UNIVERSITY OF WASHINGTON
SCHOOL OF LAW

MEMORANDUM FOR THE
HIGH LEVEL PIRACY WORKING GROUP

ISSUE:
THE EXTENT TO WHICH JOINT CRIMINAL ENTERPRISE OR CO-
PERPETRATION DOCTRINE IS SUITABLE FOR AN INTERNATIONAL
PIRACY TRIBUNAL

PUBLIC INTERNATIONAL LAW & POLICY GROUP (PILPG)

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**BOOKS, ARTICLES, & WEBSITES**


TERROR ON THE HIGH SEAS: FROM PIRACY TO STRATEGIC CHALLENGE (Yonah Alexander & Tyler B. Richardson eds., 2009)

I. Introduction and Summary of Conclusions

A. Issues

This memo addresses the issue of whether or not a form of common purpose doctrine should be included in the statute for an international piracy tribunal. It starts with an explanation of the current situation of piracy in the world. It then goes on to explore the approaches that international criminal courts and tribunals have taken regarding common purpose doctrine, explaining the development of joint criminal enterprise in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and co-perpetration liability in the International Criminal Court (ICC). The memo concludes by laying out considerations that the drafters should take into account in deciding what version of common purpose doctrine to include in the statute for an international piracy tribunal.

B. Summary of Conclusions

1. Drafters should include a form of common purpose doctrine in the statute for an international piracy tribunal.

Piracy presents the same issues of collective criminality faced by the ICTY and the ICC, and so including a form of common purpose doctrine in the statute will be helpful in carrying out the mission of the tribunal. Common purpose doctrine offers a mode of liability that reaches those individuals who agree to and participate in a common criminal plan but do not physically perpetrate the crime. Common purpose liability is more extensive than aiding and abetting liability because it provides principal liability. It also reaches those who cannot be held liable under a theory of command responsibility in situations where the command structure is not clear or hierarchical. By following the ICC example and including a provision for common purpose
doctrine in the statute, the tribunal can avoid much of the criticisms of violations of legality and creation of judge-made law that plagued the ICTY.

2. **In deciding what form of common purpose doctrine to apply, the drafters should consider how far they would like liability to reach.**

The ICTY and the ICC’s approaches to common purpose doctrine differ in the level of participation a co-perpetrator must contribute to a common plan before criminal liability under this mode attaches. The ICTY’s joint criminal enterprise doctrine requires that the defendant make a significant contribution to the common criminal plan; the ICC’s co-perpetration doctrine requires that the defendant have joint control over the common plan. In considering which type to include in the international piracy tribunal statute, the drafters should consider how far they would like liability to reach. Generally, international tribunals have limited time and resources while trying to focus their prosecutions on the worst, most culpable, highest level offenders. If this is the case with the piracy tribunal, the drafters may want to limit their common purpose doctrine to the ICC approach or at least require a substantial contribution before liability attaches. If, however, the drafters would like to reach more, lower-level participants in the piracy web, it should adopt the lower participation standard of the ICTY.
II. **Factual Background**

A. What Is Piracy?

Piracy is one of the world’s oldest professions and crimes. Legends of seventeenth-century buccaneers and privateers abound, providing ample fodder for novels and films, which portray the criminality through the lens of romance. After the Cold War ended, the reality of piracy resurged, first in the waters of Southeast Asia, then off the coasts of India and Africa, and the results have been anything but romantic.\(^1\) Piracy now poses a danger to all ships on the high seas, especially in certain parts of the world.

It has been long agreed that the illegal act of piracy has included an attack on the high seas by a private ship on another ship with the intent to steal.\(^2\) The definition has since expanded, but most are reluctant to include in the definition *any* crime on high seas.\(^3\) Both the 1958 Geneva Convention on the High Seas and the 1982 UN Convention on the Law of the Sea (UNCLOS) define piracy as

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).\(^4\)

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3 Id.
Note that for the purposes of international law, according to the treaties, the definition of piracy includes only those attacks that occur on the high seas.\(^5\) Attacks in territorial waters are left in the jurisdiction of each nation. Also, this definition only covers attacks made for “private ends,” excluding state-sponsored or politically motivated attacks.\(^6\)

The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), a UN document drafted in response to a politically motivated hijacking of an Italian ship by the Palestine Liberation Organization, is also used to deal with some piracy incidents.\(^7\) Rather than addressing piracy directly, the SUA Convention lists a set of unlawful acts against maritime vessels, including seizing, damaging, or destroying a ship.\(^8\) Thus, the SUA Convention is used to address politically-motivated crimes without the label of “piracy.”\(^9\)

The International Chamber of Commerce’s International Maritime Bureau (IMB)’s definition of piracy is broader than that of Geneva Convention and UNCLOS, including in their statistics armed robbery attacks in internal, territorial, and exclusive economic zone waters.\(^10\) The IMB recognizes three criminal levels of piracy: 1) low-level armed robbery; 2) medium-level armed assault and robbery; and 3) major criminal hijack.\(^11\) IMB also differentiates attacks

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\(^5\) The “high seas” are those waters outside internal or territorial waters (12 nautical miles from shore) and outside the exclusive economic zone (200 nautical miles from shore). See UNCLOS, supra note 4, arts. 3, 57, & 86; see also Chalk, supra note 1, at 103.


\(^9\) See section on Maritime Terrorism, infra.

\(^10\) Peçanha, supra note Error! Bookmark not defined.

based on where they occur: at pier, at anchorage, or against ships underway.\textsuperscript{12} Seizure of a
vessel can be short-term, long-term, or permanent.\textsuperscript{13}

\textbf{B. A Picture of Modern Piracy}

The IMB’s Piracy Reporting Centre began monitoring pirate attacks in 1992 with 106 cases.\textsuperscript{14} Since then the number of reported attacks has increased fairly consistently. In 2010, 445 attacks, in which 1181 sailors were captured, 8 killed, and 53 ships hijacked, were reported.\textsuperscript{15} Somalia had the highest piracy rate by far, accounting for 92% of all ships seized in 2010.\textsuperscript{16} In 2011, as of April 28, there had been 173 total attacks.\textsuperscript{17} Of those, 117 were reported for Somalia.\textsuperscript{18} Nigeria, Bangladesh, Indonesia, and the South China Seas also have relatively high piracy attack rates.\textsuperscript{19}

In addition to the increased incidence, pirate attacks have become increasingly violent.\textsuperscript{20} Modern pirates have adopted modern tactics, including use of modern weapons.\textsuperscript{21} Hijacking, kidnapping, and hostage-taking have become more common occurrences in the piracy context.\textsuperscript{22} Some allege that pirate groups operate with official backing, contributing to the “quasi-military style” of modern piracy.\textsuperscript{23} Others allege that piracy is a new part of organized crime backed by

\begin{flushleft}
\textsuperscript{12} \textit{Id.} at 20-21.  \\
\textsuperscript{13} \textit{Id.} at 21.  \\
\textsuperscript{14} \textit{Id.} at 20.  \\
\textsuperscript{16} \textit{Id.} Somali pirates accounted for 49 of ships captured and 1016 of crew members held hostage in 2010.  \\
\textsuperscript{18} \textit{Id.}  \\
\textsuperscript{19} International Chamber of Commerce, \textit{supra} note 15.  \\
\textsuperscript{20} Timothy H. Goodman, “\textit{Leaving the Corsair’s Name to Other Times: ” How to Enforces the Law of Sea Piracy in the 21st Century Through Regional International Agreements}, 31 CASE W. RES. J. INT’L L. 139, 141 (1999).  \\
\textsuperscript{21} Chalk, \textit{supra} note 1, at 93.  \\
\textsuperscript{22} Stehr, \textit{supra} note 11, at 22.  \\
\textsuperscript{23} Chalk, \textit{supra} note 1, at 93-94. 
\end{flushleft}
Asian, American, and European criminal syndicates that contribute organization, funding, planning, and more sophisticated weapons to pirate crews.24

In reality, pirate organizations run along a spectrum from small ragtag groups to larger, more organized forces. Those closer to the small ragtag group side are more prevalent and generally do not steal more than they can load onto a small boat.25 Larger, more organized forces are less common, but they are also more ambitious.26

_Piracy in Somalia_

As mentioned _supra_, Somalia has the highest incidence of pirate attacks in the world. Currently, 26 vessels and 518 hostages are being held by Somali pirates.27 Pirates thrive in Somalia for several reasons, the first of which is that Somalia is a failed state. Twenty years of lawlessness, starvation, and war have killed hundreds of thousands of Somalis. The decades of clan rivalry and war profiteering continue today with violence between the current transitional government and insurgents.28 “The perfect conditions for piracy prevail: anarchy, a cold war legacy that has left Somalia armed to the teeth, and a 1,900-mile coastline abutting the Gulf of Aden, which 20,000 ships traverse each year.”29

Without many options for making a living, Somalis turn to piracy to get money.30 One man claims that, like others, he began his pirate career as a failing fisherman, who began forcibly boarding illegal foreign fishing boats to charge a “fine.”31 The fishermen soon discovered that

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24 JOHN S. BURNETT, DANGEROUS WATERS: MODERN PIRACY AND TERROR ON THE HIGH SEAS 9 & 166 (2003); Koknar, _supra_ note 1, at 75.
26 _Id._ at 46.
27 International Maritime Bureau, _supra_ note Error! Bookmark not defined..
29 _Id._
30 _Id._
31 _Id._
this practice was more profitable than fishing, and so the pirates organized themselves into
“companies” and turned to full-time piracy by the early 2000s.\textsuperscript{32} There have been allegations of
backing by criminal organizations and some government officials, but little evidence leading
back to such individuals exists.\textsuperscript{33}

Those pirates who hijack ships, typically approach by skiff, and then, heavily armed, use
grappling hooks and ladders to climb aboard the hijacked vessel. They take the crew hostage,
holding them at gunpoint and then locking them in crew quarters, steer the ship to pirate dens on
Somali territory to begin ransom negotiations.\textsuperscript{34} Most avoid harming the captives, knowing that
such actions will lead to Western attacks on onshore bases.\textsuperscript{35}

In the lawless environment of Somalia, pirates are free to operate in the open. Towns that
revolve around piracy have emerged. “In these places, the entire local economy revolves around
hijacking ships, with hundreds of men, women, and children employed as guards, scouts, cooks,
deckhands, mechanics, skiff-builders, accountants, and tea-makers.”\textsuperscript{36}

\textit{Consequences of Piracy}

Attacks of piracy threaten security on many fronts. Most obviously, pirate attacks
directly threaten the lives and welfare of the crews of ships from all over the world.\textsuperscript{37} Because
pirates often attack commercial vessels, piracy also threatens the global economy, interrupting
supply chains and the world shipping system.\textsuperscript{38} Such threats are particularly acute for the

\begin{footnotes}
\item[32] Id.
\item[33] Id.
\item[34] Id.
\item[35] Id.
\item[36] Id.
\item[37] Chalk, \textit{supra} note 1, at 90.
\item[38] Stehr, \textit{supra} note 11, at 22; Jacob W.F. Sundberg, \textit{The Crime of Piracy}, in \textit{1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS} 799 (M. Cherif Bassiouni eds., 2008).
\end{footnotes}
international trade of countries perceived as especially vulnerable to attack.\textsuperscript{39} Additionally, hijacked ships have the potential to cause massive environmental damage.\textsuperscript{40}

Quite simply, piracy raises the cost of doing business, costing maritime insurance companies an estimated $16 billion annually.\textsuperscript{41} Note that this increased cost of doing business also causes underreporting of pirate attacks. Ship owners and crews are reluctant to report attacks because of the delays an investigation would entail and a potential increase of insurance premiums.\textsuperscript{42}

\textit{Piracy vs. Maritime Terrorism}

There is some overlap between piracy and what is referred to as “maritime terrorism.” An act of maritime terrorism is, in essence, a terrorist attack that occurs on the high seas, generally as part of a violent political movement.\textsuperscript{43} Sometimes terrorist groups do engage in pirate-like attacks, hijacking ships and holding crews captive.\textsuperscript{44} The difference lies in the motivation behind the attack: maritime terrorism is done for political purposes, which can take the form of a direct political attack or simply an effort to disrupt operations or cause harm, or to raise economic resources for a political cause. Pirates, according to the legal definitions discussed \textit{supra}, attack for private gain, not for political purposes.\textsuperscript{45}

\begin{itemize}
\item Chalk, \textit{supra} note 1, at 90-91.
\item \textit{Id.}
\item Koknar, \textit{supra} note 1, at 78.
\item Chalk, \textit{supra} note 1, at 89-90.
\item For example, the Free Aceh Movement (GEM) in Indonesia engaged in attacks for political motives as did the Moro National Liberation Front (MNLF) in the Philippines. \textit{See} Koknar, \textit{supra} note 1, at 76-77; Peçanha, \textit{supra} note \textbf{Error! Bookmark not defined.}.
\item Stehr, \textit{supra} note 11, at 22.
\item For more on Maritime Terrorism, \textit{see} Hermann, \textit{supra} note \textbf{Error! Bookmark not defined.}; \textit{TERROR ON THE HIGH SEAS: FROM PIRACY TO STRATEGIC CHALLENGE} (Yonah Alexander & Tyler B. Richardson eds., 2009).
\end{itemize}
C. Combating Piracy

Universal Jurisdiction

Universal jurisdiction gives all sovereign nations the authority to prosecute individuals for certain crimes, regardless of where the crime takes place or the nationalities of the perpetrators and victims. Piracy was the “first widely recognized universal jurisdiction offense,” and for centuries, the only one. Piracy was a crime that happened in international waters, a place of no national territorial jurisdiction or competing national jurisdictions based on the flags that the involved ships are flying and the nationalities of the people involved.

Universal jurisdiction allowed nations to address the problem of piracy, a problem that harmed all nations of the international community, by giving the power to each of those nations to prosecute and punish perpetrators of the crime. Universal jurisdiction requires no nexus and no reasonableness test; rather “those who commit such offenses are hostes humani generis — ‘enemies of all mankind’ — and all nations of the world are said to have authority to regulate their conduct.” In recent years, universal jurisdiction has been extended to other crimes like torture based on the fact that such crimes are “egregiously heinous” and the resulting interest of the international community in prosecuting and punishing such crimes.

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47 Luban et al., supra note 46, at 210; see also Kontorovich, supra note 46, at 184.
48 Kontorovich, supra note 46 at 185; see also CASSESE ET AL., supra note Error! Bookmark not defined., at 312-13; Luban et al., supra note 46, at 210; Sundberg, supra note Error! Bookmark not defined., at 813.
49 Curtis A. Bradley, Universal Jurisdiction and U.S. Law, 2001 U. CHI. LEGAL F. 324 (2001); see also Luban et al., supra note 46, at 210.
50 Kontorovitch, supra note 46, at 185; see Israel v. Eichmann, 36 I.L.R. 1 (Dist. Ct. Jerusalem 1961), in which the Israeli court explains that universal jurisdiction is about the nature of the crime and the resulting harm to all nations; see also Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium), 2002 I.C.J. ¶ 60 (Feb. 14), “It is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community.”
After World War II, it was a natural move for the international community to extend the principles of universal jurisdiction to punishing human rights violations.\footnote{Henry A. Kissinger, \textit{The Pitfalls of Universal Jurisdiction}, FOREIGN AFF., Jul.-Aug. 2001, at 86.} The Nuremberg trials, as well as other war crimes trials after the war, “arguably involved the exercise of universal jurisdiction.”\footnote{Bradley, \textit{supra} note 49, at 324.} More recently “national courts have exercised universal jurisdiction against a wide range of suspects: Bosnian war criminals, Rwandan genocidaires, Argentine torturers, and Chad’s former dictator.”\footnote{Kenneth Roth, \textit{The Case for Universal Jurisdiction}, FOREIGN AFF., Sept.-Oct. 2001, at 5-6.}

Because universal jurisdiction has become a theoretical method for prosecuting heinous crimes, nations have lost interest in utilizing the method for the purpose of regulating piracy.\footnote{Kontorovich, \textit{supra} note 46, at 184.} Sovereign nations “have a legal interest in punishing individuals subject to universal jurisdiction in order to deter and redress breaches of international order,” but piracy rarely reaches such catastrophic levels that concern individual nations.\footnote{Bradley, \textit{supra} note 49, at 346-47.} Universal jurisdiction over piracy is “more a matter of theory than of practice… [and] very few criminal prosecutions for piracy can be found that” depend on any kind of “universal principle” that warrants universal jurisdiction.\footnote{Kontorovich, \textit{supra} note 46, at 192.} Although States have the right to try pirates under universal jurisdiction, they have no duty to do so.\footnote{Luban et al., \textit{supra} note 46, at 210-11.} Thus, international law adequate to combat piracy exists; it just is not used effectively to do so.\footnote{Goodman, \textit{supra} note \textit{Error! Bookmark not defined.}, at 142.} Without the will of nations to prosecute piracy and, through doing so, deter future attacks, the law is useless to eradicate the practice.
Issues of Enforcement

Enforcement efforts have also failed in eradicating piracy. In 2009, the UN Security Council requested that all nations with the capacity to do so should send naval vessels to seize pirate ships and equipment and to pursue and capture pirates in Somali territory.\textsuperscript{59} The response has been increased naval patrols in the Gulf of Aden, a body of water that borders Somalia and a hot spot of pirate attacks beginning in 2008. In part, the effort has been successful. Piracy incidents in the Gulf of Aden dropped from 117 attacks in 2009 to 53 in 2010, largely due to increased naval patrols in the area.\textsuperscript{60} But in decreasing the overall occurrence of pirate attacks, increased naval patrols are not effective, as they would have to constantly patrol over two million square miles.\textsuperscript{61} Thus, the total number of pirate incidents (both in the world and by Somali pirates) increased between 2009 and 2010, illustrating the willingness of Somali pirates to simply move further afield to attack.\textsuperscript{62}

Even when pirates are captured, there remain issues of investigation and prosecution. Though the navies patrolling the Gulf of Aden have delivered over one hundred suspects to Kenya, a nation that has agreed to prosecute pirates, most of the cases have stalled because Western nations have failed to provide promised funding.\textsuperscript{63} Additionally, when pirates do flee to Somalia, they become harder to catch. Without a stable Somali infrastructure, catching and holding accountable pirates within Somali territory becomes impossible.\textsuperscript{64} Investigations are difficult and expensive, especially at a distance and even more especially in the context of a failed state without its own capacity to contribute.\textsuperscript{65} Oftentimes, it is simply cheaper for a

\textsuperscript{60} International Chamber of Commerce, \textit{supra} note 15.
\textsuperscript{61} LANGEWIESCHE, \textit{supra} note 25, at 44.
\textsuperscript{62} International Chamber of Commerce, \textit{supra} note 15, \textit{see also} Gettleman, \textit{supra} note 28.
\textsuperscript{63} Gettleman, \textit{supra} note 28.
\textsuperscript{64} International Chamber of Commerce, \textit{supra} note 15.
\textsuperscript{65} BURNETT, \textit{supra} note 24, at 159-60.
country to pay a ransom than to engage in law enforcement, investigation, and prosecution efforts.\textsuperscript{66}

Some efforts to combat piracy have come from the level of individual ships and shipping companies. Such efforts have included hiring security guards and escorts; increasing security training, technology, and staffing; and training ship crews in self-defense, situational awareness, and de-escalation tactics.\textsuperscript{67}

\textsuperscript{66} Gettleman, \textit{supra} note 28.

\textsuperscript{67} Koknar, \textit{supra} note 1, at 78-81; Stehr, \textit{supra} note 11, at 24-28.
III. Legal Discussion

A. Joint Criminal Enterprise: The ICTY Approach to Collective Criminality

Development of Joint Criminal Enterprise Doctrine

Collective criminality has long posed a problem in international criminal law. The scale and widespread nature of crimes against humanity and genocide virtually require a certain degree of cooperation and coordination. The problem arises in the attempt of international criminal law to hold individuals responsible when they played a part in the group crime but were not the physical perpetrators.

Holding such individuals criminally liable was an initial challenge of the ad hoc tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Neither customary international law nor the statutes of the Tribunals included conspiracy grounds for liability except in the narrow circumstance of conspiracy to commit genocide. Both statutes simply impose individual criminal responsibility on a person if he or she “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime” under the jurisdiction of the respective tribunal. Thus, joint criminal enterprise (JCE) doctrine was not specifically provided for in the statutes. Rather it was read into the ICTY Statute by the tribunal in its case law, beginning with

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72 ICTY St., supra note Error! Bookmark not defined., art. 7(1); ICTR St., supra note Error! Bookmark not defined., art. 6(1).
Tadić, as a method of “committing” a crime within the meaning of Art. 7(1). Other tribunals, including the ICTR, have since adopted JCE.

The Tadić case involved a relatively low-level Bosnian Serb reserve police officer, who was convicted for persecution, beatings, and killings as crimes against humanity. The Appeals Chamber reviewed his acquittal for his part in the murders of five men in a Bosnian village called Jaškići. Tadić had been part of a group that participated in the attack on that particular village, helping to separate the men from the women and beating and taking the men away. However, there was no evidence that Tadić himself had killed the men in question. The Appeals Chamber held that aiding and abetting liability did not cover all those who should be brought to justice in situations of collective criminality, and criminal liability extended to those in a group who participate in a common criminal design or purpose. Citing post-World War II cases as evidence of customary international law, the Chamber laid out the doctrine of joint criminal enterprise, recognizing three categories of liability.

The first category, later referred to as “basic JCE,” occurs when all co-defendants act pursuant to a common design and share the same criminal intention. To be liable under basic JCE, the defendant must voluntarily participate in at least one aspect of the common design and must intend the result of the common plan.

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73 Allison Marston Danner, Joint Criminal Enterprise, in 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 483 (M. Cherif Bassiouni ed., 2008).
74 Id. at 491; see also Rwamakuba v. Prosecutor, Case No. ICTR-98-44-AR 72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide (Oct. 2, 2004).
75 See Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion & Judgment (May 7, 1997).
76 Id. at ¶ 178 (July 15, 1999).
77 Id. at ¶ 185.
78 Id. at ¶¶ 188-92.
79 Id. at ¶ 196.
80 Id.
The second category, known as “systemic JCE,” requires a common purpose and that the offenses charged be committed by a military or administrative unit.\(^1\) To incur individual criminal liability, there must exist an organized system of ill-treatment, the defendant must be aware of the nature of the system, and the defendant must participate in enforcing the system with intent to further the system’s design.\(^2\) This category is generally used to cover concentration and detention camps.\(^3\)

The third category, “extended JCE,” is the broadest and most controversial. Extended JCE involves “a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.”\(^4\) All participants in the common plan can incur individual criminal liability if the risk of the non-agreed crime occurring was “both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk.”\(^5\) Tadić was convicted for the murders of the men in Jaškići under this category.\(^6\)

In summary, the \textit{actus reus} elements are the same for all three categories of JCE:

1) A plurality of persons;
2) A common plan, design or purpose, which amounts to or involves a crime within the Tribunal’s jurisdiction;\(^7\) and
3) The accused’s participation in or contribution to the common design.\(^8\) The participation need not be physical or personal commission of the crime, only the “assistance in, or
contribution to, the execution of a common purpose.” Subsequent cases indicate that this contribution must be “significant,” but need not be “necessary or substantial.” Any disparity in the contributions among co-perpetrators is not a defense, but rather should be dealt with in the sentencing stage.

The differences between the categories appear in the required *mens reas*, which vary. Category one requires all co-perpetrators to share the intent to perpetrate a certain crime.

Category two requires (1) personal knowledge of the system of ill treatment (which can be actual knowledge or can be inferred from the accused’s position of authority) and (2) intent to further the system of ill treatment. Category three requires (1) intent to participate in and further the criminal activity of common purpose and (2) intent to contribute to the commission of a crime.

Under category three, co-perpetrators are also criminally liable for any crime that arises as part of the JCE but were not agreed upon if such a crime was (1) foreseeable and (2) the accused willingly took the risk. Note that the crime must be foreseeable to the defendant in order for him to willingly take the risk. Materiality of the defendant’s contribution may also be taken into account in determining if the defendant had the intent to further the common plan.

*Distinguished from Aiding and Abetting*

Individuals can also be held criminally liable for aiding or abetting under the statutes of the ad hoc tribunals. In this context, “aiding” means provision of support and “abetting”

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89 Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Judgment, ¶ 309 (Feb. 28, 2005).
91 Id. at ¶ 432.
92 Guliyeva, *supra* note 69, at 55.
93 Prosecutor v. Tadić, Case No. 94-1-A, Judgment, ¶ 228 (July 15, 1999).
94 Id.
95 Id.
96 Id.
98 ICTY St., *supra* note 71, art. 7(1); ICTR St., *supra* note 71, art. 6(1).
includes actions like encouragement or sympathy.\textsuperscript{100}  The elements of aiding and abetting are (1) the acts must “assist, encourage, or lend moral support” to the commission of a crime, (2) the acts must have a “substantial effect” on the commission, and (3) the accused must be aware that he is assisting or encouraging the commission of the crime.\textsuperscript{101}

Aiding and abetting liability is distinct from JCE liability in that the accused does not share the intent of the principal perpetrator, and so the accused is considered to have less criminal culpability.\textsuperscript{102}  Thus, aiding and abetting incurs accessory liability, while JCE incurs principal liability.\textsuperscript{103}

\textit{Distinguished from Command Responsibility}

Command responsibility doctrine (also called superior responsibility doctrine) provides another avenue for holding criminally liable those who were involved in a collective crime but were not the physical perpetrators.  It is, however, a “distinct categor[y]” of individual responsibility.\textsuperscript{104}  Joint criminal enterprise requires an affirmative act while an omission suffices for command responsibility.\textsuperscript{105}  From this perspective the doctrines are mutually exclusive: a person either contributes to a criminal result by a positive act or fails to prevent a criminal result from happening.\textsuperscript{106}  However, JCE and Command Responsibility modes of liability are sometimes applied simultaneously.\textsuperscript{107}  In these cases, when a defendant could be convicted under

\begin{thebibliography}{9}
\item[100] Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 516 (Nov. 30, 2005).
\item[102] Id.
\item[105] Id.
\item[106] Id. at 159 & 180.
\item[107] See Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Judgment, ¶ 104 (Feb. 28, 2005); Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 300 et seq. (June 16, 2004).
\end{thebibliography}
either doctrine, the ICTY has given primacy to JCE. If a defendant before the ICTY can be held responsible under either doctrine, a conviction should be based on JCE, with the defendant’s authority considered as an aggravating factor in sentencing. In these cases, having both modes of liability available allows the prosecutor two avenues to conviction, each with its own evidentiary advantages.

**Criticisms of JCE**

The ICTY’s JCE doctrine is “the most wide-ranging concept of criminal liability which exists anywhere in the world,” and its prosecutors have relied heavily on it. It has even been called “Just Convict Everyone” and the “magic bullet of the Office of the Prosecutor.” In the five years between the Tadić case and 2004, 64% of ICTY indictments explicitly relied on JCE. Even when the prosecutor does not explicitly rely on JCE, the ICTY has been known to find JCE liability of its own volition.

Critics have argued that JCE is too broad, opening up criminal liability beyond its legal limits. Some argue that as applied in the ICTY, JCE is a violation of the principle of legality. Rather than being a mode of liability built into the enacting statute of the court, JCE is court-made law cobbled together from cases of “dubious precedential value” rather than through

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108 Ambos, supra note 104, at 166-67.
109 Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Judgment, ¶ 104 (Feb. 28, 2005).
110 Ambos, supra note 104, at 188.
113 Allison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 CAL. L. REV. 107, 107 (2005); see also Danner, supra note Error! Bookmark not defined., at 486.
114 Id.
115 LAUGHLAND, supra note 111, at 120; Guliyeva, supra note 69, at 49; Darcy, supra note Error! Bookmark not defined., at 172.
customary international law. As such the doctrine was not law when the defendants in the ICTY and ICTR committed the acts charged, and so violates the principle of *nullum crimen sine lege*. The ICTY Appeals Chamber and ICTR, however, have maintained that JCE was a part of international customary law at the time of the Yugoslav and Rwandan atrocities.

Opponents of JCE are especially critical of the broad reach of the third category in *Tadić*, which opens up liability to all involved in the common plan not only for the crimes agreed upon, but also for all crimes that are foreseeable. Critics say this is too broad and leads to a danger of guilt by association. According to one author, this category would make “every single member of the Bosnian Serb military guilty of all the acts committed by that army.” JCE is not, however, without limits. It does not completely ignore a causal link between the accused and the foreseeable crime for which he is charged. The prosecution must prove that defendant had knowledge of the likelihood that another participant would commit another crime in the course of the common plan and that the general circumstances of agreement made it “extremely likely... that the ‘incidental’ crimes be committed.” Note also, that because of the nature of international criminal justice, tribunals only have the time and resources to try a limited number of individuals. This leads to the so-called “gravity threshold,” which refers to efforts by international criminal tribunals to only charge and try those who are most culpable for a

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119 LAUGHLAND, *supra* note 111, at 122.
120 Cassese, *supra* note 68, at 116-17.
particular crime or set of crimes (i.e., the leaders). This serves as an additional check against prosecuting individuals who may only be guilty by association.

The lack of differentiation of liability without regard to the scale of the individual defendant’s contribution is also problematic for some. Rather than being a mode of applying individual criminal responsibility, JCE errs on the side of a one-size-fits-all approach to collective culpability. Thus, relatively low-level participants can be held liable to the same degree as those who masterminded, ordered, or actually carried out the elements of the underlying crime. This could become especially problematic when dealing with large groups. Would liability extend, for instance, to merchants who knowingly sell supplies to criminals acting in furtherance of a common design? JCE supporters refute this argument, pointing out that there are limits built into the doctrine. The degree of participation must be a significant contribution in order for JCE to even apply, and the degree of contribution is again taken into account in the sentencing stage, as discussed supra. “An accused’s liability under a [JCE] mode of commission may be as narrow or as broad as the plan in which he willingly participated.”

In short, critics see JCE as an easy way to convict without a lot of evidence. Under this view, in the necessary balancing between expediency and justice, the ICTY has erred on the side of expediency. This overstep leaves the prosecution too much discretion and is ripe for

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122 Guliyeva, supra note 69, at 60-64; Ohlin, supra note 69, at 76-77 & 85.
123 Guliyeva, supra note 69, at 60-61; Harmen van der Wilt, Joint Criminal Enterprise: Possibilities and Limitations, 5 J. INT’L CRIM. JUST. 91, 92 (2007).
124 Guliyeva, supra note 69, at 60; see also Allen O’Rourke, Joint Criminal Enterprise and Brdanin: Misguided Overcorrection, 47 HARV. INT’L L.J. 307, 322-25 (2006).
125 Ohlin, supra note 116, at 79.
127 LAUGHLAND, supra note 111, at 124.
potential abuse. The ICTY may get more convictions in the short run by using JCE, but at the possible price of lasting justice and reconciliation.

B. Co-perpetration – The ICC Approach to Collective Criminality

When dealing with the question of collective criminality, the International Criminal Court (ICC) has taken a different route than the ICTY. For one, the ICC Statute contemplated the possibility that groups of people would be acting together for a common criminal purpose and explicitly granted the court the power to hold co-perpetrators liable:

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:
(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; …
(d) In any other way contributed to the commission or attempted commission of such 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…

The ICC has begun to address how co-perpetration liability will work in its limited case law. The main difference from the JCE approach is that ICC focuses on “control over the crime” by an individual rather than a “significant contribution.” In the Lubanga case, the court set out the following elements for co-perpetration liability:

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128 See Darcy, supra note 70, at 190; Danner, supra note 73, at 487; O’Rourke, supra note 124, at 324; see also Steven Powles, Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?, 2 J. INT’L CRIM. JUST. 606, 620 (2004).
129 See Danner, supra note 73, at 191; O’Rourke, supra note 124, at 314-15; Schabas, supra note 112.
131 CASSESE ET AL., supra note Error! Bookmark not defined., at 353.
Objective Elements:

1) Existence of an agreement or common plan (with an element of criminality) between two or more persons. Agreement need not be explicit and can be inferred from subsequent concerted action.\(^{132}\)

2) Coordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime. “[O]nly those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime.”\(^{133}\)

Subjective Elements:

3) The suspect must fulfill the subjective elements of the crime in question, including any dolus specialis. In the context of the ICC Statute, the required mens rea is at least “intent” and “knowledge,” and may be higher for a specific crime if stated in the Statute.\(^{134}\)

4) The suspect and other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realization of the objective elements of the crime.\(^{135}\)

5) The suspect must be aware of the factual circumstances enabling him or her to jointly control the crime. This includes (1) awareness that his or her role is essential to commission of the crime and (2) awareness that he or she can frustrate the plan.\(^{136}\)

The Court has also held that the reach of liability extends to those whose joint commission of the crime is through another person, as his control of that person counts as joint control.\(^{137}\) “[O]nly those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime. Where such persons commit the crimes through others, their essential contribution may consist of activating the mechanisms which lead to automatic compliance with their orders and, thus, the commission of crimes.”\(^{138}\)

Through these elements, co-perpetration liability acts as a residual category to criminalize contributions that are not ordering, soliciting, inducing, aiding, abetting, or assisting if the

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\(^{132}\) Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, ¶¶ 343-45 (Jan. 29, 2007).

\(^{133}\) Id. at ¶¶ 346-47.

\(^{134}\) Id. at ¶¶ 349-59.

\(^{135}\) Id. at ¶ 361.

\(^{136}\) Id. at ¶¶ 366-67.

\(^{137}\) Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 493 (Sept. 26, 2008).

\(^{138}\) Id. at ¶ 525.
defendant has the requisite *mens rea*. At the same time, the joint control requirement and the requirement that the defendant be aware of this joint control, limits the reach of the doctrine more than the JCE approach of the ICTY. This limitation has made the ICC’s approach less vulnerable to criticisms of the danger of unbridled prosecutorial discretion and holding people guilty by association. The joint control approach suits the aims of the ICC to carry out justice and to try the leaders of international crimes. On the flip side, the Prosecutor may run into evidentiary issues.

C. Piracy and Collective Criminality

Piracy is a group crime. It takes more than one person to hijack an entire ship and hold a crew captive. Because of the prevalence of group perpetration in this type of crime, prosecuting pirates presents the same problem of collective criminality as the ad hoc tribunals and the ICC faced. How does a court hold individuals responsible for a crime committed with various contributions from multiple individuals? Liability through aiding and abetting or through command responsibility may address the culpability of some of the perpetrators, but might let others who played a significant part in the crime off completely or with only responsibility as an accessory rather than a principal. The ICTY and other ad hoc tribunals chose to use JCE to hold accountable those who contribute significantly to a common plan of criminality for the offenses committed in the course of the common scheme and for any incidental crimes by co-perpetrators that were foreseeable. The ICC chose a higher standard when holding a defendant criminally liable on a theory of co-perpetration: the defendant must have had joint control over the

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140 Guliyeva, *supra* note 69, at 75-76.
141 *Id.* at 78.
common plan in order to be held criminally liable. Those creating an international piracy tribunal should consider including a form of common purpose doctrine in the founding statute. In doing so, they should take the following factors into consideration:

- Piracy does present the same problem of collective criminality as other international crimes. However, it should be noted that piracy attacks happen on a smaller scale than many of the crimes considered by the ICTY, ICTR, and ICC. Most pirate crews include less than ten people, and it is unclear as to how extensive any organized network for planning and implementing pirate attacks is.

- Including a form of common purpose doctrine in the statute would allow a piracy tribunal to use the doctrine without the same accusations of violation of legality that plagued the ICTY. The ICC avoided this criticism simply by including a form of the doctrine in its Statute. Including common purpose doctrine in the statute will also set some specific limits for the tribunal and will eliminate the need for the tribunal to engage in a process of reading common purpose doctrine into the statute as the ICTY Appeals Chamber did in Tadić.

- A form of common purpose doctrine can be a useful tool for holding accountable those who act in furtherance of a common criminal plan but do not fall in the other modes of liability. Such a tool may be especially useful in cases of piracy where the levels of organization vary from group to group. As opposed to aiding or abetting, common purpose doctrine can extend principal liability to those who are involved in piracy schemes but are not physically involved in the actual attacks. As opposed to command responsibility, common purpose doctrine can extend liability to those in charge when the command structure is less than clear and hierarchical.
In choosing a mode of common purpose liability to include in the statute, the drafters should consider how far they want liability to reach. Using JCE allows broader liability, but includes the dangers of holding defendants guilty by association and of potential prosecutorial abuse. Do the drafters want liability to extend to the people in the “pirate villages” who cook or make tea for the pirate crews? After deciding how far they would like liability to reach under the statute’s form of common purpose liability, the drafters should accordingly set a level of culpable contribution. This could be the “significant contribution” level used by the ICTY, the “joint control” test of the ICC, or something in the middle (i.e., “substantial contribution”).

IV. Conclusion

Pirates commit one of the oldest crimes in the book and should be held criminally responsible for their actions. Despite well-established universal jurisdiction and enforcement efforts, the international community has thus far been ineffective in combating modern piracy. The establishment of an international piracy tribunal could be effective in coordinating a concerted international response to the crime of piracy, in punishing those who commit the crime, and thus, in deterring future piracy.

The fact that piracy is generally a group crime may lead to issues in properly holding individuals criminally accountable. Both the ICTY and the ICC have found solutions to the problem of addressing collective criminality through individual criminal responsibility through forms of common purpose doctrine. The ICTY and other ad hoc tribunals have adopted joint criminal enterprise liability, holding defendants accountable when they agree to a common criminal plan and make a significant contribution toward the execution of that plan. Under JCE,
co-perpetrators can even be held responsible for incidental crimes committed by other co-
perpetrators if such a crime was foreseeable. The ICC also holds co-perpetrators liable when
they agree to a common criminal plan. However, the ICC requires a higher standard for the
contribution of the individual defendant: he must have joint control over the criminal plan in
order for liability to attach.

In the case of piracy, the drafters of an international piracy tribunal statute should include
a form of common purpose doctrine in the statute. Such a form of liability will be essential in
holding accountable individuals who are responsible for piracy attacks but do not physically
perpetrate them. Including the doctrine in the statute will prevent the tribunal from reading it
into the statute itself and drawing criticisms for the potentially violating the principle of legality.
Additionally, in choosing what level of contribution to a criminal plan is sufficient to warrant
liability, the drafters should consider how far they would like the tribunal’s prosecutions to
reach. If the piracy tribunal’s purpose is to try only the worst offenders, the drafters should
include a provision similar to that of the ICC, reaching only those individuals who participate
with a level of joint control over the common criminal plan.

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