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Historical Insights into Wetland Management in Bangladesh: Policies, Practices, and Transformations

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Abstract
Wetlands play a crucial role in Bangladesh's ecology, economy, and livelihoods, yet their management has evolved through a complex interplay of traditional practices, colonial legacies, and contemporary policies. This qualitative study explores the historical trajectory of wetland management in Bangladesh, examining key policies, governance structures, and shifting approaches from pre-colonial times. Drawing on historical records, policy documents, and scholarly analyses, the study traces the transition from indigenous and community-based wetland use to state-led conservation and development initiatives. The findings reveal how colonial-era interventions disrupted traditional management systems, while post-independence policies have oscillated between exploitation and conservation. Despite efforts to integrate participatory governance and sustainable management, challenges persist due to policy inconsistencies, institutional fragmentation, and socio-economic pressures. By offering historical insights into policy transformations and their implications, this study underscores the need for an adaptive, community-inclusive, and ecologically sustainable approach to wetland governance in Bangladesh.

Keywords: Wetland Management, Bangladesh, Historical Analysis, Policy Transformation, Governance, Sustainability

1. Introduction

Bangladesh boasts vast and globally famous wetlands. In the past, the country's wetlands were considered ‘wasteland’ as these lands were not easy to use for agricultural or urbanization purposes. Only during the last thirty five to forty years have such popular perspectives changed after communities realized the enormous benefits of wetlands, that they accommodated huge biological resources, ultimately helping in livelihoods. Wetlands are remarkable because of their biological richness and cultural history. Fisheries in Bangladesh provide about 60% of the dietary protein for people of all classes. Also, people harvest food, fuel, fibre, fodder, building material, and water from the wetlands for irrigation and domestic uses. Various recreational activities such as boat races, swimming, and monsoon folk also require wetlands. People use wetlands for commercial and non-commercial purposes, such as growing flood-resistant rice paddies, rearing fish, collecting mollusc shells (snails), fruits and vegetables from wetland plants, harvesting fodder for their cattle, cultivating winter crops,

raising ducks, hunting turtles, collecting dried weeds for fuel, trapping water birds, and navigating. Bangladesh, as a deltaic country, is subject to frequent floods—during the monsoon season, before the monsoon season, and so on. Healthy wetland ecosystems operate as a flood buffer and lower livelihood risks. The above advantages contribute significantly to national revenue generation, commercial and non-commercial operations acceleration, disaster control, and poverty reduction.

The wetlands management needs to be improved in many areas, including agriculture, fish production, swamp forest protection, migratory bird conservation and floral resource harvesting. Resource users and the concerned government departments are equally paying attention to 'the sustainable management of natural resources. People in rural Bangladesh have been exploiting resources without considering the needs of our future generations. It has been happening due to a lack of awareness and updated knowledge, the prevalence of extreme poverty, poor policies and weak law enforcement. So, in response to the impending environmental catastrophe, civil society, NGOs, the government, and informed community members began to advocate urgently for the restoration of the wetlands and conservation in the interests of sustainable development and the eradication of poverty. There are eight ecologically critical areas in the country, primarily wetlands. Bangladesh joined global environment and biodiversity forums by signing and ratifying the Ramsar Convention and the Convention on Biological Diversity (Bridgewater & Kim, 2021), making it obligatory to implement global environment and biodiversity conservation measures at the country level. It implies that the local people of the ecosystems consider the critical stakeholders for planning, implementing and managing the haor resources. The engagement of the indigenous people ensures at all levels of the design and implementation of the components.

2. Wetlands: The conceptual understandings

Wetlands are regarded as valuable ecosystems by scholars worldwide. Wetlands are lands that transition from a terrestrial to an aquatic environment, covered by shallow water (Cherry, 2011). It also refers to a diverse variety of inland, coastal, and marine environments that share a range of features (Dugan, 1990). Bangladesh possesses enormous wetland areas out of which the principal ones are rivers and streams, freshwater lakes and marshes including haors, baors and beels, water storage reservoirs, fish ponds, flooded cultivated fields and estuarine systems with extensive mangrove swamps. Wetlands can be classified into freshwater wetlands, saltwater wetlands and man-made wetlands (Alam, 2013).

Wetlands are defined as follows by the Ramsar International Wetland Conservation Treaty (Gardner & Davidson, 2011):
Article 1.1: "...wetlands are areas of marsh, fen, peat land or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six meters."

Article 2.1: "[Wetlands] may incorporate riparian and coastal zones adjacent to the wetlands and islands or bodies of marine water deeper than six meters at low tide lying within the wetlands".

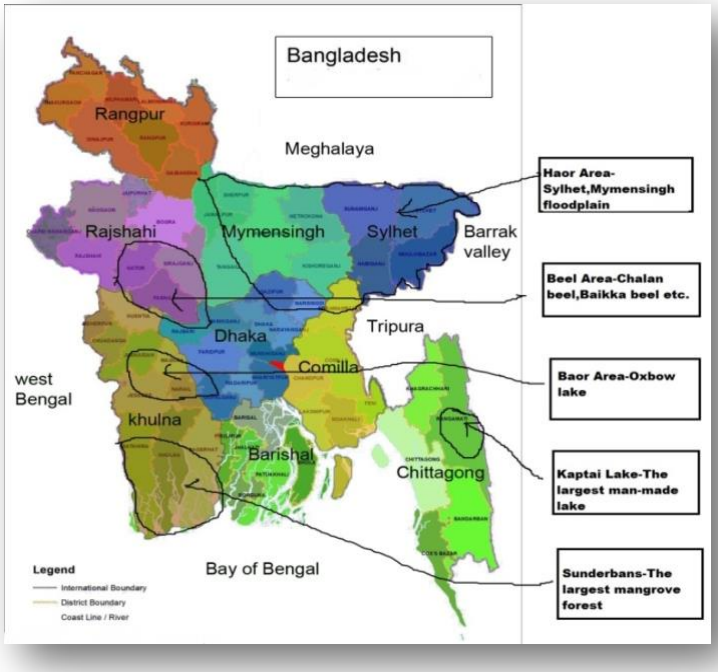

Figure 1: Major wetlands of Bangladesh
Source: http://dbhwd.gov.bd (2024)

3. Wetland management: Bangladesh perspectives

Wetland management has mainly focused on revenue generation over the last two centuries. Fishing on rivers, haors, baors, and beels was customarily allowed for Bangladeshi fishermen before the British took control of the Indian subcontinent. To support their livelihoods, the people of the haor area had access to neighbouring resources. Technologically advanced and highly centralized production and efficiency-oriented systems have dominated the post-colonial management regime. Indigenous people have been viewed as a threat to haor resources and treated as degraders of commons in the formal management system. As a result, policy changes have gradually reduced resource access and resource users' customary rights. The EEF strategy is best focused on the goal of providing society with well-being, e.g. education, health, and security. However, despite the basic purpose of the EEF strategy, there has been very little evidence of enhanced well-being of the inhabitants in the haor region of the country from the British period till now. In practice, the EEF policy regime, which is based on science and technology, has created conditions that encourage exploitation, conflicts, and disorder in the management of wetlands resources (Khan, 2011).

In the 1980s, collaborative management became a topic of discussion in the development sector of Bangladesh. Co-management of wetlands, on the other hand, began in the mid-1990s. It arose mostly from the governments, NGOs', and communities' experiences. They tried out various approaches to establish co-management of government properties, such as natural resources, by enacting rules, regulations, and standards. These initiatives were so popular that community members were encouraged to include private floodplains in the project area. Different government departments in Bangladesh, including the DoF, the DoE, and the Forest Department, have played major roles in these initiatives on behalf of the government of Bangladesh. Although nature conservation, biodiversity, and environmental sustainability are the primary goals of these programs, ensuring access rights for fishermen and the underprivileged has also been prioritized. In this regard, sustainable wetland management initiatives by the government are below:

Table 1: Projects on sustainable wetland management in Bangladesh

Name of the project	Time	Concerned agency	Area
Management of Aquatic Resources through Community Husbandry (MACH)	1998-2007	DoF-USAID	Hail Haor, Turag-Bangshi floodplain, Kangsha-Malijhee basin
Community Based Haor & Floodplain Resource Management (SEMP)	1998-2005	MoEF-IUCN-UNDP	Pagnar and Sanuar-Dakuar haors, Hakaluki Haor, and Jamuna-Padma, Madhumati, & Brahmaputra Floodplains
Community-Based Fisheries Management (CBFM-I & II)	1994-1999	DOF-Ford Foundation	116 water bodies, including Hakaluki Haor in 22 districts
Coastal and Wetland Biodiversity Management Project (CWBMP)	2001-2007	DOF-DFID-World Fish Centre	Cox's Bazar, hakaluki Haor, Sonadia Island, St. Martin's Island
Wetland Biodiversity Rehabilitation	2003-2013	DoE	3 districts (Pabna, Natore, Sirajganj)
Community-Based Adaptation in the Ecologically Critical Areas through Biodiversity Conservation and Social Protection (CBA-ECA)	2009-2015	BWDB/GIZ	Hakaluki Haor, Cox's Bazaar-Teknaf Peninsula, Sonadia Island
	2010-2015	DoE-UNDP-EKN-IUCN	Hakaluki Haor
Community-Based Sustainable Management of Tanguar Haor	2006-2018	MoEF-IUCN-SDC	Management and planning context of Tanguar Haor
Community-based Management of Tanguar Haor Wetland in Bangladesh	2022	UNDP-MoEFCC-GEF	Promote community-based management of Tanguar Haor wetland in Bangladesh.

Source: International Union for Conservation of Nature, (2018) & GEF, (2022)

4. Concepts of wetland governance in Bangladesh

Effective wetland management is inherently linked to governance, which shapes the policies, regulations, and institutional frameworks governing these vital ecosystems. Governance models increasingly influence wetland management strategies (Ruz et al., 2011). Wetland governance can be defined as "the interaction of policies, laws, and other norms, as well as institutions and processes through which society exercises power and allocates responsibilities to make and implement decisions affecting wetlands and wetland users, and to hold decision-makers accountable" (Newaz, 2019).

A crucial aspect of wetland governance is co-management, which fosters collaboration among various stakeholders. Borrini (2000:7) defines co-management as "a situation in which two or more social actors negotiate, define, and ensure amongst themselves a fair sharing of management functions, entitlements, and responsibilities for a given territory, area, or set of natural resources."

The co-management framework in Bangladesh involves multiple stakeholders (Carlsson & Berkes, 2005), including:

a) Government agencies
b) Non-governmental organizations (NGOs)
c) Business actors

d) Civil society organizations

Co-management emphasizes negotiation, problem-solving, shared responsibilities, and collaborative learning, thereby enhancing interactions between local institutions and government agencies (Williams & Tai, 2016). By involving local communities in resource management, co-management ensures sustainability and empowers marginalized groups. Indigenous knowledge plays a crucial role in devising sustainable strategies, reinforcing the significance of community participation in governance. Local engagement leads to resource equity, while exclusion often results in conflict. In Bangladesh's haor wetlands, privatization through the leasing system has led to disputes, as political and local elites exert control, marginalizing community access to resources (Khan & Haque, 2010; Rahman et al., 2012).

For community-based resource management to succeed, the voices and perspectives of local stakeholders must be acknowledged (Uddin, 2011). Co-management fosters the creation of grassroots institutions like community-based organizations (CBOs), which empower marginalized communities. The sustainability and effectiveness of these organizations are pivotal in shaping governance outcomes (Khan, 2012).

Despite the benefits of shared governance, challenges persist in ensuring inclusive stakeholder participation in wetland conservation. Effective governance demands accountability, transparency, and responsiveness to sustain ecosystems and livelihoods (Christophe & Neiland, 2006; Sithirith, 2015). Strengthening co-management approaches and institutional frameworks is essential for the long-term sustainability of Bangladesh's wetlands.

5. Wetland conservation and management in Bangladesh: Lessons, innovations and prospects

Bangladesh is home to various unique and complex wetland habitats that are rich and globally significant. Wetlands are extremely important in GDP contribution due to their environmental products and services. Rural areas, which contributed 3.57% of the GDP, rely on the fishing sector for 60 percent of their protein needs (FAO, 2018). In terms of job creation, the fisheries sector in wetland areas employs 1.2 million inhabitants directly and supports 11 million people (Department of Fisheries, 2018). Varieties of governmental institutions are responsible and engaged in managing haor resources. They have different policies and goals, creating conflict in establishing authority. This conflict is dysfunctional and destroys the interconnectedness of entities, ignoring the significant impact on resource sustainability and social-ecological resilience. Those institutions commercialize fisheries resources by leasing systems and restrict haor resource users. From the pre-British era to the present, natural resource management in Bangladesh has seen significant changes. Understanding the nature and characteristics of wetland management policy regimes is crucial, especially implications for peoples' long-term livelihoods, vulnerability, and the long-term viability of local ecosystems. Management approaches in the haor basin in different phases are below:

5.1 The British colonial administration

Since the Mughal Empire, the government has used land and other natural resources as a source of revenue generation. During British control in India, a permanent land revenue system was implemented. This Act limited the local population's access to land and natural resources. The British established Zamindars who served as an intermediary between the king and the peasants, moving money from local to public treasuries (Ishika and Sanchit, 2021).

The Mughals first used the Zamindari system to secure adequate tax collection from peasants and to carry out specific official functions within their domains. The Mughals created the zamindari system featured various landholdings, rights, and obligations ranging from independent or semi-autonomous tribal leaders to peasant-proprietors (Husain and Sarwar, 2012). Zamindars had many military and law enforcement responsibilities in addition to tax collection. The Mughal Empire granted Zamindars the power to set up Zamindari Adalat (courts)

to resolve regional legal issues inside their domains. They were able to serve the Mughals better because of the legal authority that practically made them lords of their domains, especially in tax collection.

Lands were brought under their authority through the Zamindari system, and a mechanism was established to collect revenue from peasants for the colonial rulers. Zamindars were given the authority to set the land tax and payment mechanism without considering peasant economic capacity (Swamy, 2011). Zamindars constructed one of the most exploitative land revenue collective systems and became passionate advocates of British authority in India (Garhwal & Lal, 2008).

5.1.1 Pakistan period (1947-71)

One of the common requests of the general public during India's independence movement (before 1947) to institute local people's access to land and their rights to it was the abolishment of the Zamindari systems (Rai, Zhang and Khanal, 2017). In response, the Congress Party stated that one of the pledges made by the Indian independence struggle was to abolish the Zamindari system. The British Zamindari system was eliminated in 1950 by The State Acquisition and Tenancy Act (East Bengal Act).

5.2 Wetland management in Bangladesh after independence of 1971

Since independence, natural resource management has remained the same. The newly independent state has designed its natural resource management method to have a comparable legal framework to support the state's revenue-based policies (Islam and Kitazawa, 2013). The Government of Bangladesh took numerous steps after the country's independence to devise an approach to managing its wetland resources without sacrificing its primary goal of gaining maximum revenue. It was determined that the Ministry of Land (MoL) could auction off all jalmohals to the highest bidder.

To earn as much revenue as possible from fisheries, the government's management system is built on a so-called open bidding process that allows those with the most money to own fisheries (or fishery estates) and get government subsidies to make their businesses successful. This approach eliminates the right of the local fishing communities, which include the poorest of fishermen, to their resources.

The study found numerous concerns and difficulties in a more accessible bidding system that reduced locals' access to their resources. Included are the following: 1) Leaseholders tend to be outsiders, and they commonly transfer their licenses to wealthier residents of the fishing community. To fish in the jalmohals, fishers are required to pay rent to operate in a fishery that, as a result of this arrangement, produces multiple layers of intermediaries between the fishers and the actual fishery. 2) Short-term leases (1-3 years) incentivize lessees to maximize profit by adopting damaging fishing methods, necessitating all kinds of destructive tactics due to short leases. 3) A significant leasing charge will prohibit non-commercial fishers from accessing the Jalmohals, forcing them to do other jobs instead. 4) Many legal battles have arisen from leaseholder and fisher management differences. The resulting hindrance against managing natural resources and accomplishing the mandates of other government agencies constitutes a significant setback for fish stock management.

To prevent poaching, regulations were enacted in 1973 to guarantee legal fishermen's access to their catch by making it compulsory to pay fees to fish. Non-registered fishers who were likewise poor were shut out of the system since the government only allowed licensing to Fishermen Cooperative Society (FCSs), which record their members. A license was necessary to make "cooperatives" of fishermen eligible to receive "jalmohals."

A License system was first used to better engage genuine fishers in community-based alcohol management and has proven to be quite successful with fishing communities (Thompson, 2004). Nevertheless, it has been seen that, in time, the practice of granting licenses for organizations that have major problems has the general licensing system's trust plummeting. Local elites, politicians, investors, people in business, jotters, and others held sway over the FCSs. Political intervention rendered the leasing committees unable to do their responsibility, which was to pick true fisherman cooperatives.

Management of jalmohals depended on the size of the jalmohal to help manage resources. It was decided that locals would have the same right of entry to fishing if the larger fishing spots were leased to rich fishermen, but the smaller plots would be offered to poorer residents. Though members of the Parishads executive committee would pretend to choose their supporters, in truth, they always did so themselves. The Ministry of Youth and Sports, under 8.10 ha could only be leased. In the government's selection procedure, youth organisations tied to the ruling party had an advantage. People who were influential in the government or economically powerful could influence the District Jalmohals Management Committee to provide lease agreements to those they favoured, thereby taking control of their leased land. Usually, fishers were given a license for a specific piece of gear. When they purchased another kind of gear, they had to pay a license fee for it. Fishing was granted with any gear and in any spot of the Jalmohal provided fishermen received their licenses. Illegal fishing by outsiders caused licensed fishermen's incomes to fall, which caused serious conflict between the fishers and the locals (Fraser et al., 1989).

Fishing without permission in fisheries estates was rampant due to the government's inability to adequately enforce restrictions, as they could not track down violators of fishing laws. Many outsiders set up long-term fishing operations on the Padma-Jamuna without licenses. The instance of outsiders coming into the fishery to do this ranged from three to twelve boats from 1985 to 1988. Some illegal fishermen carried out their fishing activities in the Narisha-Padma fishery, and as a result, licensed fishermen were negatively impacted in their fishing operations. Others have to gain by engaging in combat and thus lose much of their fear of each other. For example, those in the Kanglar Haor in the Sunamganj district of Bangladesh could protect their fishing resources by hiring guards to patrol the area and assign fishing shifts to their members. They created a plan for local subsistence fishing, using the Jalmohal, designed to keep unauthorized fishermen out. The Department of Fisheries (DoF) took part in putting together a collective of legal fishermen to prevent unauthorized fishermen from poaching Kanglar Haor. Additionally, the DoF gave more fishing privileges to underprivileged fishermen without licenses. Because of the DoF's current capabilities, the organization will need the direct cooperation of local fishermen to build an efficient monitoring system and safeguard huge wetlands.

The Ministry of Land encourages the competitive leasing system to raise revenues as much as possible. After independence in 1971, there were attempts to put in place policies for fishing, but Huda (2003) recorded that the only relevant change made was that leasing was given to registered fishery cooperatives in 1974. Restricted leasing was established in Jalmohals management in 1976, replacing the previous restricted leasing system that had been in place since Jalmohals was set up. The ministry in charge of wildlife and fisheries had control of Jalmohals since 1980 when the land ministry (Ministry of Land, or MoL) handed it over. The MoFAR used two different systems of leasing, one for the registered FCSs, and one for other companies and people. Jalmohals bidding was only open to registered FCSs under restrictions. Because the less organized fishermen, who failed to join the FCS, were cut out of the lease process. In direct negotiation, powerful organizations and high government officials had easy access to and were successful in allying with government agencies or other powerful organizations. It meant powerful organizations and high government officials benefited greatly from the system while ordinary citizens suffered.

When the MoL reclaimed control of the alcohol administration in 1983, the restricted leasing system was still in use. After the Upazila system was established in 1984, jalmohals ranging in size from 1.21 to 8.10 ha were given to Upazila Parishads under the previous condition. Consequently, it failed to protect the interest of genuine fishermen. The impact of the restricted leasing plan on legal fishermen could not be ascertained because there needed to be a central body to monitor it.

5.2.1 The Jalmohals (Wetlands) Management Policies (1986 – 2005)

The New Fishery Management Policy (NFMP) of 1986 and the National Fisheries Policy of 1998 both sought to facilitate and benefit legal fishermen (Firoz K. et al., 2016). They could have been more effective because of the legal entitlement of the Department of Fisheries (DoF), institutional inefficiency, and a lack of resources. Non-local elite groups took advantage of the new policies. The Jalmohals Management Policy, enacted in 2005 to decentralize the system, was recognized as a significant advance in wetland management. The approach sought

to broaden the legal institutions. The Ministry of Land (MoL) decentralized management authority, making it simpler for varied entities to participate in resource management.

Since 2000, a limited number of jalmohals have been transferred to the DoF to manage development initiatives using a co-management/community-based approach as part of a ten-year Memorandum of Understanding (MOU) between the two ministries. Tanguar Haor, a huge jalmohal was given to the MoEF for biodiversity protection with the local people's participation. The MOU, however, did not include a leasing price waiver, and it was the responsibility of the relevant institutions to ensure that the lease fee was paid to the MoL (Khan, 2010). According to the program, all jalmohals larger than 8.10 hectares had to be leased out by the district administration. The jalmohals should be leased for three years to the registered FCS with the highest bid. The lease cost was increased by 15% over the previous lease value to establish the minimum lease charge for the bidding procedure. If the fishing cooperatives could not achieve these financial conditions, a new bidding process for the sale of jalmohals was planned that would be open to the public. Subleasing jalmohals by any lessee was strictly prohibited and resulted in the lease being cancelled. However, resource management policy under successive regimes generally followed SMA and targeted EEF goals. Furthermore, wetland administration processes for tax collection have not yielded long-term, sustainable benefits to the national economy.

From 1996, NGOs were allowed to conduct experiments with the community-based management strategy (Sultana & Thompson, 2010). Community-Based Fisheries Management (CBFM) principles were tested in 18 Bangladeshi locations from 1996 to 2007 with help from the Department of Fisheries and the World Fish Centre. The main objective was to improve fishery management through community organization and conservation measures, micro-credit for alternative livelihoods. Besides CBNRM programs, existing management regimes have proven limited success in controlling resource access and boosting poor fishermen's livelihoods. The powerful elites, intermediaries, and investors influence resource access and control. However, due to the complexities of wetland management and a need for more institutional capacity, the DoF is gradually supporting and facilitating shared management approaches to ensure the sustainability of haor area resources through various development project initiatives.

5.2.2 The Jalmohals (Wetlands) Management Policy, 2009

When the present government assumed office in 2009, jalmohal management policies changed. To guarantee that jalmohals are leased to FCSs of genuine fishermen, the Jalmohals (Wetland) Management Policy was approved in 2009. To represent underrepresented fisher groups in the lease process, provisions were made to allow two members from registered FCSs to serve on the Upazila and District Jalmohal Management Committees. The Jalmohals (Wetlands) Management Policy, 2009 had its limitations: i) Fishermen representatives were selected by bureaucrats and usually biased. ii) Poor fishermen could not participate in the leasing process because they are not members of FCS. As a result, the policy adjustment did not affect the leasing system's revenue, as it maintained the same lease charge structure and collecting techniques as the Jalmohals Management Policy, 2005.

The Bangladesh parliament ratified the 15th amendment to the constitution in June 2011, granting local people access and rights to natural resources. Since local users' access and rights have been acknowledged in the wording of the supreme legislation, it marks a significant turning point in the history of the nation's management of natural resources. Additionally, adjustments to the current natural resource management framework are required to operationally implement this policy, ensuring local resource users' access to and rights on the commons.

6. Navigating institutional and policy conflicts in wetland management

Many institutions' active participation in wetlands has complicated natural resource management and led to various disputes between resource users and managers. It was observed that similar management systems based

on Economic Efficiency Focused approaches are applied from national to field-level government agencies. Government agencies involved in wetland resource management employ the same tools:

1. National-level policy formulation; and
2. Field-level implementation.

The National Development Plan articulates policy objectives and is implemented by field administration. Field-level needs and demands should be considered in the planning processes for defining policy objectives and development activities to generate effective linkages among stakeholders to solve critical field-level difficulties.

In Bangladesh, involving multiple entities without coordination frequently results in complexities and disputes in the management system. The DoF is responsible for the fishery, and the MoL has management responsibility over land resources, including jalmohals, according to the government's allocation of business. Similarly, the DoE, MoA, Ministry of Water Resources and Water Development Board, LGRD, and

MoYS administer natural resources without control over land resources. The lack of coordination and inter-departmental conflicts seriously harmed sustainable resource management objectives. Fishery resource management policies, for example, have been implemented at three levels of government:

Table 2: Distribution of wetlands and responsible authority

Types of jalmohals	Area	Responsible authority
Larger	more than 8.10 ha	District Administration
Medium	1.21 to 8.10 ha	Upazila administration
Small	less than 1.21 ha	Union Parishad

Source: Khan. M. H., (2011)

The Department of Fisheries frequently is unable to play a meaningful role in fisheries management due to this manner of management. As a result of the involvement of so many other parties in wetlands management, the DoF has little authority to decide its institutional role in practice. The DoF's ability to undertake any development efforts by assuming control of jalmohals from the MoL was complicated by institutional arrangements in wetland resource management. Long bureaucratic processes for transferring jalmohal administration power from the Ministry of Land to the Department of Fisheries cause pointless delays in implementing development initiatives. Delays are also caused by the DoF's failure to provide commendable outcomes.

Even though numerous institutions are actively pursuing varied interests in wetland management, inter-institutional conflicts and limits have substantially impacted resource management sustainability factors.

7. The dynamics of exclusion: Understanding marginalization

The current Jalmohal leasing system transfers the possession rights of the wetland to private ownership. This renting system promotes the exploitation of resources through state mechanisms. Individual investors benefit economically, and the conservation and protection of resources are ignored. Tanguar Haor is not eligible for leasing, according to this analysis; however, Kalma-Hania beel is due to be leased out due to a High Court order (The ruling was executed in 1980). To maintain fish productivity, the leaseholders use a variety of fishing gear that is legally prohibited. In the haor area, leaseholders use the dewatering method of fishing. Leases also restrict poor local communities' access to resources, severely limiting their livelihood activities and making them more vulnerable to extreme poverty.

Policymakers prefer increasing revenue collection by transferring customary property rights and systematically excluding local people from management activities. My research in the Tanguar Haor region supports the idea

that SMA and the corresponding legal, financial, and regulatory tools increase residents' susceptibility and marginalization. This is especially true for the producers themselves.

Although the current Wetland Management Policy- 2009 gives priority to the FCS, it still engages in malpractice by giving non-fishers access rights to fishermen's cooperative societies. The latter group operates by creating and promoting fake cooperatives. Fisherman cooperatives must agree to pay ever-rising leasing costs, application fees, and upfront bidding amounts with each subsequent lease term to access a alcohol. Fisherman cooperative groups cannot take part in the lease process due to these problems. In addition, 'gang fishing' by powerful outsiders, increases the transaction costs of jalmohal management because impoverished fishermen are frequently unable to protect their jalmohals.

The real fisherman needs more cash to cover all of the financial commitments imposed by the bidding system. Poor fishermen borrow money at a high interest rate from local moneylenders to participate in the bidding process. FCSs are hesitating to be involved in the bidding system because they are sceptical of their return on investment. If they are unable to maximize the profit, they will become debt-ridden. Another cause is, increased lease fees (15% increase), which make it more difficult for them to obtain funds. Toufique elaborated on fishermen's limited ability to manage access compared to elites (1997; 2000).

Poor fishermen, in general, have no benefit in the new bidding system (open to everyone) initiated by the state-governed management authority. The new bidding system is the highest open bidding mechanism. However, big investors can mobilize funds to engage in the leasing process and maximize profit where poor fishermen are neglected. Consequently, the haor area becomes an economically viable and profitable venture for big investors. They are not interested in reinvesting their capital in the local area. Genuine fishermen are being pushed out of the local resources and management activities under the current management strategy.

Another important aspect is that resource extraction approaches by local fishermen and non-local fishers are fundamentally different. Non-local fishermen are not interested in wise use or sustainable use of resources. They are very keen to maximize their profit within the stipulated lease period. It is harmful to wetlands that non-local investors illegally extract other resources except fish. They are involved in corruption and manipulate the management authority by bribing them. Residents also claim that management authority permits the bird hunters in exchange for a fee. A local fisherman of Tanguar Haor has fallen into a helpless situation to earn their livelihood; national newspapers and relevant journals regularly cover this type of news. Poverty, vulnerability and marginalisation are the three main dimensions of fishing communities' general deprivation (Christophe, B., 2010).

7.1. Financial toll of marginalization: Unpacking the economic burdens of exclusion

Bangladesh has done tremendously well in reducing poverty and vulnerability. The scenario of the haor area is different from this statement. The financial constraints and procedural difficulties are major roadblocks for local disadvantaged populations interested in participating in the haor leasing system. For participating in the bidding process, FCS has to pay a 5% fee on the bidding amount and 100% payment within seven days of the first year value if selected as the highest bidder. Also, tax and VAT must be paid. The value increases by 15% in the second year. Before renting or renewing an existing jalmohal, a local fisherman must raise money. Poor fishermen are often forced to withdraw from the leasing procedure due to a lack of funds to pay these financial obligations.

Fishermen in the Tanguar Haor area represent the poorest segment of the rural classes. Mahajan, informal creditors or local moneylenders, take advantage of poor fishermen's circumstances because they borrow money from Mahajan to keep their fishing operations afloat. Mohajans commonly take on leases and give out loans to fishermen as sub-lease agreements. It is evident in the study area that moneylenders forcefully purchase the catch (fish) of the fishermen at a lower price, which also burdens them. As a result, poor fishermen lose their income and pay interest rates from their reduced income, making them marginalized and vulnerable.

Poor fishermen cannot borrow money from NGOs like Grameen Bank, ASA, and BRAC, because those institutions do not issue credit for the fisheries sector in the Tanguar Haor area. Micro-credit facilities in the haor region are limited because the fishermen community is mostly landless, and their ability to repay the loan amount. As a result, the fishermen's community rely on Mohajans.

Local impoverished fishermen are not supported by financial institutions when leasing jalmohals and fishing operations. On the other hand, genuine fishermen have restricted access to finance through Bangladesh Krishi (agricultural) Bank (BKB), a government-owned institution. Fishermen must mortgage their land to the bank to obtain such credit. In most situations, poor fishermen cannot obtain credit because they lack land ownership to offer as security. The documentation process is highly difficult, and local fishermen have a low level of acceptance. Furthermore, fishermen need to be made aware of BKB's credit window. Even if local fishermen abide by the bank's terms, the loan amount is insufficient to meet their financial needs.

The formal institutional structure and management practices are critical in enabling local people to participate in the governance process. The leasing system in haor (wetlands) replaces the customary property rights without considering social, economic and contemporary political structures that may result from dysfunctional governance practices. The main purpose of including a local indigenous community in resource management is to enable them to adopt a complex resource management system that ensures sustainable management practices (Agrawal, 2002) From a theoretical perspective, the state frequently tries to make a real improvement in natural resource management to improve the condition of disadvantaged communities, whose livelihoods depend on local natural resources. After the independence of Bangladesh in 1971, GoB announced its aim to overhaul the leasing system of jalmohals by instituting a licensing system. Licensing systems will allow genuine fishermen to manage haor resources, but this system needs to collect revenue as the government expected. Consequentially, the government switched from a licensing system to a previous leasing system. Poor communities have been deprived, exploited and denied access to resources. Though the provisions in the lease policy give precedence to FCSs to secure impoverished fishermen's participation in the bidding process, it is difficult for them to execute against politically and financially sound elite and influential. Fishermen Cooperative Society is disorganized because of a visionary leadership crisis. So-called registered FCSs had devolved water lords, touts, and non-local investors, eventually excluding genuine fishermen from the Jalmohal administration.

The negative impact of the commercial leasing system is being used to privatize the ‘commons’ and shift advantages from underprivileged areas to the wealthier section of society. The Economic Efficiency Focused (EEF) leasing system largely denies the ecological components, facilitating resource acquisition by powerful individuals or organizations. A system like this marginalizes poor rural people and forces them to migrate to semi-urban areas. These types of migration create unemployment and lead them to extreme poverty. In the real sense, the leasing system creates inequality for genuine fishermen. Also, resource destruction and depletion, restrictions and limited access to resources accelerate societal damage and negative influence on resource sustainability, which is a key threat in the Tanguar Haor area.

The tenure of the leasing period is a source of contention. A short-term leasing tenure, such as one to three years, often provides no conservation actions. Because they are unsure if their lease will be renewed for the next tenure, leaseholders desire to maximize the exploitation of wetland resources throughout their lease time. Long-time leasing permits the same leaseholders to use resources for an extended period, but there is also no guarantee that leaseholders will develop wetlands. The MoL’s current management system lacks the institutional capability to establish an adequate monitoring mechanism to safeguard the jalmohal ecosystems' long-term viability (Thomson et al., 1999)

The Wetlands (Jalmohals) Management Policy 2005 does not adequately address jalmohals management's failure to protect local people’s access rights and entitlements in the implementation phase of different policy regimes. This policy also accelerates the exclusion of locals from resource rights. The management structure in Tanguar Haor has resulted in practically all of the haor's resource-rich jalmohals falling into the hands of the government. Residents have limited financial resources and political influence, making it difficult to organize professional pressure organizations to preserve their interests and access rights under the current system. As a

result, the local people lack de jure management authority over the jalmohals and de facto rights to the resources necessary to support their way of life.

Vulnerability suffers a multitude of effects as a result of marginalization. Marginalization has reduced local institutional and social capacities to establish common boundaries. Tanguar Haor's marginalization is mostly caused by political, legal, and financial processes, with the poorest local fishing communities continuing to sustain the greatest sufferers. Since Tanguar Haor's socioeconomic conditions and physical environment have become worse as a result of economic efficiency-based SMA, the exploitation process has resulted in more tragedies.

8. Conclusion

Traditional approaches to natural resource management focus only on economic considerations. It ignores social, political and ecological components of resource distribution. Also, it exacerbates exclusion, deprivation, injustice and inequality in haor areas. The economic benefit approach greatly hampered resource privileges and involvement in the decision-making process of the local poor people. The SMA's short-term economic goal jeopardizes wetland resource sustainability by pushing leaseholders to earn more profit by destroying natural resources.

The Jalmohal leasing system in Bangladesh also creates conflict and mistrust among stakeholders. It also discourages collective actions, which is more effective in resource management. It is evident from the study that the licensing and leasing system cannot effectively address resource distribution inequality and marginalisation, ensuring local people's participation in the benefit-sharing mechanism, decision-making, implementation and evaluation processes.

The legacy of the existing policy framework crates such mismanagement and lack of coordination. In these circumstances, a community-based management or co-management approach is the right choice for the policymaker to address the participation issue and reduce the marginalization and vulnerability of local people. The community-based management strategy has improved livelihood security for local people in Bangladesh, Cambodia and India (Thomson & Gray, 2009).

The formation of the leasing system privatizes the natural resources rights and hampers social comfort. Such privatisation significantly impacts rural local institutions with the combination of local power structures. It is thought that local institutions always protect the interests of the poor people of the locality in the wetland management system. The integrated and sustainable management approach needs to involve local people in decision-making. Wetland resources in Bangladesh have degraded quickly over the last century for lacking local people's active and proper participation in the management.

The output from the co-management in the Tanguar Haor area demonstrated the differences between EEF and community-based management approaches. Co-management approach substantially establishes a decision-making mechanism, benefit-sharing facility, implementation, and monitoring and evaluation capabilities. Increasing people's participation can reduce inequality and injustice in resource management.

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Victim Offender Mediation in Ghana: Opportunities, Challenges, and the Way Forward

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Abstract
Victim Offender Mediation (VOM) is a mechanism of alternative justice. It is founded on the principles of restorative justice, which attempts to create an opportunity where offenders and the victims of their offence can dialogue, discuss accountability for actions, and reconcile. Employing the doctrinal research methodology, this article analysed the legal framework and challenges associated with VOM in Ghana. The study examines existing legal provisions, such as the Courts Act 1993 (Act 459) and the Alternative Dispute Resolution Act 2010 (Act 798), which support mediation in criminal cases. While VOM provides significant benefits, including victim empowerment, offender rehabilitation, and community healing, its implementation in Ghana faces obstacles such as legislative gaps, public scepticism, resource constraints, and cultural barriers. To enhance VOM, the article recommends enacting specific legislation, increasing public awareness, training mediators, and establishing evaluation mechanisms. Collaboration among key stakeholders is critical for integrating VOM into the Ghanaian criminal justice system. This study offers insights into how VOM can serve as a restorative justice tool in Ghana.

Keywords: Accountability, Alternative Dispute Resolution, Mediation, Recidivism, Restorative Justice, Victim Offender Mediation

1. Introduction

Victim Offender Mediation (VOM) is an integral aspect of restorative justice that facilitates constructive dialogue between victims and offenders, with the aim of resolving conflicts in a way that promotes healing and accountability. Unlike the traditional criminal justice system, which focuses on retribution and punishment, VOM prioritises dialogue, mutual understanding, and reparation of harm. By allowing the victims to confront offenders in a structured environment, VOM empowers them to express the emotional, physical, and financial

impact of the crime, while also offering offenders a chance to take responsibility for their actions (Umbreit et al., 2006).

In Ghana, VOM has gained some attention, but its implementation remains limited due to various challenges, such as inadequate legislation and limited public awareness. According to Nweke and Addea-Kusi (2022), VOM has the potential to complement the existing criminal justice system by promoting reconciliation, which is particularly effective for minor crimes. This mediation process can provide victims with emotional closure, allow offenders to make amends, and ultimately help reduce the likelihood of recidivism (Batinge, 2019). Moreover, VOM offers an opportunity to decongest the courts and reduce the burden on the prison system by handling minor cases through dialogue, thereby aligning with Ghana's broader alternative dispute resolution efforts.

Restorative justice, in which VOM is embedded, is a growing global movement, especially in countries like the United States and Canada. Its principles—respect, accountability, and reparation—offer a holistic approach to criminal justice, one that benefits victims, offenders, and the broader community (Nartey, 2022). In Ghana, legal provisions such as Section 73 of the Courts Act 1993 (Act 459) and Section 64(1) of the Alternative Dispute Resolution Act 2010 (Act 798) provide a foundational basis for implementing VOM, though more robust legislative frameworks are needed to fully institutionalise the practice (Nweke & Addea-Kusi, 2022).

The aim of this article is to explore the potential and challenges of VOM in Ghana, with particular attention to its legal, cultural, and institutional contexts. The article will also suggest ways to strengthen the application of VOM as a viable alternative to traditional retributive justice. This study draws upon scholarly discussions of restorative justice and examines relevant legal frameworks to propose recommendations for integrating VOM into Ghana’s criminal justice system.

2. Literature Review

The concept of Victim Offender Mediation (VOM) is rooted in the broader framework of restorative justice, which seeks to shift the focus of justice from punishment to reconciliation, accountability, and healing. As Nartey (2022) points out, VOM aims to bring both the victim and the offender into a structured mediation process where they can discuss the crime and its consequences, helping victims obtain answers and closure while encouraging offenders to take responsibility. The restorative justice approach has gained prominence globally, particularly in North America and Europe, as an alternative to traditional retributive systems (Umbreit et al., 2006).

Several studies have highlighted the benefits of VOM, particularly its ability to reduce recidivism among offenders and provide victims with a sense of justice and closure (Umbreit et al., 2006). In the context of juvenile justice, Abrams et al. (2006) emphasise that VOM provides young offenders with an opportunity to reflect on their actions and develop empathy for their victims. In contrast to retributive justice, where the state takes precedence over the individual victim, restorative justice places victims at the centre, providing them with a platform to express their emotional and material losses (Batinge, 2019). This approach has proven effective in reducing victim distress and promoting offender accountability.

In Ghana, legal provisions for VOM exist, but the practice has not been fully institutionalised. Nweke and Addea-Kusi (2022) discuss how Section 73 of the Courts Act 1993 (Act 459) allows courts to promote reconciliation for offences that are not felonies or aggravated in degree, offering a legal framework for mediation. Similarly, Section 64(1) of the Alternative Dispute Resolution Act 2010 (Act 798) provides that courts may refer criminal cases to mediation, provided that such mediation is deemed appropriate by the court. However, these provisions lack the specificity and procedural clarity needed to support widespread adoption of VOM in Ghana (Nweke & Addea-Kusi, 2022).

Internationally, VOM has demonstrated considerable success in addressing crimes like theft, property damage, and minor assaults. According to Schneider (1986), one of the key benefits of VOM is that it provides victims

with the opportunity to express how the crime impacted their lives, while offenders are encouraged to acknowledge their wrongdoing and make amends. This interaction has been found to foster mutual understanding and, in many cases, result in restitution agreements that hold offenders accountable for their actions. Nartey (2022) concurs that the dialogue-driven nature of VOM makes it an effective means of restoring balance between victims, offenders, and the community.

Despite its potential, VOM in Ghana faces challenges. As Nweke and Addea-Kusi (2022) highlight, the lack of public awareness and understanding of VOM means that many victims and offenders are not aware of this alternative path to justice. Moreover, Ghana lacks a systematic evaluation mechanism for VOM cases, making it difficult to assess the long-term outcomes of mediation (Batinge, 2019). There is also limited research on the impact of VOM on reducing recidivism and fostering community healing in Ghana, indicating a gap in the existing literature.

This literature review underscores the importance of expanding VOM in Ghana by addressing legislative gaps, increasing public awareness, and developing more robust mechanisms for evaluating mediation outcomes.

3. The Concept of Victim Offender Mediation

Victim Offender Mediation (VOM) is a process grounded in the principles of restorative justice, which seeks to repair harm by facilitating dialogue between victims and offenders. Unlike the adversarial nature of traditional criminal justice systems, VOM encourages a collaborative approach where the focus is on understanding the impact of the crime, fostering empathy, and finding a path to reconciliation. As Nartey (2022) explains, VOM enables victims to meet with offenders in a controlled environment, allowing them to express the emotional and material consequences of the offence and providing offenders with the opportunity to take responsibility for their actions.

The key components of VOM include a structured mediation process facilitated by trained mediators, with the primary goal of accountability, restitution, and healing. The victim is encouraged to articulate how the crime has affected them, and the offender is given the opportunity to explain their actions, apologise, and propose ways to make amends. This dialogue-driven process empowers both parties to participate actively in the resolution of the conflict (Umbreit et al., 2006). Nweke and Addea-Kusi (2022) further highlight that this process fosters mutual understanding, promotes offender accountability, and provides the victim with a sense of closure.

Restorative justice, the framework within which VOM operates, views crime not just as a violation against the state but as a harm inflicted on individuals and communities (Batinge, 2019). This perspective contrasts with retributive justice, which focuses on punishment and often sidelines the needs of the victim. Restorative justice, by contrast, prioritises repairing the harm done to victims and rehabilitating offenders, making it a more holistic approach to justice (Nartey, 2022). The practice of VOM is therefore deeply rooted in the restorative justice ideals of respect, responsibility, and reparation.

In Ghana, the legal framework for VOM is supported by the Courts Act 1993 (Act 459) and the Alternative Dispute Resolution Act 2010 (Act 798). Section 73 of the Courts Act grants the court the authority to promote reconciliation in cases that are not felonies or aggravated offences, encouraging settlements that emphasise compensation and accountability. Similarly, Section 64(1) of the ADR Act allows the court to refer cases to mediation at any stage of proceedings, thereby providing an alternative to the retributive court process (Nweke & Addea-Kusi, 2022).

It is important to note, however, that VOM is not applicable in all cases. The court retains discretion over which cases may be referred to mediation, and serious offences such as felonies or those aggravated in degree are excluded from the process (Batinge, 2019). The emphasis of VOM is primarily on minor offences such as property crimes and minor assaults, where the goal is to restore relationships and address the harm caused rather than impose severe punishment.

In summary, VOM offers a structured and empathetic platform for both victims and offenders to engage in meaningful dialogue. It seeks to provide a more balanced form of justice, one that recognises the needs of the victim, holds the offender accountable, and fosters a pathway towards healing. While VOM holds great potential as a restorative justice tool, its full adoption in Ghana is contingent upon the development of more robust legal frameworks and public awareness.

4. Legal and Institutional Framework for VOM in Ghana

The legal and institutional framework for Victim Offender Mediation (VOM) in Ghana is built on a foundation of restorative justice principles, supported by various legal provisions. These laws provide courts with the authority to refer certain cases to mediation, offering an alternative to the conventional criminal justice system. However, while the legislative framework offers some support for VOM, significant gaps remain that hinder its full adoption and implementation.

4.1. Legal Provisions Supporting VOM

The primary legal basis for VOM in Ghana stems from Section 73 of the Courts Act 1993 (Act 459), which permits the court to promote reconciliation in criminal cases involving offences that are not classified as felonies or aggravated in degree. This provision allows the court to encourage parties to reach an amicable settlement through compensation or other terms approved by the court. If such a settlement is reached, the court can dismiss the case and discharge the accused (Nweke & Addea-Kusi, 2022). This legal basis is crucial for enabling restorative justice practices like VOM to function within the formal justice system.

Additionally, Section 64(1) of the Alternative Dispute Resolution (ADR) Act 2010 (Act 798) empowers the court to refer cases to mediation at any stage of proceedings. This provision is not limited to criminal matters and can be applied broadly to civil disputes. However, in the context of VOM, the ADR Act provides the flexibility needed for mediation to take place as a means of resolving minor criminal offences, particularly where restitution and reconciliation are more appropriate than punitive measures (Nartey, 2022). These legal frameworks collectively provide a starting point for integrating restorative justice practices into the Ghanaian legal system.

Another relevant legal provision is Section 73(1) of the Children's Act 1998 (Act 560), which allows for the mediation of cases involving minors, provided that the offences are not murder, manslaughter, or those punishable by life imprisonment. This provision reflects the understanding that juvenile offenders may benefit more from rehabilitation and reconciliation than from punitive measures. VOM, when applied to juvenile cases, can help offenders understand the consequences of their actions while fostering empathy for the victims (Batinge, 2019).

4.2. Challenges in the Legal Framework

Despite these provisions, there are challenges that hinder the widespread adoption of VOM in Ghana. One of the primary issues is the lack of specific guidelines for referring cases to VOM, selecting mediators, and conducting mediation sessions. Nweke and Addea-Kusi (2022) note that the existing laws do not provide detailed criteria for when and how VOM should be applied, leaving much of the decision-making to the discretion of the courts. This can result in inconsistent application and a lack of clarity regarding the suitability of cases for VOM.

Furthermore, the absence of specific legislation addressing VOM means that there are no comprehensive protocols for monitoring outcomes or enforcing mediation agreements. While Section 64(1) of the ADR Act allows for mediation, it does not provide specific guidance on how criminal cases involving restitution and reconciliation should be handled post-mediation (Nartey, 2022). This lack of procedural clarity can lead to challenges in ensuring compliance with restitution agreements and in assessing the long-term effectiveness of VOM.

4.3. Institutional Support for VOM

Institutionally, VOM in Ghana remains underdeveloped. Although the courts are empowered to refer cases to mediation, there is a shortage of trained mediators who can handle VOM cases effectively. Nartey (2022) points out that mediators require specialised training to facilitate discussions between victims and offenders in a sensitive and balanced manner. Without such training, there is a risk of power imbalances during mediation sessions, where offenders may not fully take responsibility, or victims may feel coerced into accepting inadequate restitution.

Moreover, public awareness of VOM is limited. Many Ghanaians are unfamiliar with the concept of restorative justice and may view mediation as a soft option that undermines justice (Nweke & Addea-Kusi, 2022). This perception hinders the willingness of victims and offenders to engage in mediation and reduces the potential for VOM to serve as an effective alternative to traditional justice mechanisms.

In conclusion, while the legal framework for VOM exists in Ghana, it lacks the specificity and institutional support needed to fully realise its potential. For VOM to be a viable part of the justice system, there needs to be more robust legislation, greater public awareness, and a structured institutional approach to training mediators and monitoring the outcomes of mediation agreements.

5. Methodology

This article adopts a doctrinal research methodology, which is primarily concerned with the analysis and interpretation of legal frameworks, statutory provisions, case laws, and scholarly literature related to Victim Offender Mediation (VOM). The doctrinal approach is widely recognised as a method that allows researchers to critically examine the laws and legal structures governing a particular subject area. For this study, the methodology focuses on the interpretation of Ghana's legal framework concerning VOM, as well as an evaluation of its challenges and potential, drawing on both primary and secondary legal sources.

5.1. Use of Primary Sources

The primary legal sources for this article include statutory provisions such as the Courts Act 1993 (Act 459) and the Alternative Dispute Resolution Act 2010 (Act 798), which provide the legal foundation for mediation in criminal cases in Ghana. These Acts grant courts the discretion to refer certain criminal matters to mediation, thereby creating the legal space for restorative justice practices like VOM. As highlighted by Nweke and Addea-Kusi (2022), these legal provisions, while a step in the right direction, lack the detailed guidelines necessary for effective and consistent application of VOM in practice.

In addition to these statutes, the Children's Act 1998 (Act 560) is also examined, particularly for its role in allowing the mediation of cases involving juvenile offenders. The legislation provides a mechanism for the rehabilitation of young offenders, offering a restorative path that is less punitive and more focused on reconciliation (Batinge, 2019).

5.2. Use of Secondary Sources

In line with doctrinal research principles, secondary sources play a critical role in supporting the analysis of the legal framework. Scholarly works by restorative justice experts such as Umbreit et al. (2006) and studies on VOM, including research by Abrams et al. (2006), provide essential insights into the application and effectiveness of VOM globally. These sources are used to compare the Ghanaian experience with practices in other jurisdictions, offering a broader perspective on the potential for VOM to enhance the criminal justice system.

The article also draws on the work of Alex Nartey (2022), who provides an in-depth discussion of the practical aspects of VOM and its challenges in the Ghanaian context. Nartey's insights are particularly relevant in

understanding the cultural and institutional barriers to the adoption of VOM. Similarly, Batinge (2019) highlights the need for greater public awareness and legislative reforms to make VOM a more robust alternative to retributive justice in Ghana.

5.3. Doctrinal Approach Justification

Doctrinal research is particularly suitable for this study as it allows for a systematic analysis of the legal provisions governing VOM and an exploration of the challenges and gaps within the current legal framework. This approach facilitates a thorough examination of existing laws and how they can be improved to enhance the application of VOM in Ghana's criminal justice system. Moreover, doctrinal research provides the necessary tools for evaluating the effectiveness of statutory provisions, such as those found in the Courts Act 1993 (Act 459) and ADR Act 2010 (Act 798), and for proposing legal reforms based on this analysis.

The methodology also employs comparative analysis, drawing parallels between the Ghanaian legal framework and international best practices in restorative justice, particularly in North America and Europe. This comparison helps highlight areas where Ghana's VOM system can be strengthened and adapted to local needs and cultural contexts.

6. The Benefits of VOM in Ghana

Victim Offender Mediation (VOM) presents numerous benefits for both victims and offenders in Ghana, offering a restorative justice mechanism that prioritises reconciliation and accountability over punishment. The success of VOM lies in its ability to transform the traditional adversarial nature of the criminal justice system into a more collaborative process where victims can express their feelings, and offenders can take responsibility for their actions. By engaging in this structured dialogue, both parties are empowered, and the likelihood of achieving a more meaningful resolution is greatly increased.

6.1. Empowerment of Victims

One of the primary benefits of VOM is the empowerment it offers to victims. In conventional criminal proceedings, victims often feel sidelined as the state takes over the prosecution of the offence, with little room for victims to express how the crime has affected them. VOM, however, shifts the focus towards the victims, giving them a platform to share their experiences and receive answers to lingering questions. This process helps victims to regain a sense of control and involvement in the justice process (Umbreit et al., 2006).

As Nartey (2022) explains, the dialogue-driven nature of VOM allows victims to confront the offender in a safe environment, where they can communicate the emotional, psychological, and material impact of the offence. This process not only provides closure but also enables victims to be directly involved in the creation of restitution agreements. These agreements are often tailored to address the specific harm caused, allowing victims to receive compensation or other forms of reparation (Schneider, 1986).

6.2. Offender Accountability and Rehabilitation

For offenders, VOM offers a chance to take direct responsibility for their actions. Rather than passively serving a punishment, offenders in VOM sessions are required to engage with the victim, understand the harm they have caused, and propose ways to make amends. This direct accountability is a key factor in promoting the rehabilitation of offenders (Abrams et al., 2006). By fostering empathy and self-awareness, VOM helps offenders to reflect on their behaviour, increasing the likelihood that they will desist from future criminal activity (Umbreit et al., 2006).

In Ghana, VOM has been recognised as an effective alternative for resolving minor offences, such as theft or property damage, where offenders are more likely to benefit from reconciliation and restitution rather than punitive sanctions. According to Nweke and Addea-Kusi (2022), VOM can play a crucial role in reducing

recidivism, as offenders who have actively participated in making amends are less likely to re-offend. This is particularly important in juvenile cases, where rehabilitation and reintegration into society are essential for the long-term well-being of the offender.

6.3. Restitution and Community Healing

Another significant benefit of VOM is its ability to foster community healing. Crime affects not only the immediate victim but also the wider community. VOM facilitates the restoration of relationships by encouraging dialogue and understanding between offenders and the communities they have harmed (Batinge, 2019). In some cases, offenders are required to make reparations not just to the victim but also to the community, strengthening the bonds of social cohesion.

Moreover, the restorative nature of VOM reduces the strain on the criminal justice system by diverting minor cases from the courts. This is particularly relevant in Ghana, where the judiciary is often overburdened with cases. By resolving minor criminal matters through mediation, VOM helps to decongest the courts and reduce the prison population, allowing the justice system to focus on more serious offences (Nartey, 2022).

6.4. Long-term Positive Effects

The long-term effects of VOM are also significant. Research suggests that victims who participate in VOM are more likely to feel satisfied with the outcome compared to those who go through the traditional court process (Umbreit et al., 2006). This satisfaction stems from the ability to play an active role in the justice process and from the emotional healing that comes from hearing an apology and receiving reparations.

For offenders, VOM offers a pathway to reintegration. By addressing the root causes of their behaviour and making amends, offenders are better equipped to reintegrate into society and avoid future conflict with the law. This is particularly important in Ghana, where the high rate of recidivism continues to challenge the effectiveness of the penal system (Nweke & Addea-Kusi, 2022).

In summary, VOM offers a range of benefits for victims, offenders, and communities in Ghana. It empowers victims, promotes offender accountability, and fosters community healing, making it a valuable tool in the criminal justice system.

7. Challenges and Limitations of VOM in Ghana

Despite its potential to transform the justice system, Victim Offender Mediation (VOM) in Ghana faces significant challenges and limitations. These obstacles impede the full adoption of VOM and present difficulties in achieving its intended restorative outcomes. While some of these challenges are inherent in the mediation process itself, others are rooted in broader societal and institutional issues within the Ghanaian context.

7.1. Lack of Specific Legislation and Guidelines

One of the key challenges facing VOM in Ghana is the lack of specific legislation and clear procedural guidelines. Although legal provisions such as Section 73 of the Courts Act 1993 (Act 459) and Section 64(1) of the Alternative Dispute Resolution Act 2010 (Act 798) allow for the promotion of reconciliation and mediation in criminal cases, they lack the detailed framework necessary for the consistent and effective implementation of VOM (Nweke & Addea-Kusi, 2022). This legislative gap leaves much of the decision-making to the discretion of the courts, which can lead to inconsistencies in how VOM is applied.

Without clear guidelines on when and how cases should be referred to VOM, there is a risk that certain types of offences may be inappropriately directed to mediation, or that deserving cases may not be considered at all. Furthermore, there are no standardised procedures for selecting mediators, conducting sessions, and enforcing

restitution agreements. This lack of procedural clarity undermines the effectiveness of the VOM process and limits its potential as a restorative tool.

7.2. Limited Public Awareness and Acceptance

Another major challenge is the limited public awareness and acceptance of VOM in Ghana. Many victims and offenders are unfamiliar with the concept of restorative justice and may be sceptical of mediation as an alternative to the formal justice system. This is particularly true in cases where victims feel that mediation is a soft option that compromises justice by allowing offenders to escape punishment (Batinge, 2019). In such instances, victims may be reluctant to participate in VOM, preferring instead to pursue more traditional forms of justice through the courts.

Moreover, offenders may not always be sincere in their participation in VOM. There is a risk that some offenders may view mediation as a way to avoid harsher penalties rather than a genuine opportunity to make amends (Nartey, 2022). This lack of sincerity can undermine the integrity of the mediation process and reduce its ability to achieve true reconciliation and accountability.

7.3. Power Imbalances in the Mediation Process

Power imbalances between victims and offenders present another significant challenge to the success of VOM. In many cases, victims may feel intimidated or overwhelmed by the mediation process, especially when the offender is perceived to have more power or influence. This can be particularly problematic in cases involving domestic violence or other forms of abuse, where the victim may feel coerced into accepting inadequate restitution or reconciliation (Nartey, 2022).

Mediators must be trained to recognise and address these power imbalances to ensure that both parties have an equal voice in the mediation process. However, as Nweke and Addea-Kusi (2022) point out, there is currently a shortage of trained mediators in Ghana who possess the necessary skills to handle VOM cases effectively and sensitively. This lack of capacity hampers the ability of VOM to provide a fair and balanced mediation experience for all parties involved.

7.4. Resource Constraints

The successful implementation of VOM in Ghana is further hindered by resource constraints. There is a lack of adequate facilities, funding, and human resources to support the expansion of VOM programmes across the country. As Nartey (2022) highlights, the limited availability of trained mediators, combined with insufficient financial and institutional support, makes it difficult to scale up VOM initiatives and reach more communities.

This resource shortage also affects the ability to monitor and evaluate the outcomes of VOM sessions. Without systematic data collection and evaluation mechanisms, it is challenging to assess the effectiveness of VOM in reducing recidivism and fostering reconciliation (Batinge, 2019). This lack of empirical evidence further limits the ability of policymakers to make informed decisions about the future of VOM in Ghana.

7.5. Cultural Barriers

Cultural perceptions of justice in Ghana can also pose a challenge to the adoption of VOM. In some communities, there is a strong preference for punitive justice over restorative approaches. The idea that offenders should face punishment as a deterrent to future crime is deeply ingrained in certain segments of society, making it difficult to promote VOM as a viable alternative (Nweke & Addea-Kusi, 2022). Changing these cultural perceptions will require sustained public education and awareness campaigns to highlight the benefits of restorative justice.

In conclusion, while VOM offers significant potential as a restorative justice tool in Ghana, its success is limited by legislative gaps, public scepticism, power imbalances, resource constraints, and cultural barriers. Addressing these challenges will require comprehensive legal reforms, increased public education, and stronger institutional support to ensure that VOM can be effectively integrated into Ghana's justice system.

8. Recommendations for Strengthening VOM in Ghana

To fully realise the potential of Victim Offender Mediation (VOM) in Ghana, several targeted measures need to be adopted. These recommendations focus on addressing the challenges that hinder the effective implementation of VOM and ensuring that the framework is strengthened to promote restorative justice.

8.1. Enacting Specific Legislation on VOM

One of the most critical steps towards strengthening VOM in Ghana is the enactment of specific legislation that provides detailed guidelines and criteria for its application. While Section 73 of the Courts Act 1993 (Act 459) and Section 64(1) of the Alternative Dispute Resolution Act 2010 (Act 798) allow for mediation in criminal cases, they lack the procedural clarity necessary for consistent practice (Nweke & Addea-Kusi, 2022). A comprehensive VOM law should clearly define the types of cases eligible for mediation, the qualifications required for mediators, and the steps for conducting a VOM session.

Such legislation should also include mechanisms for monitoring and enforcing restitution agreements reached through mediation, ensuring that offenders are held accountable for making reparations. By providing a more structured legal framework, this legislation would give courts, mediators, and participants greater confidence in the process, reducing the current inconsistencies in VOM's application (Nartey, 2022).

8.2. Public Awareness and Education Campaigns

Increased public awareness is essential to the success of VOM in Ghana. Many people, including victims and offenders, are unfamiliar with the concept of restorative justice and may perceive VOM as a lenient option that undermines justice (Batinge, 2019). To address this misconception, public education campaigns should be launched to inform the general public about the benefits of VOM, including its capacity to promote healing, foster accountability, and reduce recidivism.

These campaigns could take the form of media outreach, community workshops, and educational programmes in schools, with a focus on explaining how VOM offers a more holistic approach to justice. By changing public attitudes and building trust in the mediation process, more victims and offenders may be encouraged to participate in VOM, enhancing its effectiveness.

8.3. Training and Capacity Building for Mediators

The shortage of trained mediators is a significant barrier to the widespread implementation of VOM in Ghana (Nartey, 2022). It is essential to invest in the training and certification of mediators who possess the skills necessary to handle VOM cases effectively. This training should focus on communication techniques, conflict resolution, and the ability to manage power imbalances during mediation sessions, ensuring that both parties are heard and respected.

Building a pool of qualified mediators will increase the availability of VOM services across Ghana, making it possible to expand the reach of VOM programmes to more communities. Institutions such as the Judicial Service of Ghana and the Ghana ADR Hub could play a leading role in organising these training initiatives, partnering with civil society and international organisations to develop robust training programmes (Nweke & Addea-Kusi, 2022).

8.4. Establishing Evaluation and Monitoring Mechanisms

To improve the effectiveness of VOM, there is a need for systematic evaluation and monitoring of mediation outcomes. This would involve the collection of data on VOM cases, including the nature of the offence, the restitution agreement reached, and the long-term outcomes for both victims and offenders (Batinge, 2019). By developing key performance indicators and tools to measure the success of VOM, stakeholders can assess its impact on reducing recidivism, promoting victim satisfaction, and fostering community reconciliation.

Evaluation mechanisms will also provide valuable insights into how VOM can be improved over time, ensuring that it remains a relevant and effective tool within Ghana's criminal justice system.

8.5. Collaborating with Stakeholders

Strengthening VOM in Ghana will require collaboration between key stakeholders, including the judiciary, civil society organisations, traditional leaders, and religious institutions. These groups can work together to advocate for VOM's adoption, promote public awareness, and provide the necessary support systems to ensure the success of mediation programmes. Traditional authorities, in particular, have a crucial role to play, as their involvement can lend cultural legitimacy to VOM in local communities (Nartey, 2022).

In conclusion, by enacting specific legislation, raising public awareness, building mediator capacity, establishing evaluation mechanisms, and fostering stakeholder collaboration, VOM can become a more integral part of Ghana's justice system. These efforts will help ensure that VOM achieves its potential as a restorative justice tool that benefits victims, offenders, and the wider community.

9. Conclusion

Victim Offender Mediation (VOM) offers a transformative approach to justice by focusing on reconciliation, accountability, and the healing of both victims and offenders. In the Ghanaian context, VOM holds the potential to complement the traditional criminal justice system by offering a restorative justice option for minor offences. This approach is not only beneficial for reducing recidivism but also for empowering victims and fostering community healing. By allowing victims to engage directly with offenders, VOM provides an opportunity for emotional closure and the development of restitution agreements that cater to the specific needs of the victim (Nartey, 2022).

However, as highlighted throughout this article, there are significant challenges that need to be addressed for VOM to reach its full potential in Ghana. The lack of specific legislation and procedural guidelines is a major hindrance to the consistent application of VOM, leaving too much discretion in the hands of the courts. This gap, combined with limited public awareness, resource constraints, and the scarcity of trained mediators, poses obstacles to the widespread adoption of VOM (Nweke & Addea-Kusi, 2022). Furthermore, cultural attitudes towards justice and the reluctance of some victims to engage in mediation reflect the need for more comprehensive public education and outreach efforts (Batinge, 2019).

To overcome these challenges, targeted reforms are necessary. The enactment of specific legislation on VOM will provide the necessary legal framework for its consistent and effective implementation. Public education campaigns, coupled with the training and certification of mediators, will help build the necessary infrastructure to support VOM programmes. Additionally, establishing systematic evaluation and monitoring mechanisms will allow stakeholders to assess the long-term impact of VOM and make informed decisions about its future (Nartey, 2022).

Collaboration between the judiciary, civil society organisations, and traditional leaders will also be key in promoting VOM across Ghana. With the support of these stakeholders, VOM can be strengthened as a restorative justice tool that enhances the criminal justice system while addressing the emotional and material needs of both victims and offenders (Nweke & Addea-Kusi, 2022).

In conclusion, VOM has the potential to play a significant role in transforming Ghana's justice system. By addressing its current challenges and implementing the recommended reforms, VOM can provide a more humane, participatory, and effective approach to resolving conflicts between victims and offenders in Ghana.

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Joint Criminal Enterprise as a Mode of Individual Criminal Responsibility under the Rome Statute

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Abstract
The Doctrine of Joint Criminal Enterprise is spelled out for the first time by ICTY on the Dusko Tadic Appeals Judgment case in International Criminal Law. This dissertation seeks to study the evolution and development of the doctrine and focuses on elaborating on the three types of JCE. The dissertation will explore the different criminal elements of actus reus and mens reus in all the three types by explaining how the ad hoc Tribunals approach to the doctrine. The dissertation also discusses the fundamental issue of the mental element under Article 30 of the Rome Statute regard to the third form of JCE. Based on the above-mention question, it will further explain the legal issues regarding the implementation and challenges to the doctrine by ad hoc Tribunals. Though, it creates ambiguity for future cases and courts to apply the doctrine. At the same time, it poses a challenge to international criminal law on the issue of extensive application of the doctrine. This dissertation will first discuss the historical evolution of Joint Criminal Enterprise including its relationship with Article 25 of the Rome Statute with all its criminal requirements and types. Then it elaborates the Individual Criminal Responsibility under Article 25(3) of the Rome Statute. Finally, it discusses the mental element of the Crime under Article 30 of the Rome Statute while interpreting so extensively by the Tribunals that convicts everyone in the group.

Keywords: Joint Criminal Enterprise, Individual Criminal Responsibility, Rome Statute

1. Introduction

The doctrine of Joint Criminal Enterprise (JCE) (Common Purpose Doctrine) provides that where a pre-existing plan to commit core international crimes exists, or where members of a group are acting with a common criminal purpose, all those who knowingly participate in, and contribute to, the realization of this purpose may be held individually criminally responsible. In accordance with this doctrine, a person can be convicted for crimes which he not only committed/participated in with intent, but also for crimes which he did not intend nor actually personally commit, but which were a 'natural and foreseeable consequence' of the common purpose or the purpose of the joint criminal enterprise (Damgaard, 2008).

The doctrine of JCE which imposes individual criminal responsibility on accused for their participation in a group's common criminal plan rise to prominence in the ICTY Appeal Chamber decision, *Prosecutor v. Tadic.* Since Tadic, there has been a general reluctance by international ad hoc tribunals to review the legal foundation of JCE (Marsh & Ramsden, 2011).

Moreover, according to the Yugoslavia Tribunal, the notion of JCE encompasses three different categories: the basic form, the systematic form and the extended form while the actus reus can be the same for each of the three categories, the Appeals Chamber has declared that the three categories differ in respect of the mens rea (Werle,2007).

The actus reus elements common to all three categories, JCE I, JCE II, JCE III, are: (a) a plurality of persons; (b) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; and (c) participation of the accused in the common design. The mens rea element differs for each category of JCE. For JCE I, the accused must share the intent to commit a certain crime. For JCE II, the accused must know of the system of ill-treatment and intend to further it. For JCE III, the accused must intend to participate in and further the criminal purpose of the group. While, he will be liable for a crime other than the one envisaged in the common plan if the crime was a foreseeable consequence of the common plan and the accused willingly took that risk (Jain, 2014). The doctrine suffers three conceptual deficiencies: (1) the mistaken attribution of criminal liability for contributors who do not intend to further the criminal purpose of the enterprise, (2) the imposition of criminal liability for the foreseeability acts of one's co-perpetrators and (3) the mistaken claim that all members of a joint enterprise are equally culpable for the actions of its members (Ohlin, 2007).

2. Literature review

The literature reviewed for the current study is presented thematically. The existing literature on the subject of JCE had dealt with a quiet range of issues. The dissertation will focus mainly on three main themes: Concept of JCE, Constituents of Criminal responsibility within the JCE doctrine along with the contextual interpretation of the mental element under Art 30 of the Rome Statute.

However, scholars have propounded different viewpoints on the doctrine and have suggested alternative doctrines which are more suitable for the criminal responsibility on collective criminality. One scholar has suggested functional perpetration. The concept of functional perpetration offers several interesting opportunities to address the responsibility of people involved in system criminality. It recognizes that functionaries and their contributions are interrelated and may thus help obtain the whole picture of system criminality while suggests by the scholars to be perfectly capable of serving a tool in the hands of courts to make such refined distinctions. However, several scholars argue and defend that the word commission in Article 25 of the Rome Statute, which has interpreted and applied extensively, includes the joint criminal enterprise mode of criminal responsibility too.
Meanwhile, the Appeals Chamber claims of not creating any new basis of liability when articulating and setting out the joint criminal enterprise doctrine, but an individual's participation in a joint criminal enterprise fell within the scope of having 'committed' a crime and thereby within the purview of Art7(1) itself states that '… whoever contributes to the commission of crimes by the group of persons or some member of the group, in the execution of a common criminal purpose, may be held criminally liable…(Powels, 2004)'.

Furthermore, it is not considered sufficiently 'serious' to reflect the involvement and participation of the senior's leaders in the crime due to its contentious nature. Therefore, it is notoriously difficult to find the right mechanisms to bring such high-level perpetrators to justice and, even such difficulties be overcome, framing the criminal responsibility of these leaders within the modes of participation recognized in domestic criminal law remains highly problematic (Powells,2011)

However, some scholars have suggested the alternative to be utilized instead of JCE, e.g. functional perpetration (Wilt, 2007), indirect perpetration (Manacorda & Meloni, 2011), co-perpetration (Manacorda & Meloni, 2011), control over the crime (Wilt, 2007) , etc.

JCE as a mode of liability in international criminal law is a concept widely upheld by international case law. However, it has been harshly attacked by commentators particularly what comes to be known as the 'third category' of the notion, that of liability based on foreseeability and the voluntary taking of the risk that a crime outside the common plan or enterprise be perpetrated (Wilt, 2007).

Some scholars criticize the doctrine as the violative of the principle of culpability. From the perspective of the principle of individual guilt, criminal responsibility for mere membership of an organization was equally questionable. Therefore, the first question which arises was whether the doctrine could be used to establish the criminal responsibility of the high official (political and military leaders) for the commission of the crime considering the physical and mental distance between them? (Wilt, 2007). Hence, a rather vague expression such as 'intention to further the criminal activities or purpose of the group' arguably falls short of the requirement, stemming from the principle of legality, that the elements of the crime should be drafted as precisely as possible (Wilt, 2007). Art 25(3) envisions a large range of personal contributions to the commission of a crime.

Which includes three forms of commission by an individual where the single individual can commit one of the crimes contemplated in the Statute: (i) as agent, author or principal; (ii) as accomplice (contributor) alongside one or more agents; (iii) as participant in at least the attempted commission of a crime by a group sharing an action plan and also regulates as a matter of fact, other ways in which a crime can materialize (Militello, 2007). Article 25(1) provides that the court shall have jurisdiction over natural persons, not over states or organizations. Paragraph 2 of Article 25 reiterates the principle of individual criminal responsibility. Paragraph 3 the provision distinguishes various modes of individual responsibility. Sections 3(a)-(d) is certainly the core of Article 25. Commission, ordering, instigating and aiding and abetting are confirmed as modes of participation. The same holds true for the joint commission, although this form was never explicitly mentioned in former statutes or conventions. Also, the ICC Statute also includes the concept of perpetration-by-means and contributions to a group crime (Werle, 2007).

Furthermore, Article 25 (3)(a)-(d) ICC Statute is, therefore, best construed as a differentiation model with four levels of participation: at the top, commission as the mode of participation that warrants the highest degree of individual responsibility; on the second level, the different forms of instigation and ordering as accessory liability for those who prompt others to commit crimes under international law; on the third level, assisting a crime, for 'simple' accessories; and finally, contribution to group crime, as the weakest mode of participation on the fourth level (Werle, 2007).

3. Object and Scope of the Proposed Research

The significance and relevance of the research will be of threefold:

- To find out is there any place or justification for the joint criminal enterprise under Article 25 of the Rome Statute.
- To find out whether the constituents of the joint criminal enterprise are present while justifying the criminal responsibility of an individual.
- To find out the harmonizing factor of an extended form of the joint criminal enterprise within the Article 30 of the Rome Statute.

4. Research Questions

The proposed research questions intended to be answered by this research:

1. What constitutes the motion of joint criminal enterprise under international law and whether it is inbuilt within the Rome Statute?
2. Whether the three forms of joint criminal enterprise adequately determine the varying degrees of responsibility in view of different mental elements?
3. Whether the joint criminal enterprise contradicts the limits of Art 30 of the Rome Statute?

5. Joint Criminal Enterprise

5.1. Introduction

International crimes such as genocide, crimes against humanity, and war crimes which involves the commission of mass atrocities committed by individuals acting in groups. However, they may be regular or irregular military units, rebels operating under the control of the government or outside the control of the government, or any other armed groups of individuals furthering a state policy while acting jointly (Bogdan, 2006). Therefore, the international criminal tribunals refrain themselves from imposing the criminal liability on the group; instead, they look for to individualize the criminal responsibility related to the commission of the crime (Bogdan, 2006) Therefore, the main focus and aim of the international trials are to reasonably and equitably allocate the criminal liability to individuals acted in groups for the perpetration of prohibited conduct under international criminal law (Bogdan, 2006).

Further, imposing criminal responsibility on an individual while violating or committing any criminal conduct is included in all the domestic criminal justice system of the world. Whereas, individual criminal responsibility recognized for the first time for international crimes in the Nuremberg and Tokyo prosecutions after the Second World War (Bogdan, 2006). Therefore, both the tribunal affirmed the concept in their Charters and accepted it in their judgments (Bogdan, 2006). Also, the International Tribunal for the Former Yugoslavia and International Tribunal for Rwanda placed the concept in their Statutes, and finally, the Rome Statute provides for individual criminal responsibility in details (Bogdan, 2006).

After the Nuremberg trials, there was no other international tribunal until the ICTY, and the ICTR establish as a subsidiary organ of the Security Council for imposing criminal liability for the mass atrocities and violence committed in the former Yugoslavia and Rwanda, respectively (Stephens,2013). The Dusko Tadic case first introduced joint criminal enterprise doctrine tried by ICTR (Stephens,2013).

Dusko Tadic was accused of the killing of five men from the village of Jaskici in Bosnia while there was no direct evidence available that the accused personally killed any of them (Bogdan,2006). Meanwhile, according to post world war II trials before the International Military Tribunal at Nuremberg (Nuremberg Tribunals) and the International Military Tribunal for the Far East (Tokyo Tribunal), the Charters of these two Tribunals do not expressly provide any provision regarding joint criminal enterprise but it provides for individual criminal responsibility under ICTY and ICTR under Article 7(1) and Article 6(1) respectively. Moreover, Article 7(1) of the ICTY provides under the heading of individual criminal responsibility as “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, perpetration or execution of a crime referred to in article 2 to 5 of the present Statute , shall be individually responsible for the crime.” (Statute of the ICTY, art. 7(1), United Nations, 1993). Whereas, Article 6(1) of ICTR states for individual criminal responsibility “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, perpetration or execution of a crime referred to in Article 2 to 4 of the present Statute, shall be individually responsible for the crime. (Statute of the ICTY, art. 7(1), United Nations, 1993)”. Therefore, the Appeals Chamber insists that it covers not only the physical perpetrators but all those who person responsible for the serious violation of international humanitarian law in the former Yugoslavia whereas the ICTR takes the stand that the doctrine of JCE has become a customary international law and the reliance on the doctrine has grown since ICTY cases (Damgaar, 2008). Finally, the ICC Statute is the first international instrument which deals with the doctrine of JCE in detail, and it expressly provides for the inclusion of doctrine under Article 25(3) (d) of the Statute as “3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:…

d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made with the knowledge of the intention of the group to commit the crime (Damgaar, 2008);

An individual is not only criminally responsible for the commission of a crime when he physically commits the crime, but he can be held responsible for the commission of a crime where he engages in any other form of criminal behavior or conduct (Antonio, 2008). However, according to the principle of personal culpability a person cannot be held responsible for any crime where he/she did not participate personally in the commission of a crime or he/she may participate (involve) in some other way (Antonio, 2008). Furthermore, the Tadic Appeal Judgment lays down two main notions by personal culpability. First, nobody may be held accountable for the commission of criminal conduct perpetrated by others; second, a person may be held responsible if he somehow takes part or involved in the perpetration of the crime (Antonio, 2008).

Meanwhile, it defines it as follows: "in sum, the objective elements (actus reus) of this mode of participation in one of the crimes provided for in the Statute (about each of the three categories of cases) are as follows:

i. A plurality of persons. They need not be organized in the military, political or administrative structure
ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.
iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. By contrast, the mens rea element differs according to the category of common design under consideration (Haan, 2005)

However, the joint criminal enterprise has spelled out by the ICTY as a model of criminal responsibility, and the doctrine has used by different international criminal courts to the extent that it regarded as a 'darling notion' by the Prosecution (Cassese, 2007). Further, the doctrine plays a crucial role in the world community as compared to the domestic level. For the world community, international crimes such as war crimes, crimes against humanity, genocide, torture, and terrorism have common features for example, these crimes are committed by, plurality of persons, expression of a collective criminality, paramilitary units or commission by government officials in unison for achieving a common policy where the actual contribution of every individual is difficult to be determined along with the difficulty of producing the evidence of every individual for the criminal conduct or the role played by each one of them (Cassese, 2007). Generally, the origin and history of the joint criminal enterprise can be traced to the events of the Second World War (Damgaard, 2008). The reason behind the doctrine was that no perpetrator should go unpunished; hence, to find a legal solution for punishing the Nazi perpetrators.

Meanwhile, a proposal was suggested by Colonel Murray C.Bernays from the American Department of War, in his memorandum entitled ' Trial of European War Criminals,' deals with pre-war as well as wartime atrocities (Van Sliedregt,2012) which suggests two doctrines namely, the doctrine of conspiracy and doctrine of membership in the criminal organization (Van Sliedregt,2012). Where the conspiracy was intended to capture and punish the major war criminals, on the other hand, the membership in the criminal organization was intended to catch the 'little fish. (Damgaard, 2008)' Some scholars have comparatively described the doctrine with other terminologies to testify the outcome and efficiency of the doctrine. According to Neha Jain, the JCE doctrine deals and resolves the complex cases while comparing the same with co-perpetration.

Further, she explains the Anglo-American complicity law doctrine where the foundation of the complicity based on the actus reus. Complicity doctrine explains that the perpetrators are the one who physically and materially causes the crime which creates doubt in case of group crime. Notwithstanding, no one is identifiable as the sole perpetrator where all the participants were equally supportive of, concerned in the commission of the crime so the distinction between the principal and accessory is irrelevant and the members are all called as ' parties to the joint enterprise. (Damgaard, 2008)'

According to the Appeals Chamber in Dusko Tadic case emphasized that, the concept of JCE has three distinct categories (Jain, 2014). Three categories of JCE will be comprehensively discussed below.

5.2. Variants of JCE (Three Categories of JCE)

Joint Criminal Enterprise (JCE) was first introduced by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Tadic* judgment where it divided it into three categories (Jain, 2014). The three variants of the JCE have the same and common element of actus reus (physical element) in all its three types while the mens rea (mental element) is different for each of these categories (Jain, 2014). These types are named as a basic form, the systemic form and the extended form by some scholars (Marsh & Ramsden, 2011). The commonality of actus reus in all the three variants is (i) the plurality of persons, (ii) the existence of a common plan, design or purpose and (iii) membership or participation of the accused in the concerted plan (Haan, 2005). For the sake of better understanding, each category of JCE will be addressed separately while some elements are common to them.

a) The basic form (JCE I) : According to the first category, all the participants have shared intention while pursuing the common design which make them co-perpetrators to each other nevertheless the accused voluntarily participates in the common design, its immaterial who commit the actual offence, for example where a plurality of persons agree for killing of a person while every member perform a different role in the group but they have the intention to kill which make them all liable for murder (Damgaard, 2005).

   I. The objective elements of the first category: the basic form of JCE consist of three ingredients to form the objective element of crime namely (1) plurality of persons, (2) existence of a common plan, (3) participation of accused in the common plan to form a joint criminal enterprise (Haan, 2005).

   (1) Plurality of persons: according to this requirement at least two individuals should be present for the commission of offense. It is not required that they must be military, politically or due to the administration hierarchy be organized hence, the spontaneously gathering of some persons for the commission of a crime for example mob violence cases will satisfy this criteria of plurality of persons (Haan, 2005).

   (2) The existence of a common plan: this ingredient has attracted conflicting views from scholars. According to V. Haan, it's a kind of understanding and arrangement among the participants which amount to an agreement for the commission of one specific or series of crimes (Haan, 2005) while Katrin Gustafson claims that the express agreement is neither conceptually sound nor practically helpful (Gustafson, 2007). However, the Trial Chamber in *Simic* case emphasized that the exact time when the common plan was envisaged is irrelevant while it will be sufficient to show that during the commission of the crime the common plan existed (Haan, 2005). Moreover, the ICTY Trial Chamber decision in *Brdanin* case ruled out that, the prosecutor must prove that if the defendant did not take part in the commission of crime personally but he has contributed in some other way to the commission of the crime. hence, the prosecutor must prove and show that he has entered into an express agreement with the actual perpetrators for the commission of the crime (Gustafson, 2007). Whereas, Katrina Gustafson criticize the imposition and requirement of an express agreement by the trial chamber on the Brdanin case by the tribunal.

   She further goes, the crucial requirement for the JCE liability is, in the context of system and collective criminality, the high officials and rankers are not committing the crime physically but they should remain responsible for the crimes if not as perpetrators it could bear the responsibility as principal perpetrators or as the organizers for its commission. Though, the high officials of criminal activity are unlikely to enter into any express criminal agreement with the actual perpetrators because the official hierarchy and position provide them more efficient mechanism through which the could ensure the realization of their criminal plans (Gustafson, 2007).

   (3) Participation of accused in the common plan: the accused needs to take an effective part in the commission of a crime in anyhow. Although, any role played by him must have the effect of furthering the common purose that may vary in different degrees (Haan, 2005). Nevertheless, it may be in the form of assistance in, contribution to, or execution of the common purpose (Gustafson, 2007).

II. The subjective elements of the first category: according to the judgment of the Appeals Chamber in Tadic case the first category of JCE has the shared intent, awareness, and knowledge of the crime and willingness to further the crime by the accused. Each one of the elements discussed as follow:
   (1) Knowledge and awareness of the crime and participation of the accused: the accused must voluntarily join the group while he has the knowledge and awareness of the crime being committed by the group or the criminal character of the group while voluntarily joining the group it is immaterial whether the accused knows every criminal activity of the group or have knowledge about some of their criminal acts while pursuing the common purpose (Haan, 2005).
   (2) Intent: the accused must have a clear intention for the commission of the crime. He has the result in mind while committing the crime. For example, he should have a specific intention and plan in his mind while pursuing and participating in the criminal group (Haan, 2005).
   (3) Shared intent: all the participants must share their common intention for the criminal act while the word 'shared' did not comprehensively explained and remain unclear.

b) Second category or the Systemic form of JCE (JCE II): while this category is mostly similar to the first category which includes the concentration camp cases where the crimes were committed by the military or administrative officials by pursuing a common plan or policy meanwhile, the accused held some authority or a position in the hierarchical institutional framework to pursue the common policy by mistreating the camp prisoners or killing the detainees (Damgaard, 2008). According to Luke Marsh and M.Ramsden, the systemic form of JCEII is the sub-group of the basic form of JCEI (Marsh & Michael, 2011). Whereas, Antonio Cassese called this category "liability for participation in an institutionalize common criminal plan" (Cassese, 2007) where he claims that the prisoners of camp were mistreated, tortured in the camp so the responsibility should not be imposed on the top officials and heads of the camp, but all those should be held responsible who perform whatsoever administrative function for the achieving of the common goal (Cassese, 2007). All the participants bear the liability while they were aware of the criminal activity of the administration and willingly further the same while the role they played is immaterial as they provide a cog in the killing machinery and connect the chain of mass atrocities (Cassese, 2007). While any function or task of any consequence would in the structural criminal framework activate their responsibility for the crimes which committed or will be committing (Cassese, 2007). The second category of JCE has the same objective, and subjective elements of the basic form with a slight difference highlighted below
   I. The objective elements: the objective elements of the second category are similar to the first category with a slight varying degree which is (1) plurality of persons, (2) the existence of the common plan and (3) participation of the accused in a joint criminal enterprise. Each element is explained below
      1) A plurality of persons: this ingredient is the same as the first category which has a similar and identical characteristic of the first category.
      2) The existence of a "system of ill-treatment": while the slight difference between the first and second categories is on the basis of the existence of the system of ill-treatment of the detainees and prisoners, on the first category it applies to all kinds of arrangements among the members for the commission of the crime in whatsoever manner it may be, but in the second category, is based on the institutionalized hierarchical structure which talks about the system of repression (Haan, 2005). According to Ciara Damgaard, For the establishment of the responsibility on accused's part three requirements are need to be existed (i) the existence of an organized system of ill-treatment of the detainees, (ii) the accused's awareness of the system of ill-treatment or repression, and (iii) the active participation of the accused in the furthering of such system or to achieve the realization to the common purpose (Damgaard, 2008). Meanwhile, V.Haan insisted that such a system (ill-treatment) has two characteristics to be recognized, first, the existence of an institution such as a prison camp or an organization of a comparable structure, second, the violation and repression toward the inmates on the basis of a large scale and systematic nature which explicitly perceivable that such an organization works and operated for criminal purposes only (Haan, 2005).

3) The participation: according to the second category the participation in the criminal group means that the accused has a direct or a significant contribution to the system for the proper functioning of the enterprise and smoothly achieving the goal of the institution (Haan, 2005). There is a slight difference between the first and second category of JCE for the element of participation of the accused in the group. The threshold of participating in the systemic JCE is higher than that of the non-systemic JCE responsibility on the grounds of direct and significant contribution whereas for the first one the membership was sufficient to be responsible without the role played by the accused while some argues that the degree of participation will definitely differ on the parts of each accused which must not be criminal whereas it may take the form of assistance in, or contribution to, the execution of the common plan or purpose of the group so it would be sufficient that the accused has taken part for the furthering or achieving of the common goal of the institution.

Furthermore, according to *Kvocka* judgment, the substantial contribution could be made through acts or omissions of the duties which could be perceived by way of failure to complain or protest or approval of silence about the crimes and repressions.

II. The subject elements of the second category: According to the Tadic judgment, the mens rea elements of the second category, which relates to the system of ill-treatment such as concentration camps or detention camps, the accused must have personal knowledge of the system of ill-treatment as well as the intent to further such common purpose of the group while he holds some position or authority in the hierarchical structure of the organization. Whereas for the first category the subjective elements could be inferred from the circumstance of the specific case on the ground of 'shared intent' while in case of the second category of JCE it could not be necessary to be established on case by case basis but it may automatically inferred from the assumption that a person who met the objective requirements of the JCE for example which contributed significantly to the establishment or maintenance of the prison camp or criminal institution, also acted with knowledge of criminal character of the institution and will be liable for all the crimes which would happen or committed during the time he worked or employed there.

III. The extended or third form of JCE (JCE III): it is the most controversial variant of the JCE doctrine knowing the fact that the accused did not know intend nor plays in the crime with which he is charged. JCE III is different from the first two categories (JCE I, II). According to JCE III, the accused pursued one course of conduct, but where one of the perpetrators commits an act which is outside of the common purpose, but it was a natural and foreseeable consequence of the act committed. And the accused willingly took that risk while having the knowledge of the act that it will be certain to occur. For example, having the shared intent to forcibly remove members of one ethnicity from their place to another which will cause the death of one or more members though there was no intention of murder to be part of the common plan, but the forcible removal of members on gunpoint was nevertheless foreseeable the deaths might be the result where the responsibility may attribute to all the members in the group (Damgaard, 2005). Meanwhile, V.Haan argues that the extended form of JCE mode of liability only stretches and broaden the responsibility of the members of the criminal group to the crimes which are beyond the common purpose but a natural and foreseeable consequence of the affecting the enterprise (Haan, 2005). The additional requirements were discussed as follow:

a) The additional objective element: According to JCE III the additional element of natural and foreseeable consequence would be imposed on the members of the group on the condition of having a specific state of mind toward the crimes they are committing the so-called dolus eventualis is required some called it 'advertent recklessness.' (Marsh & Ramsden, 2011) Whereas, some scholars argue that a state of mind is required for the commission of the crime while he not intend on bringing out a specific result but no doubt having the knowledge and awareness of the result that would be occurred due to the group actions still the accused willingly took that risk and further the common purpose of the group (Damgaard, 2008). However, the Tadic judgment did not define the term 'state of mind' which remains ambiguous (Haan, 2005). in addition, it is worth mentioning that JCE III is still a controversial debate between the criminal tribunals and scholars on the ground of imputation of responsibility for the crimes of genocide

or special intent crimes. (Haan, 2005) Whereas, the one hand, some scholars argue that the state of mind needs a dolus specialis (the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group) for specific intent crimes such as genocide, on the other hand, some argue that the dolus eventualis is enough for them to be responsible for the commission of the crimes (Bantekas & Nash, 2009). For example, a person who contributed to a specific intent crime such as genocide but who did not share the required intent could not be held responsible as a participant in a joint criminal enterprise on the ground of extended form of JCE III, but it could be responsible as an aider and abettor only (Haan, 2005).

b) The additional objective element: the additional objective elements of JCE III are the acts and crimes committed by any one of the participants of the group which is beyond the common purpose which was nevertheless a natural and foreseeable consequence of the execution of the common design (Haan, 2005). Meanwhile, there is no distinction made or established between the crimes fell within the scope from those fell outside or beyond the scope of joint criminal enterprise although some criteria were highlighted by judges while deciding the crimes as part of common enterprise such as, crimes committed without discipline and not according to a specific pattern, the armed unit under the command of accused was not involved in the crimes, crimes happened beyond the territory of accused's authority etc (Haan, 2005). However, the distinctive character of the extended form of JCE is the 'fault element,' which, subject to certain conditions, stretches criminal liability to be extended to crimes other than those fundamentally agreed upon in the plan or design (Schabas & Bernaz, 2011). For better understanding, the summary of all three types of JCE has drawn in the following Table 1.

JCE Categories	Mens rea	Actus Reus
1. Co-perpetration	Intent to perpetrate certain crime (having share intent on the part of all co-perpetrators).	(i) A plurality of persons which may not need to be organized in a military, political or administrative structure. (ii) The existence of a common plan, design or purpose for the commission of a crime(which may not be necessary to be previously arranged but can me materialize extemporaneously) (iii) Participation of the accused in the criminal group which is not necessary to be involved for a specific crime enlisted in the statute which may take the form of assistance in, or contribution to, the execution of the common purpose.
2. Concentration camp cases	(i) Personal knowledge of the system of ill-treatment (ii) Intent to further the system of ill-treatment	Same as for the JCE I
3. Crimes committed outside the common plan	(i) Intention to participate in and further the common purpose (ii) Responsibility for the crimes falling outside the plan only arise (a) it was natural and foreseeable and (b) the accused willingly took that risk	
JCE Categories	Mens rea	Actus Reus
4. Co-perpetration	Intent to perpetrate certain crime (having share intent on the part of all co-perpetrators).	(iv) A plurality of persons which may not need to be organized in a military, political or administrative structure. (v) The existence of a common plan, design or purpose for the commission of a crime(which may not be necessary to be previously arranged but can me materialize extemporaneously) (vi) Participation of the accused in the criminal group which is not necessary to be involved for a specific crime enlisted in the statute which may take the form of assistance in, or contribution to, the execution of the common purpose.
5. Concentration camp cases	(iii) Personal knowledge of the system of ill-treatment (iv) Intent to further the system of ill-treatment	Same as for the JCE I

6. Crimes committed outside the common plan	(iii) Intention to participate in and further the common purpose (iv) Responsibility for the crimes falling outside the plan only arises (a) it was natural and foreseeable and (b) the accused willingly took that risk	
JCE Categories	Mens rea	Actus Reus
7. Co-perpetration	Intent to perpetrate certain crime (having share intent on the part of all co-perpetrators).	(vii) A plurality of persons which may not need to be organized in a military, political or administrative structure. (viii) The existence of a common plan, design or purpose for the commission of a crime(which may not be necessary to be previously arranged but can me materialize extemporaneously) (ix) Participation of the accused in the criminal group which is not necessary to be involved for a specific crime enlisted in the statute which may take the form of assistance in, or contribution to, the execution of the common purpose.
8. Concentration camp cases	(v) Personal knowledge of the system of ill-treatment (vi) Intent to further the system of ill-treatment	Same as for the JCE I
9. Crimes committed outside the common plan	(v) Intention to participate in and further the common purpose (vi) Responsibility for the crimes falling outside the plan only arise (a) it was natural and foreseeable and (b) the accused willingly took that risk	

6. Joint Criminal Enterprise impact on other provisions (Article 25 of the Rome Statute)

Art 25 of the Statute of the international criminal court (ICC) contains a comprehensively detailed regulation for individual criminal responsibility, on the one hand, it deals with different modes of individual responsibility, on the other hand, it insists in the systematization of modes of participation (Schabas & Bernaz, 2011). However, it is based on the differentiation model which focused on four levels of participation under Article 25(3) of the ICC Statute (Schabas & Bernaz, 2011). Further, in common parlance, international crimes are committed by the cooperation of a large number of individuals where they may be connected through a network that could be called a state or military which were really organized and well disciplined (Schabas & Bernaz, 2011). Furthermore, they have come together, targeted their victims at the same time, they have planned, organized and finally implemented

their plan by using force against their target so while determining the individual criminal responsibility within the group actions it would not decrease the degree of responsibility of individual with those who actually perpetrate the crime, for example, Adolf Hitler, who sent millions of people to their deaths without touching or physically hurting any victim himself (Werle, 2007).

Moreover, the Appeals Chamber sums up the problem as: "Most of these crimes do not result from the criminal propensity of a single individual but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although some members of the group may physically perpetrate the criminal act (murder…) the participation and contribution of the other members of the group are often vital in facilitating the commission of the offense in question. It follows that the moral gravity of such participation is often no less – or indeed no different - from those actually carrying out the acts in question."

Article 25 of the Rome Statute, specifically paragraphs 1 and 2 insist and accepts the individual criminal responsibility as a universal principle which is recognized by the International Military Tribunal (Nuremberg Trials) and reaffirmed by the ICTY in the Tadic Judgment (Werle, 2007). In addition, subparagraphs (a-c) deal with the attribution and imposition of individual criminal responsibility, subparagraph (a) deals with three forms of perpetration: one's own conduct as co-perpetrator or through another person (some called it as perpetration by means) subparagraph (b) deals with other forms of participation such as ordering and attempted crime and soliciting or inducing others for its commission while subparagraph (c) deals with the subsidiary forms of responsibility of aiding and abetting on the commission of crime and subparagraph (d) deals with the contribution and facilitating the help with the group for achieving their goal (DeFalco, 2013).

Hence, Article 25 (3) (a-d) ICC Statute is based on differentiation model dealing with four levels of participation: at the top level , commission as mode of participation which entails the high degree of individual responsibility; on the second level deals with other forms of accessory form such as instigation and ordering for those who provoke and induce others for the commission of the international crimes; on third level, deals with the assistance which provide and facilitate the commission of the crime with others and finally at the end level it talks about the weakest mode of participation which is contribution with the group for the commission of the crime (Werle, 2007). It is necessary to shed some light on the contents of Article 25(3) (a-d) of the ICC Statute for a better understanding of the different modes of criminal participation which is discussed below.

6.1. Commission (Perpetration):

The general principles of liability apply across the various different offenses to impose the accountability on those who commit the crime by playing different roles or the accused may commit, participate in, or otherwise be found responsible for those crimes. These include different models of liability such as aiding and abetting, instigating and inducing, assisting or command responsibility etc, while it's not only distinguishable on their actus reus or having different conduct elements but may also have different mental elements too, so that it could differentiate the degree and extent of their responsibility along with the differences on the sentencing stage (Werle, 2007).

It's admitted that the principles of liability are not watertight compartments sometime they overlap for which the discretion is granted to the Trial Chambers by the ICTY to choose the appropriate label of responsibility under which the accused best suited and tried (Werle, 2007). Basically Article 25(3)(a) ICC Statute deals with three forms of the commission such as commission as an individual, joint commission with other and commission by or through another person while some include the commission by omission (Cryer & Friman, 2007) too where the first category inferred the higher responsibility as compared to others and must construed strictly (Werle, 2007).

i) Commission as an Individual: a person who physically commits the crime or who's conduct fulfills the requirements of the definition of crime under Article 25(3) (a) along with having a required mens rea which defines under Article 25(3) (a) of the Statute is responsible for the commission as a principle under international law.

ii) Joint Commission (Co-perpetration): in case of joint commission all the members who come together for the commission of the crime while having a certain policy and design for its achieving so all the members

are jointly and individually responsible for the crime committed on the basis of one for all and all for one theory which shows their shared intent for its commission.

iii) Commission through another person (perpetrator by means)(perpetrator behind perpetrator): in case of perpetrator behind perpetrator or so-called perpetrator by means shift the responsibility to those who used third party or their subordinates as a tool for the commission of the crime which is no doubt is a sub-category of commission while the same is punishable under international law. Criminal responsibility which is conferred under Article 25(3) (a) is independent from the direct perpetrator while it can be possible that the actual perpetrator is excused for the criminal liability on the legal ground such as not of a legal age, follow the orders of their seniors, etc. while he or she could be manipulated by their mastermind perpetrators that impose the criminal liability to the perpetrators who are behind the scene and those holds superior positions become actual perpetrators for the crime.

iv) Commission by omission (Failure to prevent or punish): there is no express provision in the Rome Statute for the criminal responsibility in case of omission but no doubt there is certain circumstance which causes the crime to take place by failure to prevent or punish the perpetrator or it may be the intention of seniors to allow their subordinates to act in such a manner that produces the contemplate result which is clearly discussed under Article 28 of the Rome Statute under the heading of Command responsibility.

6.2. Instigation and ordering

Article 25 (3) (b) of the ICC Statute expressly highlights that, anyone who orders the commission of a crime under international law or who instigates (‘solicits’ or ‘induces’) another for the commission of the crime will be responsible for its commission on the basis that the crime is actually committed or attempted. The word ‘instigation’ has been defined by ad hoc tribunals of ICTY and ICTR jurisprudence respectively as “promoting” and ‘ urging or encouraging’ another to commit a crime where the causal link is required to prove the crime. while according to G.Werle, an instigator is that person who induces and instigate or influence another person to commit a crime under international law meanwhile, it is necessary that a causal link should exist between the instigation and commission of the crime, in addition, substantial contribution by the instigator to influence the actual perpetrator for the commission of the crime is sufficient to hold him responsible for the resulted crime (Van Sliedregt, 2012). further, regarding the mental element of the instigator, it only requires that the instigator should aware of the conduct of the perpetrator or having the knowledge that his provocation and inducing will have a substantial likelihood of commission of the crime (Van Sliedregt, 2012) whereas, the trial chamber further holds in number of cases that intention contains cognitive element of knowledge and a volitional element of acceptance and that this intention must be present with respect to both the participant’s own conduct and the principle crime he is participating in. an order is a command of superior for doing of certain actions or prohibiting from doing of certain actions to the subordinate irrespective of their relationship being a military one or civilian one whereas it could be a written one or oral one or it could be addressed to a specific addressee or to unknown recipients (Bantekas & Nash, 2003).

6.3. Aiding and abetting (Assistance)

There are two elements to impose the responsibility upon the person who assists the perpetrator to commit the crime namely, actus reus and mens reus. The Tribunals has defined the elements as actus reus of aiding and abetting is constituted and assumed by the acts or omissions which assist, further, or lend moral support to the actual perpetrator for the commission of a specific crime which no doubt substantially contribute and effectuate the perpetration of the crime while the mens rea element of aiding and abetting is the knowledge and the certainty of the contemplated result given by the aider and abettor while assisting the principle for its commission (Ingle, 2016). Moreover, assistance may be given or provided at any time it may be before the commission of the crime, during the course of action or even after the commission of the crime, however, the language used in Article 25(3) (c) does not need that the assistance has to have a substantial effect on the commission of the crime (Werle, 2007). further, the Appeals Chamber explain the actus reus and mens reus of aiding and abetting as under: (i) the aider and abettor carries out acts specifically directed to assist, further or lend moral support to the perpetration of a certain specific crime (murder, rape, extermination…), and this support has a substantial effect upon the

perpetration of the crime, (ii) in the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principle. Meanwhile, the Appeals Judgment in case of Vasiljevic the chamber included the assistance of aiding and abetting within the ambit of commission with a lesser degree of responsibility as compared to the actual commission.

6.4. Contribution to a group crime:

The whole subparagraph (d) of Article 25(3) is an almost a literal copy of 1998 Anti-Terrorism Convention (Ambos, 2011). However, Article 25(3) (d) deals with a new form of criminal participation such as contributing to the commission of the actual crime or attempted through a group where it bears the weakest form of liability as it construed as a subsidiary mode of liability which is somehow slightly different from those previously mentioned in other subparagraphs (Werle, 2007). Further, in case of contribution to a group there are certain ingredients for establishing the actus reus and mens reus of the perpetrators, regarding the actus reus element of the Article 25(3) (d) requires the contribution to a crime under international law which is committed or attempted by a group whereas a group is an association of at least three members pursuing a common criminal plan and the mental element of Article 25(3) (d) provides two main standards so where the person give assistance and contribute to the crime (i) he has the aim to further their criminal purpose or common criminal design and (ii) he has the knowledge or awareness of the criminal intent of the group which is about to commit an international crime hence the contributor become criminally liable under Article 25(3) (d).

7. **Current Status of JCE (Overall Jurisprudence)**

After establishing the ad hoc tribunals and the international criminal court (ICC) has started to search and quest to find a proper theory of liability that could effectively address the systemic character of international crimes (van Sliedregt, 2014). Basically, they have focused on the central point and role played by the military and political leaders for the commission of the concerned crimes hence to end this, the tribunals and international criminal court (ICC) have relied on the doctrine of JCE and indirect joint perpetration, respectively. However, there are certain proposals for alternative concepts instead of JCE 'functional perpetration' is an alternative proposed concept of criminal liability by Harmen van der Wilt. Functional perpetration is a mode of criminal liability which imposes the criminal responsibility on those who hold the high post due to which they influence and effectuate others for the commission of the crime where they qualify to bear the criminal responsibility rather than those who physically perpetrate the crime as they follow the orders and carry out the instructions of their superiors (Damgaard, 2008). Moreover, the concept of functional perpetration offers number of interesting opportunities which are identical to the 'superior responsibility' and 'command responsibility' concepts for example, the concept of functional perpetration is identical to superior responsibility which show a hierarchy and an organizational structure which links up the functions of a military or civil commander to issue orders and commands their subordinates to follow. Furthermore, the position they hold which is very important for the establishment of criminal responsibility not as a condition for participation but as a starting point for inquiry of their involvement in concerned crimes besides these the 'policy' crimes which they execute for achieving their goals is perfectly express the concept of functional perpetration (Van der Wilt, 2007). It is a great challenge for the world community to bring the high-level officials and perpetrators to justice as they did not personally and physically commits the crimes but in some way or the other they have a link and connection with the resulted crimes for the same which is difficult to prove but not impossible whereas it has proven by the ad tribunals dealt with a number of such cases (Manacorda & Meloni, 2011). Hence, the international criminal tribunals recently adopted two different approaches to define the liability of high officials of accused in the commission of international crimes namely, Milosevic approach which basically explains the JCE doctrine (JCE has comprehensively discussed above) and The Al Bashir approach (Indirect Perpetration) deals with indirect perpetration which is important to dealt with as an alternative to JCE here (Manacorda & Meloni, 2011). There are several cases which deals with the concept of indirect perpetration where the principal used the actual perpetrator for the commission of the crime while some argue that due to the control over the crime it influences the physical perpetrator to commit the crime (Shelton, 2012). Furthermore, the ICC judges have interpreted and insisted that Article 25(3) (a) of the Rome Statute encompasses both the co-perpetration model on the ground of control over the crime and control over the organization which automatically shift the criminal responsibility upon the high-level officials (Manacorda & Meloni, 2011). Hence, Article 25(3)

(a) 3rd alternative (through another) can be attributed to the accused if he controls and influence the conduct or will of others or conduct or will of their subordinates (Wirth, 2012).

8. Research Methodology

The research would follow the doctrinal method of research. Both primary and secondary sources of data will be used. Primary sources include treaties, institutional positions and cases particularly the ICTY Statute especially Art 7(1), ICTR Statute especially Art 6(1), Rome Statute especially Art 25 and 30. Also all other relevant and necessary standing of these courts relates to the subject of research here. Secondary sources include books, journal articles along with other materials available online which shed light on the subject of research.

9. Primary Sources

9.1. Treaties

- Statute of the International Criminal Tribunal for the former Yugoslavia, 1993.
- Statute of the International Tribunal for Rwanda, 1994.
- Rome Statute, 1998.

91.1. Article 30 of the Rome Statute:

Article 30 of the Rome Statute of the international criminal law is the first international statute which provides for the mental element of crime which is required for criminal responsibility of individuals for serious violations of international humanitarian law (Finnin, 2012). Basically, Article 30 of the Rome Statute stated about the mental element of crime and provides for the definition of mental statue while committing a crime which is required to be proven for the criminal responsibility of an individual for the violation of international humanitarian law (Badar, 2008), while the threshold of mental element is very high (Schabas, 2011) to hold someone responsible for the committed crimes, in addition, no doubt it includes certain other concepts which will be elaborate in the coming discussion whether they are thought to be included by the draftsman or not, which yet to be answered. Meanwhile, there are number of debates and discussion among the scholars and international lawyers from different communities where some suggestions for the inclusion of 'omission', 'recklessness' and 'dolus eventualis' in the realm of Article 30 while some of them are of the opinion for the exclusion of them from Article 30 for criminal liability (Elewa Badar, 2009).

Generally, an act cannot be done or take place without prepared or intended mind where the mental status of the person is not ready or already prepared itself for performing whatsoever act it may be, however, according to the Latin maxim '*Actus non facit reum nisi mens sit rea'* which means ' an act does not make [a person] guilty , unless the mind be guilty' mean in common parlance, that a person is not criminally liable or guilty for the commission of any crime unless and until the act is a prohibited act and the government not only proves that the offender did such a forbidden act (actus reus) but also it needs to prove the mental element or guilty mind of the accused (mens rea) while doing the act, in short, criminal liability required the proof of an evil-meaning mind with an evil-doing hand.

Hence, there is no specific definition which is generally accepted, is give anywhere in criminal law while some are of the opinion that 'mens rea' is defined as a ' general immortality of motives' , 'vicious will' , ' evil-meaning mind' etc where each of these concepts has a slightly different connotation from each other while there is one thing common in all the suggest ideas for means rea which is 'moral blameworthiness' that the accused (defendant) committed the social harm of an offense with a moral blameworthiness state of mind or the defendant committed a wrong which is forbidden and morally against the norms of the society where we can term it as 'culpability'.

Meanwhile, it is hardly required the intention or knowledge for most of the crimes enlisted in the Rome Statute for, because of their different inbuilt mens rea which is constructed in every crime according to their gravity and circumstance when they are being committed, like genocide is defined as a punishable act committed 'with the intent to destroy' a protected group, crimes against humanity talks about the widespread or systematic attack

against civilian population 'with knowledge of the attack' etc., hence, most of the crimes listed under Article 8 of the Statute used the adjectives such as 'willfully', 'wantonly', and 'treacherously' therefore, Article 30 begin with the phrase ' unless otherwise provided' which give the discretion to the judges to apply their minds which concepts are included and which concepts are excluded while dealing with Article 30 for the individual criminal responsibility for the violations of international humanitarian law.

9.1.2. Anatomy of Article 30 of the Rome Statute:

Article 30 of the Rome Statute provides that:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court only if the material elements are committed with intent and knowledge.
2. For the purpose of this article, a person has intent where
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purpose of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly. Article 30 of the Rome Statute discussed as follow.

9.2. Meaning of 'intent' under Article 30 ICC Statute

Article 30 deals with the same line of argument as of the Latin maxim of 'actus non facit reum nisi sit rea' it goes further, by arguing that the mental element of the article consists of two ingredients namely, volitional element of intent and cognitive element of knowledge which insist on the basis of the developments by the ad hoc tribunals on the issue of mens rea under their jurisprudence which needed both the elements of cognitive and volitional to be established as a legal standard and proven for imposing criminal responsibility for serious violations of international humanitarian law (Badar, 2008). However, to hold an individual criminally responsible for the commission of any crime listed under the Rome Statute or under the jurisdiction of the ICC it must be proven and established that the material elements were committed with intent and knowledge which is provided by Article 30 (1) (Badar, 2010).

Whereas, the ICC Statute did not provide for the definition of the actus reus or the material element of the crime which leaves the door open for interpretation to be adopted in different circumstances in due course of time to be understood from the phrase 'material elements' appears in Article 30 (1) meanwhile, this deficiency is remedied by subsequent paragraphs of the same Article under paragraphs (2) and (3) while establishing the relationship between the two mental elements and material elements of an offence by referring to as conduct, consequence and circumstance (Badar, 2008). However, the term 'intent' has two broad meanings under Article 30 of the Statute whether it relates to conduct or consequence therefore, Article 30 (2) (a) a person has intent in relation to conduct where 'the person means to engage in that conduct' while Article 30 (2) (b) where in relation to consequence, a person is said to have intent if ' that person means to cause that consequence' or ' is aware that it will occur in the ordinary course of events (Elewa Badar, 2009).

9.3. The intent in relation to conduct (in the first degree):

According to Article 30 (2) (a) of the ICC Statute, a person is said to have the intention relates to a conduct when that person means to engage in that conduct; hence, this definition has two different aspects, first, the relationship between the conduct and intent set out in article while common lawyers called it 'volitional element' or 'volitional' part of an 'act' means the action has taken place with deliberately and voluntary action on the part of the perpetrator (Badar, 2008).

Whereas, this kind of intent is known as 'intentionally,' 'purposefully,' 'direct intent or dolus directus) in common law systems such as the United States of America and Germany respectively (Elewa Badar, 2009). Second, intent

with regard to conduct, there are different contradictory viewpoints for the inclusion of 'omission' within the ambit of conduct in the drafting history of Rome Statute therefore, the preparatory committee of 1996 included the word 'omission' within the heading of 'Actus reus' as 'act and/or omission' and the same is defined under Article 28 of the preparatory committee which provides that term 'conduct' defined as ' constitute either act or an omission, or a combination thereof' which faced a disagreement on the part of the members and finally reject its inclusion within the article and suggest that the doors of interpretation should be left open to the future courts in due circumstance to constitute its meaning (Badar, 2008).

9.4. The intent in relation to conduct (Oblique intent) or (direct intent in the second degree):

According to Article 30 (2) (b) of the ICC Statute which provides for the second alternative of the intent with regard to consequence element, in such a case, the perpetrator did not intent the contemplated or resulted in conduct to happen but the perpetrator foresees as a certainty or as highly probable that certain circumstances will occur due to his/her conduct (Finnin, 2012), in another language, while the perpetrator does not intend the prescribed conduct to happen, but he has the knowledge and awareness that such result or consequence will occur in the ordinary course of events (Badar, 2010).

For example, P wishes to kill V by bombing the building in which V is located. P is aware that there are other individuals in the building, and that they will almost certainly be killed as well. While P does not want these other individuals to be killed, he nevertheless bombs the building. Both V and the number of other individuals are killed in the blast (Finnin, 2012). Furthermore, M.E.Badar further goes and gives a judgment of a Canadian case of *Regina v. Buzzanga and Durocher* by Ontario court of Appeal focusing on the notion of 'foresight of certainty' as the second alternative of intent: "as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intents that consequence. The actor's foresight of the certainty or moral certainty of the consequence resulting from his conduct compels a conclusion that if he, none the less, acted to produce it, then he decided to bring it about (albeit regretfully) to achieve his ultimate purpose. His intention encompasses the means as well as to his ultimate objective (Badar, 2012)."

9.5. Dolus Eventualis, Recklessness and Article 30:

The ad hoc tribunals have recognized other degrees of the culpable mental element along with the direct intent of the first degree and indirect intent of second degree by going further and ensuring that volitional element of crimes also encompasses the other aspects of dolus such as dolus eventualis (Badar, 2010). Furthermore, the Pre-Trial Chamber in Lubanga case insisted that that dolus eventualis is applicable in situations where the perpetrator (a) is aware and have the knowledge about the resulted risk of his action or omission , and (b) undertakes and accepts the outcome by reconciling himself with it or consenting to the result by carrying out the act (Badar, 2008).

On the other hand, the Chamber emphasized in the same case on the situations where the mental status and mental element of the suspect is 'falls short of accepting that the objective elements of the crime may result from his actions or omission' means the suspect thought of impossibility or non-probability of the resulted risk will not qualify under Article 30 of the Statute. However, the Pre-Trial Chamber excludes the recklessness from the realm of Article 30 by stating: "the concept of recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result.

In so far as recklessness does not require the suspect to reconcile himself or herself with the causation of the objective elements of the crime as a result of his or her actions or omissions, it is not part of the concept of intention." on the other hand, Antonio Casses advocates the necessity of including the [intent and knowledge within article 30], while he criticized the exclusion of recklessness from ambit of article 30 therefore, he claims that the intention and knowledge is presuppose to be established before imposing criminal liability of an individual for serious and heinous crime such as genocide, crime against humanity and aggression where the gravity of the

crime is extreme but for less serious crimes such as war crimes , recklessness must be reconsidered and allowed to include within article 30 of the Statute (Badar, 2008).

9.6. The Meaning of Knowledge:

Article 30(3) of the Rome Statute explains the term 'knowledge' on the part of the perpetrator while committing the crime. This article describes two aspects of knowledge firstly, knowledge concerning a circumstance if he or she has 'awareness that it exists and secondly knowledge with respect to a consequence if he or she has 'awareness that… it will occur in the ordinary course of events (Finnin, 2012) describes as follow.

i. 'Awareness that a circumstance exists.'

Generally, if the perpetrator intends for a certain circumstance to exists at the time he carries out the crime then he only hope it exists or will exist because the knowledge according to circumstance element arises in various situations in various aspects due to the definition of the crime it produces or results in the crime where the conduct forms part of the definition of the crime (Badar, 2008) , for example, requirement of knowledge of the widespread or systematic attack directed against any civilian population as provided for in the chapeau element of article 7 (International Criminal Court, 1998, art. 7).

Therefore, the language of article 30 clearly expresses that 'knowingly' should be referred and looked from the perpetrator's subjective state of mind and not from a reasonable person's state of mind (Badar, 2008). In addition, knowledge under the article means 'the actual knowledge' and not the 'constructive knowledge' its immaterial how much certainty or high probability of the knowledge it may not pass the culpability test under article 30(3) meanwhile, a question can be ask here that, whether the doctrine of 'willful blindness' or 'willfully shutting one's eyes to the obvious' could be able to fulfill the mens rea threshold under article 30(3) of the Statute?.

The answer could be in affirmative if the doctrine applies only in the situation where the perpetrator is substantially believed or virtually certain that the fact exists. Furthermore, according to Glanville Williams describing the 'willful blindness' stating, "A court can properly find willful blindness only where it can almost be said that the defendant knew. He suspected that fact; he realized its probability, but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This and this alone is willful blindness. Hence, Sarah Finnin cites Williams and advocates that article 30 could be interpreted in such a way in cases that the perpetrator knows and realizes the high probability and certainty of the circumstance exist but intentionally and purposefully refrained and restrained him from obtaining the confirmation as he or she wanted to be able to deny knowledge (Finnin, 2012).

10. Conclusion

The doctrine of Joint Criminal Enterprise is a discretionary tool in the hands of Judges of the ad hoc Tribunal for imposing the individual criminal liability to members of the groups for the perpetration of the crime they commit jointly. However, there is no specific provision in the previous Statutes or Charters of Criminal courts for the joint criminal liability. The Nuremberg Trials were the first trials emerged in response to collective criminality. The Statutes of ICTY and ICTR did not expressly provide for joint criminal liability in their Statutes though it provides for individual criminal liability. Notwithstanding, they provide for the criminal responsibility in other forms of commission such as planning, instigating, executing, assisting, aiding or abetting but not explicitly talks about joint criminal liability until and unless the Rome Statute comes into existence which provides a comprehensive provision under Article 25(3) for individual Criminal Responsibility which also includes the Joint Criminal Enterprise within this Article.

Moreover, Dusko Tadic was the first defendant who tried by the ICTY under the doctrine of JCE. The Appeals Chamber in the instant case divides the doctrine into three types based on their mental element while the physical element (actus reus) is the same for all the types. Namely, the basic form, systemic form, and extended form. However, the long debate regarding the validity and legality of the JCE doctrine has come to an end by establishing the International Criminal Court (ICC) which provides a comprehensive provision under Article 25 of the Rome Statute where the JCE expressly include in the provision.

Therefore, JCE doctrine is more suitable for the group criminality where there is no one perpetrator, but several members are participating for its commission. Mainly JCE III could help the court for determining the individual criminal responsibility of every individual in the group on the ground of it's natural and foreseeable; nevertheless, they have a direct or indirect connection with the commission of the resulted crime. Though there are challenges while relying on JCE but some scrutiny is required regarding mental element specifically for the special intent crimes. Hence, the doctrine of JCE is rejected in a number of cases to be applied for the crimes of genocide on the basis of lack of specific intent to destroy or commit the crime of genocide.it would not be legal to convict everyone under one heading for the crimes of genocide.

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Collection of Value Added Tax on Online Transportation Services in Indonesia: A Literature Review

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Abstract
The enormous growth of the digital economy has given tax authorities everywhere, including Indonesia, both opportunities and difficulties. An important aspect of the transportation environment is now online platforms that use digital applications to link drivers and passengers. The Value Added Tax (VAT) collection on Indonesian online transportation services is thus the subject of this literature review. This paper summarizes the body of knowledge regarding the implementation and difficulties of collecting VAT on these services in Indonesia, including academic literature, legal frameworks, and policy discussions. The review also looks at the potential ambiguities in the implementation of VAT, the legal basis for its imposition, and comparisons with the VAT treatment in other traditional transportation and digital services sectors. In order to give a thorough grasp of Indonesia's online transportation VAT collection, this review will synthesize existing knowledge, identify research and policy gaps, and recommend possible areas for further study and regulatory improvement. In the end, this work advances knowledge of the financial effects of the digital economy in Indonesia, particularly with regard to the changing online transportation scene.

Keywords: Digital Economy, Indonesia, Online Transportation, Value-Added Tax

1. Introduction

Land transportation is a business sector that is currently growing. The increase in the number of motorized vehicles in Indonesia evidences this. According to the Central Statistics Agency (BPS), the number of motorized vehicles in Indonesia reached 136.32 million units in 2020. This includes 115.29 million motorcycles, 15.8 million passenger cars, 5.01 million trucks, and 233,420 buses (Katadata, 2021). This total has increased by 14.39 million motorized vehicles compared to 2015 (Katadata, 2017). In addition to the growth in the number of vehicles, the choices for land transportation services are also increasingly diverse, ranging from buses, city transportation, microlets, travel services, and taxis to motorcycle taxis (ojek).

Over time, the development of the internet has driven a transformation related to how humans interact with each other, carry out daily activities, including in the field of land transportation services. In 2019, the number of internet

users worldwide was 3.97 billion people. This means that more than half of the world's population is now connected to the internet (Johnson, 2021).

The way that business is conducted in Indonesia has evolved as a result of technological advancements and the use of online transportation systems, for instance, Grab, Gojek, and Uber. In addition to being a result of the advancement of information technology, online transportation emerged as a result of consumer desire for a rapid, simple, and useful service. Furthermore, online transportation methods offer lower cost, convenience, flexibility and guaranteed security (Endang, 2017; Tuasalamony, 2020). People can choose from a greater range of services with different quality and quantity according to their preferences. On the one hand, the internet's impact on customers as a result of the information technology revolution has altered their behaviour, making them more picky and critical about the things they choose. The range of transportation service modes is now more accessible to consumers. For instance, a group of four individuals would find it easier to use an online taxi to order transportation to move from one place to another.

The result of this rapid technological development is the emergence of various new types of transactions facilitated by technology. One form of new transaction that has emerged is the online transaction of goods and services. Specifically for online service transactions, a common example in people's daily lives is ordering online transportation services using applications.

Online transportation or ride-hailing services are a new travel option that allows passengers to request a car or motorcycle ride on demand from driver-partners using a smartphone application (such as Gojek, Grab, and Maxim) (Rayle et al., 2016). With this technology, the waiting time for potential passengers can be reduced compared to using conventional taxis or ojek (Feng et al., 2017). The initiative to create online transportation applications in Indonesia began with Gojek in 2011. Then, in 2014, Grab and Uber began entering the Indonesian market and increased the popularity of online transportation applications since 2015 (Prabowo, 2018).

As of June 2020, 170 million users had downloaded the Gojek application, and the Grab application had been downloaded by 187 million users (Eka, 2020). Of these downloads, 90% came from Indonesia for Gojek and 66% from Grab. The large number of users of both applications shows that the public accepts these applications because they offer a convenience that has never existed before.

Nevertheless, behind all the convenience offered, the taxation issues arising from the operation of online transportation services need to be examined. Basically, all transactions in the service sector are taxable services (Jasa Kena Pajak - JKP), except for those not included as JKP based on the VAT Law. To date, land transportation services for public interest are one type of service that is exempt from VAT based on the Minister of Finance Regulation Number 80/PMK.03/2012 concerning Public Land Transportation Services and Public Water Transportation Services Not Subject to VAT. The determination of whether a land transportation service is in public interest is made by checking the motor vehicle registration plate (TNKB). Only vehicles with yellow TNKB and black writing receive VAT exemption facilities. Thus, business actors in the field of land transportation services for public interest are not allowed to collect VAT. This aims to protect the purchasing power of land transportation service consumers and drive the economy.

The emergence of the online transportation service application business model blurs who is obligated to pay taxes. This is because the role of the application company is only as a liaison between customers and driver-partners. This business model obscures the boundary between being a technology company and a transportation service company. If treated the same as taxi companies, application-owning companies do not meet the requirements of transportation service companies that have existed so far. However, application-owning companies actually provide services through their operations in Indonesia. Therefore, the Government, through the Directorate General of Taxes, also feels entitled to obtain tax revenue from these online transportation service application companies (Sukmawijaya, 2017).

Until now, there is no legal umbrella that forms the basis for VAT collection on online transportation services, but there has been a plan to implement collection since 2017. This plan emerged after the Ministry of Transportation

issued Minister of Transportation Regulation Number 32 of 2016 concerning the Implementation of Public Passenger Transportation with Public Motor Vehicles Not in Routes. After the issuance of this regulation, the Ministry of Transportation and the Ministry of Finance held a meeting to discuss issues related to online transportation services (Sukmawijaya, 2017). The result of this meeting was the statement by the Minister of Finance, Sri Mulyani: "*The signal is that the government will create a level playing field. So, if between online and conventional businesses, the treatment regarding taxation is also the same*."

Based on this statement, there is already a plan to provide the same treatment for businesses conducted online and conventionally, especially regarding taxation, including VAT. For comparison, the government has currently issued the Regulation of the Minister of Finance of the Republic of Indonesia Number 48/PMK.03/2020 as the legal basis for collecting VAT on trade through electronic systems. The primary targets of this regulation are application companies that sell products via marketplaces and streaming services for music and video. This regulation states that there is currently no regulation governing the use of VAT collection for online transportation services.

This study has three primary goals. A thorough grasp of Indonesia's online transportation VAT collection is the primary goal of this study. The second is determining any gaps in VAT policy that currently exist in the context of online transportation. Last but not least, this paper provides a conceptual framework to help future investigations and regulatory refinement.

2. Research Method

2.1 Literature Synthesis Analysis

Problem identification, research objectives, and research question formulation are the first steps of the study. In order to guarantee that everyone understands the terminology used in this study, concepts must be defined. A literature review will next be conducted in order to develop the research. A literature review's main goal is to provide a thorough overview of value-added tax research and online transportation. The literature review also helps to clarify the rational relationship between earlier and current research. Journal articles, research papers, and books make up the study's literature. The reviewed literature will be analyzed to extract research findings. The research findings will ultimately be used to conclude. There are also suggestions for additional research.

3. Results and Discussions

In the literature review, the qualitative analysis of the resulting papers has been arranged into three columns: author and year of publication, article objective, and findings. The research on the application of VAT in Indonesia is described in Table 1. In the context of online transactions, this aids in exposing Indonesian VAT policy gaps.

Table 1: Results of Literature Review

Author	Objectives	Findings
Zebua & Setiawan (2024)	Examines policies on online transportation and conventional public transport.	• More lenient and accommodating rules regarding online travel as opposed to traditional modes of transportation
Aulia et al (2025)	Investigate how Indonesia's governmental revenue and social welfare are affected by the 12% VAT hike.	• The VAT increase mostly affects secondary and tertiary goods, while basic commodities remain unaffected, causing the Consumer Price Index (CPI) to increase by 0.8 to 1 percent. • It is crucial that the government establish efficient monitoring systems and provide targeted subsidies and direct aid.
Wahyudi & Wijaya (2021)	Ascertain how an application company handles	• Drivers and partners who use the application services offered by online motorcycle taxi companies are subject to value-added tax.

Author	Objectives	Findings
	value-added tax and the relevant tax laws.	• Since there is already a contract between the two parties, online motorcycle taxi operators' transaction submission of applications does not meet the requirements for being a retail entrepreneur. • Regardless of whether the application user has an NPWP or not, online motorcycle taxi providers should create a tax invoice for each of these submissions in accordance with taxation regulations.
Tausalamony et al (2020)	Ascertain how well online transportation company taxpayers comply with their tax-related duties at the West Makassar Primary Tax Office (KPP).	• The Primary Tax Office (KPP) of West Makassar works to reduce the challenges that arise by educating people about taxes, either directly or through social media or online, as not all online transportation partners or drivers are aware of the tax reporting requirements. • There are no particular rules governing the classification of internet transportation businesses, and it is challenging to determine whether taxpayers operating these businesses are in accordance with tax laws.
Siregar & Harahap (2020)	To examine how Value Added Tax is handled in online sales.	• Tax losses resulting from the current VAT imposition on e-commerce transactions cannot be appropriately used, and not all businesses impose VAT on the consumer. • When online firms use VAT in their operations, the DGT should legally establish rights and obligations. If they don't charge VAT to the buyer, the DGT should impose strict penalties on them.
Fang & Ma (2024)	Evaluates the impact of EU VAT reform on cross-border e-commerce	• Although online tax compliance has increased as a result of the EU reform, it has negatively affected consumers to a great extent.
Asante et al (2024)	Examining the nature and results of the E-levy tax bargaining process, public views the engagement process, encapsulating the character of citizen-state relations as expressed in public opinions regarding government responsiveness throughout the E-levy dispute.	• People are actively using a number of tactics to evade paying taxes, such as switching back to cash and lowering the amount and frequency of transactions, in light of the poor tax morale. The administration made the situation worse by "loosening the safety net" and "tightening the tax net" during a period when the nation was experiencing an economic crisis and was still dealing with the effects of the COVID-19 pandemic.
Santoso & Julia (2021)	Analyse the use of an electronic system for VAT collection on trade in an attempt to boost tax revenue at the Bekasi Utara Primary Tax Office, based on an examination of the implementation, the challenges encountered, and the measures taken to overcome these challenges	• KPP Pratama Bekasi Utara's implementation of VAT on Trading Through Electronic Systems in an Effort to Increase Tax Revenue has not been carried out as effectively as it could be, since not all PMSE business players are aware of and follow the rules pertaining to VAT collection on PMSE transactions.
Fathur et al (2020)	Examine how the Value Added Tax (VAT) policy	• The presence of e-commerce and VAT policies had a positive and significant impact on consumer behavior because, according to students in the

Author	Objectives	Findings
	and e-commerce affect consumer behavior.	Faculty of Economics and Business, e-commerce made it easier to purchase the goods they wanted, and students were more likely to trust e-commerce sites if they were given clear information about the imposition of VAT and believed that the policy did not negatively impact their desire to purchase the product.
Moossdorff (2024)	Examine how digital platforms are used to collect VAT on services in a few of the most important Middle Eastern nations.	• Operators of digital platforms and service providers should evaluate their stance, decide who is responsible for accounting for VAT, and adjust the arrangements as needed to support or modify their stance. • Digital platforms operating in the Middle East must constantly monitor and assess changes in domestic legislation pertaining to platform responsibility, given the continuing examination of VAT regulations worldwide.
Elisabeth (2023)	Determine whether Ministry of Finance Regulation No. 60/PMK.03/2022 satisfies international standards by using the Regulatory Impact Assessment included in the Organization for Economic Co-operation and Development's recommendations.	• Through tariff adjustments and the implementation of multi-tariff VAT, PMK 48/2020 and PMK 60/2022 were passed in an effort to help lower the state budget deficit.
Rivaldi (2021)	Determine and summarize the issues of taxes on the digital economy, the types of digital service items, and their pressing importance for Indonesia.	• Big-Tech businesses' home base will differ due to the appropriate authorities' lack of alignment. • The current international tax system is no longer regarded as being applicable. • Expanding the international tax regime to levy taxes on foreign digital enterprises that do not have a physical presence but have a major economic presence in destination countries should be made possible by the growth of digital commerce.
Sari (2022)	Analyze the potential increase in VAT revenue of 2023 and the strategies implemented by the government in respond to the vast digital economy shifting.	• The digital tax, which was introduced in mid-July 2020, has gradually increased until 2022, despite the PMSE VAT performance being negligible in comparison to other VAT deposits. • Many significant overseas corporations have been appointed PMSE VAT collectors as a result of the expansion of tax items that have not yet been touched.
Sumilat et al. (2025)	Explore the process of imposing VAT on digital goods transactions.	• With a VAT rate of 11%, the VAT PMSE mechanism, which is used to impose VAT on digital transactions, is applied to all digital transactions. Since digital commodities are intangible and subject to a single tariff system, there is no particular classification for transactions involving them. • The VAT collectors are obligated to remit the VAT on transactions involving digital goods by the end of the subsequent month, together with the accompanying paperwork. • Since the majority of businesses are foreign, the VAT reporting for transactions involving digital

Author	Objectives	Findings
		goods is completed on a quarterly basis. This strategy guarantees that these businesses conveniently and methodically report VAT each quarter.
Lembang (2021)	Study the regulations governing the imposition of VAT on digital products that are smartphone applications, as well as the efficacy of applying VAT rates to users of smartphone applications in relation to the progressive legal paradigm and the theory put forth by Lawrence M. Friedman and Roscoe Pound.	• VAT on smartphone applications can be used to boost state revenue and establish equity for all business actors—conventional and digital—it is deemed effective.

The suggested framework is displayed below to illustrate the anticipated relationship between the variables. Figure 1 depicts a flow starting with Online Transportation Service Transaction and Taxable Service leading to Value-Added Tax, which is then linked to Law No. 8 Year 1983 in conjunction with Law No. 7 Year 2021 and subsequently influences VAT Collection on Taxable Service via Article 4, Article 4A paragraph (2) and (3), Article 7.

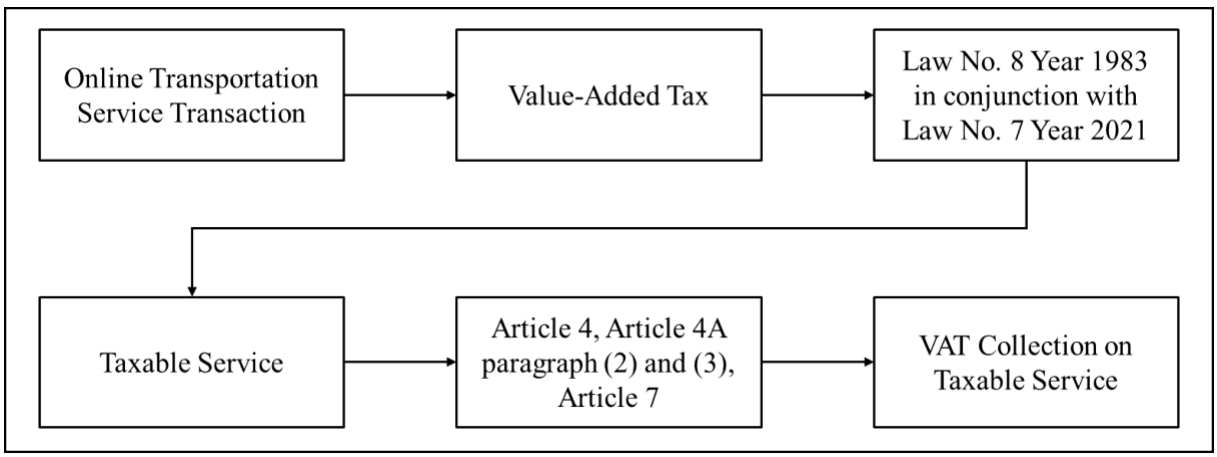

Figure 1: Conceptual Framework

Three main gaps are identified. First, the flowchart begins with "Online Transportation Service Transaction" as a specific case. Sari (2022) and Zebua & Setiawan (2024) highlighted differences in regulations between online and conventional transport. To ensure the same playing field between offline and online transaction landscapes, it is worth exploring the VAT treatment and other tax policies that contribute to or mitigate competitive imbalances between online and traditional service providers.

In addition, to analyze about VAT law, Law No.8 Year 1983, in accordance with Law No. 7 Year 2021 is used. It's intriguing to look into how effectively this legal framework handles VAT on digital services, such as online transportation, which is a subset of taxable services. Furthermore, studies can confirm whether Indonesia's VAT regulations adhere to global standards. To determine whether it adopts or departs from global best practices for taxing the digital economy, future research can present additional analysis that goes beyond the domestic legal framework.

Third, we need to research the government's strategy in relation to "VAT Collection on Taxable Service". This is to guarantee efficient VAT collection, especially when it comes to online services. The Indonesian government has already established a VAT regulation for electronic service providers (PMSEs), but the regulation does not yet

specify a specific classification for transactions involving them, according to Sari (2022) and Sumilat et al. (2025). For example, even though the law establishes the framework for VAT collection, it is still unclear how the government will oversee and implement this for digital services like online transportation.

4. Conclusions

This article concludes by providing a thorough understanding of Value Added Tax (VAT) collection in Indonesia's quickly expanding online transportation industry. It demonstrates how important this industry is to the larger digital economy and focuses on the unique business model of online motorcycle taxis, where providing application services to driver partners becomes a crucial factor for VAT calculations. Through a review of the literature, the study finds preliminary information about how VAT is applied in online transactions and the unique context of online transportation, highlighting areas where existing policies might be lacking or need clarification.

In addition, the paper effectively identifies the current VAT policy's shortcomings with regard to online travel. The literature review identifies issues with applying current VAT laws intended for traditional services to digital platforms, the disparities in how online and conventional transportation are treated by the government, and the practical challenges of guaranteeing efficient VAT collection from digital service providers. A more detailed and specialized regulatory framework that is adapted to the particularities of the online transportation sector is required, as these gaps have highlighted.

Lastly, this paper offers a conceptual framework that serves as a foundation for understanding the relationship between taxable services, VAT, online transportation service transactions, and the pertinent legal basis. Future research into the nuances of VAT collection in this field can be guided by this framework, which is a useful tool. The article's concise description of the main factors and their possible relationships opens the door for more in-depth investigation and possible regulatory improvement to maximize VAT collection and guarantee fair competition in Indonesia's changing transportation environment.

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Timeless Councils: Indigenous Assemblies from the Hindu Kush to the Globe

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Abstract
Afghanistan has long been mapped and (re)mapped in international relations through the lenses of strategic interests, and geopolitical complexity. However, these narratives often overlook Afghanistan's rich indigenous political traditions and lived experiences, which have contributed to governance and dispute resolution for centuries. Among these, the Loya Jirga, or Grand Assembly, stands out as a unique and enduring institution rooted in consultation, consensus-building, and collective participation. This work examines the historical significance of the Loya Jirga, its adaptability across political contexts, and its relevance when compared to traditional governance mechanisms in other societies. Through a scholarly lens, this commentary aims to contribute to broader academic conversations on indigenous political systems and their place in understanding governance in diverse settings.

Keywords: Loya Jirga, Geopolitics and Indigenous Governance, Afghanistan Politics, International Relations, Afghan Epistemologies

1. Beyond Conflict: Rethinking Afghanistan's Political Identity

The important conundrum that needs to be addressed— and warrants deep exploration—is the fact that for centuries, Afghanistan has been approached, remembered, and speculated upon through the lens of state-centric geopolitics and conflict (Gregory; 2004; Chaturvedi, 2017). However, beneath this narrative lies a rich tradition of governance that has significantly shaped Afghan society for generations (Ghobar, 2001l; Dupree, 1980). One of the most profound and overlooked contributions Afghanistan offers to global political thought and theories of international relations is the Loya Jirga—a traditional grand assembly used for decision-making and dispute resolution (Robin, 2012; Hazara, 2012). While such a geopolitical narrative may hold relevance in the field of international relations, it has often overshadowed and overlooked the visibility of this indigenous system that could provide valuable insights into global diplomacy and governance (Chaturvedi, 2017).

There is a growing academic need to (re)locate Afghan knowledge(s), narratives, political experiences, and indigenous governance within the field of international relations (Manchanda, 2020). Afghanistan should not be seen solely through the prism of geopolitical strategy.

However, it is important to engage with its rich histories of thought and resilience– site of knowledge. Engaging with Afghan epistemologies opens spaces for a more inclusive and pluralistic understanding of global governance (Chaturvedi & Painter, 2007; Chaturvedi, 2017) (See Tuathail, 1989; 1996; 1999. Agnew and Corbridge, 1996; Agnew, 1998; Agnew, 2010; Agnew, 2013; Dalby, 2010).

International Relations (IR) as a discipline has been mainly shaped by Western theoretical frameworks (Acharya & Buzan 2019; Acharya, 2016; 2017). From realism to liberal institutionalism, these paradigms emerged from European historical geopolitical experiences and spatial imaginaries (Kang, 2003; Safi, Momand & Safi, 2025). When these theories, while analytically influential, are applied to contexts like Afghanistan, they fall short of explaining the country's political resilience and adaptability. As a result, Afghanistan has been frequently approached as a strategic location in global politics, often bypassing the depth of its political traditions (Rashid, 2008; Jalali, 2017). This oversight has had real-world consequences. Time and again, efforts to establish an external governance model in Afghanistan have struggled to achieve credibility because they did not fully account for localized governance traditions that are deeply embedded in Afghan society (Saikal, 2004).

2. What is the Loya Jirga?

The Loya Jirga (translated as 'Grand Assembly') is a centuries-old Afghan tradition used for making important political and national decisions. It brings together tribal elders, scholars, politicians, and local representatives to debate and decide on critical matters. Unlike rigid procedural frameworks, the Loya Jirga is built on consensus, deliberation, and negotiation, making it uniquely suited for a country as ethnically and politically diverse as Afghanistan (Barfield, 2010).

Historically, the Loya Jirga has been instrumental in shaping Afghan politics.

- 1747: It selected Ahman Shah Durrani as Afghanistan's first king, making the foundation of modern Afghanistan (Gregorian, 1969).
- 1923: It ratified constitutional reforms.
- 1941: It decided Afghanistan's stance to stay neutral in World War II.
- 1964: It established a constitutional monarchy.
- 1977: It approved a new constitution.
- 2001-2002: It helped guide the formation of an interim government (Rubin, 2002).
- 2019: It played a role in discussions about peace talks.

3. Where the Loya Jirga is Relevant Today

As a traditional mechanism for decision-making, the Loya Jirga continues to be a vital institution. It is relevant even today, reflecting Afghanistan's unique approach to governance. Given its historical significance, the Loya Jirga provides a culturally resonant framework that has the potential to foster dialogue, strengthen unity, and support efforts toward stability. It is worth acknowledging that while no governance model is without limitations, mechanisms like the Loya Jirga are deeply embedded in Afghan society and offer a means of addressing political questions through inclusive consultation.

Beyond Afghanistan, similar traditional governance models have been effective in other regions facing political crises. In Somalia, traditional clan-based governance structures have been instrumental in resolving disputes where modern state institutions have failed (Menkhaus, 2006). Similarly, in South Sudan and Iraq, tribal councils and the Majlis system have been instrumental in facilitating peace agreements and contributing to the post-war reconciliation process. Moreover, the Ujamaa system of collective decision-making in Tanzania merits attention, as it represents a governance model that promotes self-reliance, local autonomy, and social equality alongside community-driven governance and collective decision-making (Odoom & Andrews, 2017; Hyden, 1980). The Loya Jirga offers a comparable model that could be adapted in post-conflict scenarios worldwide.

Hence, in this context, the world should pay attention to Afghanistan's experience with the Loya Jirga. It offers three significant lessons for global governance:

1. **Consensus-Based Decision-Making Works** – Unlike adversarial electoral politics, which often leads to polarization, the Loya Jirga fosters dialogue, cooperation, and compromise.
2. **Cultural Context Matters** – Recognizing and incorporating indigenous governance models can lead to more sustainable political systems. In addition, governance models that align with local traditions and societal structures tend to gain greater credibility and durability as well.
3. **Lessons for Conflict Resolution** – The Loya Jirga has been used to mediate disputes within Afghanistan for centuries. Its principles could be adapted to mediate conflicts in other regions.

4. A Call to Recognize Afghanistan's Intellectual Contribution

For centuries, Afghanistan has been subjected to a reductionist and excessive geopolitical narrative. This narrative has surpassed its rich history, local narratives, and discourses, resulting in repeated difficulties in implementing externally designed political systems due to eclipsing local and indigenous political systems (Odoom, & Andrews 2017; Saikal, 2004). The Loya Jirga is not merely a customary Afghan institution; it represents a deeply embedded governance model rooted in centuries of deliberation, consensus-building, and negotiated political adaptation.

In a time when global governance is searching for more inclusive and pluralistic understandings of governance. The Loya Jirga presents a compelling case, illustrating that governing frameworks should originate from inside communities, rooted in their unique traditions, political cultures, and lived experiences. It encourages everyone to rethink that foreign policy think tanks cannot develop sustainable governance models without considering historical and cultural contexts and configurations. They must originate from within society, adjusting to and incorporating their social-political environments. Attempts to impose foreign frameworks—whether in Afghanistan or elsewhere—have repeatedly faltered because they fail to recognize the deep-rooted political traditions that sustain communities. The Loya Jirga proves to be more effective in settling disputes and influencing national decisions. Therefore, Afghanistan could benefit from institutionalizing the Loya Jirga or creating a model that blends local traditions with modern governance.

As some scholars have pointed out in the context of other regions, many places have been treated as mere "strategic buffers" rather than acknowledged for their governance traditions (Hopkirk, 1992). Rather than seeing Afghanistan solely as a strategic space, scholars and policymakers should recognize it as a society with its enduring political mechanism. Instead of offering prescriptive solutions, this discussion aims to contribute to academic reflections on the importance of recognizing diverse political traditions when studying governance. Afghanistan’s governance traditions provide valuable insights for rethinking how governance is conceptualized and practiced in diverse cultural contexts (Manchana, 2020). In doing so, the global community may find alternative pathways for promoting peace and sustainable political systems.

Consequently, the Loya Jirga as an institution extends beyond the confines of Afghanistan. It represents a significant contribution to the realms of intellectual discourse and political frameworks within the context of global governance. Afghanistan’s traditions provide profound insights: prioritizing dialogue over division, establishing the pursuit of legitimacy through active participation, and a vision of governance that emerges organically rather than being externally imposed. The global community would benefit from heeding this perspective.

5. Conclusion

This analysis has examined the historical and comparative importance of the Loya Jirga as a native political institution in Afghanistan. The Loya Jirga has been positioned within a wider global framework of traditional governance models that prioritize consensus, local autonomy, and active community involvement.

This discourse seeks to enrich scholarly contemplation regarding the significance of acknowledging varied political traditions in the study of governance, especially within societies characterized by intricate social

structures and histories marked by conflict. As interest expands in more inclusive and pluralistic interpretations of governance, institutions such as the Loya Jirga offer significant insights into the ways local communities structure political life, resolve conflicts, and uphold social cohesion through culturally resonant practices.

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