer Rouge, when the war ended in 1998 with the distilling of political and military structure of Khmer Rouge; there was an establishment of ECCC that is Extraordinary Chamber in the Courts of Cambodia to bring the people responsible for genocide in Cambodia to justice. The paper would talk about how by applying the doctrine of Joint Criminal Enterprise' ECCC was able to make perpetrators that were not directly involved liable for their actions. It also focuses on how it's important to establish local tribunals while punishing international crimes.

Key Words: ECCC; Joint Criminal Enterprise; Genocide; International law.

INTRODUCTION

From 17th April 1975 to 7th January 1979 Cambodia was under the power of Khmer Rougeⁱ. 1.7 Million People were believed to have died of starvation, torture, execution and forced labor in his three years of rule.ⁱⁱ The war ended in 1998 with the distilling of political and military structure of Khmer Rouge.ⁱⁱⁱ

In consequence of this atrocity, Extraordinary Chamber in the Courts of Cambodia (ECCC) was established, in accordance with the agreement between royal government of Cambodia and united nation, within the existing court structure of Cambodia.^{iv}

To accomplish this scale of atrocity there has to be a systematic functioning of the government in a state. This can only be accomplished when there are people who come together to bring their goals to finality. This brings us to the principle of Joint Criminal Enterprise. Joint criminal enterprise applies to people who carry out crime collectively.^v Though it is not certified in

international law, it has been used as a yardstick to convict people not directly involved in many trials. It was first formulated by *Tadic* appeals chamber.^{vi} Joint criminal enterprise has been causing controversies at international criminal tribunal, due to its lack of statutory base as well as its weak foundation under customary international law.^{vii} Its use in ECCC proved problematic as well because its implication includes not only who orders, aids, investigates, plans and abets but also those superiors who fail in preventing the crimes.

JOINT CRIMINAL ENTERPRISE

From the former Yugoslavia (ICTY) till *Tadić* the appeal judgment in 1992,^{viii} the joint criminal enterprise doctrine, as a personal criminal liability has emerged in the jurisprudence of the International criminal trial, it has been subsequently reliable and also been relied upon by other international tribunal and courts.^{ix} Since, then ICTY has pronounced JCE on many occasions now it can be considered as consolidated concept of international criminal law capable of providing a legal framework to inculcate perpetrators of mass crimes whose particular structure and magnitude are a direct consequence of their international nature.^x The basic characteristic of these crimes is that there are usually collective plan or policy implemented behind their commotion, by an individuals acting at different levels and in different capacity.^{xi} The person who concretely commits the crime is often mere participant in a broader criminal venture planned and organized by senior political or military leaders.^{xii} Therefor excluding or undermining superiors' criminal liability would disregard their role in commission of the offence as well as the gravity of their behavior.^{xiii}

JCE is a mode of liability within the meaning of committing under article 29 of the ECCC law. The use of JCE must be in alliance with *nullum crimen sine lege*^{xiv}, it is the fundamental principle in international human rights law and international criminal law. Therefor the application of JCE must satisfy the existence of law requirement and foreseeability and accessibility requirement.^{xv}

ECCC

In 1975, Khmer Rouge regime came into power under the leadership of pol pot.^{xvi} This time resulted in civil war and wide spread atrocities over people, which resulted in death of around 1.7 million in Cambodia.^{xvii} With the coming in of Vietnamese in 1979 Khmer rouge regime was over thrown.^{xviii} To prosecute the senior leaders of Khmer rouge regime Cambodian government requested United Nations to help them in establishing a trial.^{xix} ECCC was formed when Colombian government asked for help in proceeding Khmer Rouge government, from United Nations.^{xx} In 2001, Cambodian government validated the establishment law and then amended it in 2014.^{xxi} The law gave all the subject matter, the temporal and personal jurisdiction of ECCC.^{xxii}

United Nations general assembly on 13th may 2003 approved the draft agreement between UN and Cambodia offering extraordinary chambers in courts of Cambodia to punish senior leaders and those who were most responsible for serious crimes and violation of Cambodian penal law, and international laws.^{xxiii} Secretary General in March 2006 and list of thirty Cambodian nominated seven judges and international judges were approved by supreme council of magistracy in May 2006 this was followed by royal decree.^{xxiv}

ECCC unlike most of the international courts in based in its own country that is where the crime took place.^{xxv} According to one's, believe this helps towards establishing the local relevance of the legal proceedings and establishing a healthy relationship between the courts and the people suffering because of the crime. Holding the trail in the same place where the crime took place makes it easier to collect evidence and investigating crime scenes, and calling of the witnesses.^{xxvi} ECCC has given a very effective model for future prosecutions of international justice, as it makes it mandatory for every international staff to work in collision with a local counterpart.^{xxvii}

Working of local people with the UN help it giving justice efficiently and faster, as they are able to speak to the local people without hesitation and language barriers, which has been seen through the establishment of various truth commissions. It also helps, as they are able to understand the degrees of social roles that can contextualize fact-findings, such as issues of socioeconomic standing, ethnicity, and gender; also they have lived through the atrocities, which makes it easier for them to associate with the situation rather than them explaining the situation to a third party.

The ECCC has provided a model of a hybrid, which is a significant achievement, which provides a potential template for future international justice proceedings.^{xxviii} A hybrid tribunal is the one, which based on both international and national laws and norms.^{xxix}

‘The ECCC presented an unprecedented task of leading historical legal research in the context of preserving the rights of the accused, while in a race against time to collect testimonial evidence in the context of fading memories and witnesses dying of old age.’^{xxx} This clearly showed that passing of any amount of time does not immune the crime.

JURISDICTION

ECCC particularly deals with the crime of genocide as according to the provisions laid down in the Genocide Convention, 1948^{xxxi}, crimes committed against humanity as defined in 1998 Rome statute of international criminal court, breach of Geneva conventions and crimes defined in chapter II of Cambodian law of 2001.^{xxxii} The procedure of the chamber moves parallel to the Cambodian law but if in a particular matter Cambodian law is silent, or if in any case, there is uncertainty regarding the interpretation or application of any domestic law, guidance could be sought in procedural laws established at the international levels.^{xxxiii} The ECCC are supposed to exercise their jurisdiction in harmony with international standards of justice, fairness and due process, as set in article 14^{xxxiv} and 15^{xxxv} of 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party.^{xxxvi} ECCC follow subject matter jurisdiction as mentioned in the article 2 of the agreement, which would be compatible with Cambodian law of 2001.^{xxxvii} It also mentions that the agreement would be implemented through the Cambodian law of 2001.^{xxxviii} The agreement also states that Vienna Convention on the Law of Treaties, 1969 also applies.^{xxxix}

This agreement is seen as an international treaty although it ties perfectly well with the domestic laws of the country. The chambers consist of two chambers 1) Trial Chamber and 2) Supreme Court Chamber. The trial chamber comprises of three Cambodian judges and two international judges whereas Supreme Court chamber consists of four Cambodian judges and three international judges.^{xl} The Supreme Court chamber serves as both appellate and final instance.^{xli}

NULLUM CRIMEN

Nullum crimen sine lege principal emerged as a domestic law was recognized by international law post world war II.^{xlii} At Nuremberg tribunal, the defendants, as was recognized as a general principle of justice repeatedly invoked this principle.^{xliii}

The main issue of JCE applicability at ECCC is that it should be in accordance with the principle of *nullum crime sine lege*. ECCC authorized this principle under article 33 of ECCC law, which states “The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.”^{xliv} This clearly shows that the laws are in harmony with that of international laws and not in exclusion of it, specifically the basic Human Rights.

Therefor by fulfilling this obligation, the crimes that were committed from 1975 to 1979 fall under ECCC’s jurisdiction only if they were part of international or national criminal offence at the time.^{xlv}

In ECCC, the defense teams have vigorously challenged the JCE liability and sparked controversial decision by the co-investigating judges, PTC, and trial chamber.^{xlvi} JCE in ECCC is an argumentative issue as its jurisdiction covers a period, which is well before, that any other modern international court as covered.^{xlvii} JCE as a mode of obligation under global law currently is well established as has been clearly established by its application by various tribunals in various cases.

ECCC needs to focus, on what type of regular plan/JCE obligation existed in standard universal law starting 1975. This determination will turn generally on the Court's perspective of how nearly the Tadić detailing of JCE reflects post-WWII law. If the holding of *Tadic* is on the lines of JCE jurisprudence and its interpretation of after world war jurisprudence, then the chamber can hold that JCE existed in a form substantially similar to its modern incarnation, as virtually all of the legal precedent cited by the ICTY.^{xlviii}

There are only two multilateral and some domestic equivalent modes of liability that are the only legal sources cited in *Tadic* that are post ECCC’s temporal jurisdiction.^{xlix} These treaties and laws were examined as secondary evidence of general state practice and *opinio juris*.¹ Even

ICTY appeals chamber has openly specified that Joint criminal enterprise and common plan liability are the same.^{li} This clearly shows that joint criminal enterprise made its place in international law sometime during or shortly after World War II era.^{lii} Now if ECCC supreme court chamber follows the PTC's joint criminal enterprise decision, holding that JCE still exists in some form different from its modern version, then the chamber would be indirectly disagreeing with the ICTY, ICTR and SCSL's reading of the post-world war II jurisprudence.^{liii} If ECCC holds that joint criminal enterprise existed in form of common plan in customary international law in 1975, in that case it has to determine whether each accused had sufficiently enough information of this form of liability at the time of action or the crime.^{liv} Even many domestic criminal codes provide support in an indirect way to joint criminal enterprise as legal concept by 1975.^{lv}

In addition to crimes under international law that ere applicable to Cambodia in 1975, the chamber also has a jurisdiction over crimes under the 1956 Cambodian Penal Code^{lvi} this code is broadly based on French criminal law occupies three separate while dealing with group liability, which are

1. Co- action
2. Complicity
3. Co- authorship^{lvii}

The code is quite clear regarding how to differentiate between these three interrelated concepts.^{lviii} Besides, there exists a heap of wellsprings of global law that now largely accommodate such risk.^{lix}

Holding a Position of Authority

The prime probative factor of JCE liability is whether the accused held a position of authority within JCE. As held in the cases under ICTY chambers, when Applying a systematic JCE, the position of authority is also relevant evidence for establishing the accused's awareness of the systematic attack.^{lx} The accused participation in enforcing or perpetuating the common criminal purpose of the system and eventually for evaluating his level of participation is important for the sentence of punishment.^{lxi} The position of authority is a probative of accused's knowledge and his participation in the original plan.^{lxii} This position of the accused

is also useful when extending JCE is charged, as it may tell about the accused's subjective knowledge of the likelihood of the commission of furtherance, and foreseeability of the crime.^{lxiii}

ICC

ICC applies the doctrine of co-perpetration, which is defined as those who have joint control over the collective crime.^{lxiv} Collectiveness of the crimes has always been and remains, one of the most contentious areas of substantive international criminal law. To impose individual liability for collective endeavors the doctrine that are applicable, which have obsessively dominated the case laws from Nuremberg to current pronounced decisions of ICC are that of conspiracy, JCE, and co-perpetration.^{lxv} Although every court applies different doctrines, the basic principle of all of them is the same that is how to hold a defendant responsible for the action of others.^{lxvi}

Rome Statute is the first international instrument that explicitly regulates JCE doctrine. It does not resemble those of the statutes of ICTY and ICTR.^{lxvii} Article 25(3) (d) of the Rome Statute expressly deals with the doctrine of JCE.^{lxviii} In the Lubanga case, pre-trial chamber took, the view that article 25(3) (d) refers to a concept of co-perpetration based on the notion of joint control over the crime.^{lxix} The major difference between ICC chamber's concept of joint control and JCE is that joint control requires accused to make an essential contribution such that the commission of the crime would be frustrated if the contribution were withdrawn.^{lxx}

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ⁱⁱ *Ibid.*

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^{ix} *Supra* 5.

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^{xi} *Supra* 8.

^{xii} *Supra* 8.

^{xiii} *Supra* 8.

^{xiv} “Nullum crimen sine lege is the principle in criminal law and international criminal law that a person cannot or should not face criminal punishment except for an act that was criminalized by law before he/she performed the act.”

^{xv} Giulia Bigi, JCE in jurisprudence, available at http://www.mpil.de/files/pdf3/mpunyb_02_big1_14.pdf, visited on 24th April 2019, 5:30p.m.

^{xvi} *Supra* 1.

^{xvii} *Supra* 1.

^{xviii} *Supra* 1.

^{xix} *Supra* 1.

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^{xxi} *Ibid.*

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^{xxxiv} **Article 14**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

^{xxxv} **Article 15**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

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^{xxxviii} *Supra* 33.

^{xxxix} *Supra* 33.

^{xl} *Supra* 33.

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lxviii *Ibid.*

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