BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S REPLY TO THE CO-PROSECUTORS' RESPONSE TO IENG SARY, IENG THIRITH AND KHIEU SAMPHAN'S APPEALS ON JOINT CRIMINAL ENTERPRISE

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby replies,[1] to the Co-Prosecutors' Joint Response to IENG Sary, IENG Thirith and KHIEU Samphan's Appeals on Joint Criminal Enterprise ("Response").[2] This Reply will address the issues raised in the Response following the order in which they have been raised by the Office of the Co-Prosecutors ("OCP"). Essentially, the Defence submits that the OCP in its Response fails to provide either cogent reasoning or relevant legal authority to support its assertions that the OCIJ did not issue an order under Rule 55(10), that the Appeal is inadmissible under Rules 55(10), or 74(3)(a) or (b), and that JCE as a form of liability is applicable before the ECCC.

I. INTRODUCTION

1. Paragraphs 1 to 3 of the Response simply introduce the arguments raised later in the Response. For this reason, they will not be dealt with separately here.

II. PRELIMINARY OBJECTIONS

2. Paragraph 4 simply introduces the arguments raised in the preliminary objections section. These will be dealt with separately below.

The JCE Order is an Order and hence Appealable

3. In paragraph 5, the OCP asserts that only an order can be appealed. The Defence agrees that orders may be appealed. The OCIJ issued an order; hence the appeal. The OCIJ held that IENG Sary's Motion Against the Application at the ECCC of the Mode of Liability Known as Joint Criminal Enterprise ("Defence Motion")[3] is a Request as it refers to it as "the Request."[4] Further, the OCIJ considered the Defence Motion under Rule 55(10) of the ECCC Internal Rules ("Rules").[5] Rule 55(10) solely deals with requests. Following a request, Rule 55(10) allows the OCIJ to make orders or undertake investigative action.[6] Indeed, the OCIJ has stated that "[g]iven the discretion of the parties to make requests, the Co-Investigating Judges have the corresponding discretion to determine the form of

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[1] *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ (PTC 35), Decision to Determine the Appeals on the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE) on Written Submissions and Direction for Reply, 9 March 2010, D97/14/11, ERN: 00482749-00482752. *See also Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ (PTC 35), IENG Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, ERN 00429213-00429253, D97/14/5, 22 January 2010 ("Appeal").

[2] *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ (PTC 35, 38 & 39), Co-Prosecutors' Joint Response to IENG Sary, IENG Thirith and KHIEU Samphan's Appeals on Joint Criminal Enterprise, 19 February 2010, D97/14/10, ERN: 00463937-00463971.

[3] *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Motion Against the Application at the ECCC of the Mode of Liability Known as Joint Criminal Enterprise, 28 July 2008, D97, ERN: 00208225-00208240

[4] *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, ERN: 00411047-00411056, p. 2 ("JCE Order").

[5] *Id.*, para. 8.

[6] Rule 55(10) states in part: "At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation." (emphasis added).

the response."[7] In the JCE Order, the Co-Investigating Judges have determined the form of the response to be an Order. The title reads: *Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise.*[8]

4. In paragraph 6, the OCP asserts that the JCE Order is "clearly not an 'order,'" but rather "declaration." The OCP provides no cogent reasons or legal authority as to why – despite the title of the JCE Order and the fact that the OCIJ deals with the Request under Rule 55(10) – it considers this Order to be a "declaration" rather than a properly issued (albeit ill-reasoned and ill-founded) order. While the Defence concedes that in its Motion it requested the OCIJ to declare that JCE as a form of liability is inapplicable before the ECCC,[9] it is axiomatic that it was requesting a legal finding, which, as the Rules permit would be issued in the form of an order. Indeed, the OCIJ did just that: in issuing the JCE Order, it conducted a legal analysis, having considered the arguments and submissions of the parties. Had the OCIJ wished to issue a "declaration" – assuming such an issuance is permissible under the applicable Rules and jurisprudence – it would have done so quite clearly and unequivocally. The JCE Order would have been titled JCE Declaration, with the content therein, presumably, reflecting at the very least some notion that the OCIJ was issuing a declaration.

The JCE Order is a jurisdictional issue of the ECCC and hence is appealable

5. In paragraph 7, the OCP asserts that even if the JCE Order is an Order, it is not appealable under Rule 74(3)(a). This assertion is illogical and unfounded. Rule 74(3)(a) states that Charged Persons may appeal against orders of the OCIJ confirming the jurisdiction of the ECCC. The jurisdiction of the ECCC is delimited by the Establishment Law, which, pursuant to the Agreement, sets out its jurisdiction.[10] JCE liability is not included in the Establishment Law, and therefore, jurisdictionally, cannot be applied at the ECCC. The OCP admittedly recognizes the challenge of the application of JCE as a form of liability to be a "jurisdictional challenge."[11] Thus, the Defence was well within its rights to appeal, pursuant to Rule 74(3)(a), the OCIJ's finding that the ECCC has jurisdiction to apply JCE as a form of liability to international crimes.
6. In paragraph 8, the OCP asserts that the JCE Order is only "declaring an existing norm" and the OCIJ is not undertaking any actions regarding JCE. The Defence submits, as it

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[7] JCE Order, para. 9.
[8] *Id.*, title (emphasis and italics added).
[9] Defence Motion, p. 15.
[10] Agreement, Art. 2(1).
[11] Response, para. 18; *Case of KAING Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Co-Prosecutor's Appeal of the Closing Order against KAING Guek Eav alias "Duch", 8 August 2008, D99/3/3, ERN: 00221998-00222027.

has argued in all its submissions concerning JCE, that as a form of liability, JCE is not an "existing norm" before the Cambodian legal system or the ECCC and is therefore inapplicable. As such, the Defence further submits that the OCIJ in the JCE Order erred in stating that JCE was applicable. While it remains to be seen (since the OCIJ has yet to issue its Closing Order) what actions the OCIJ will undertake concerning the application of JCE, the Defence submits that no actions should be undertaken unless and until this jurisdictional issue is resolved. If indeed JCE as a form of liability is inapplicable, then obviously it will impact the manner in which the OCIJ analyzes and synthesizes the evidence it gathered, deals with investigative requests, and more importantly, makes its ultimate findings of fact and conclusions of law.

7. In paragraph 9, the OCP attempts to limit the definition of jurisdiction under Rule 74(3)(a). Jurisdiction is not only limited to the standing of Mr. IENG Sary[12] but also extends to the applicable law, including forms of liability, before the ECCC. This is supported by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") Appeals Chamber in the *Tadić* case: "[Jurisdiction] is the power of a court to decide a matter in question and presupposes the existence of a duly constituted court with control over the subject matter and the parties."[13] JCE challenges before the *ad hoc* tribunals are jurisdictional challenges.[14] The OCP provides no cogent reasons as to why a JCE challenge would not constitute a jurisdictional challenge also before the ECCC.

The JCE Order can be appealed under Rule 74(3)(b)

8. In paragraphs 10 to 13, the OCP asserts that the Defence Motion is not a request for investigative action under Rule 55(5) and therefore cannot be appealed under Rule 74(3)(b). JCE is a form of liability raised in the Introductory Submission.[15] By considering the Defence Motion under Rule 55(10),[16] the OCIJ, through its JCE Order effectively concluded that the resolution of this jurisdictional issue was "necessary for the conduct of the investigation."[17] The determination as to whether JCE applies at the ECCC affects the entire conduct of the investigation, and subsequently, any requests for investigative action. Thus, it is self-evident as to why the OCIJ would treat (*proprio*

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[12] *Id.*, para. 9 gives the example of "the Pre-Trial Chamber entertain[ing] an appeal under Rule 74(3)(a) when IENG Sary challenged a detention order of the Co-Investigating Judges on the grounds that his previous conviction and the royal amnesty would bar any proceedings against him before this Court."

[13] *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 10, *citing* BLACK'S LAW DICTIONARY, 712 (6th ed. 1990).

[14] *See e.g.*, *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 190 ("*Tadić* Appeals Judgement"); *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006, para. 62.

[15] *See* Press Release, Statement of the Co-Prosecutors, 18 July 2007.

[16] JCE Order, para. 8.

[17] Rule 55(10).

motu, if necessary)[18] the Defence Motion as an investigative action. Hence, the Appeal is admissible under Rule 74(3)(b).

The JCE Order can be appealed directly under Rule 55(10)

9. In paragraph 12, the OCP raises decisions containing "principles" which the Pre-Trial Chamber uses to determine the admissibility of appeals. One of these so-called principles is that any appeal through Rule 55(10) cannot stand alone.[19] The Pre-Trial Chamber has not provided sufficiently specific reasons as to why an appeal through Rule 55(10) cannot stand alone.[20] Rule 55(10) states an order "shall be subject to appeal." In *Duch*, the Pre-Trial Chamber found that the OCIJ had not set out the material facts in sufficiently specific detail,[21] and subsequently made its own determinations. The Pre-Trial Chamber is not following its own reasoning in providing sufficient specificity in stating why an appeal through Rule 55(10) cannot stand alone. The Defence is thus compelled to make its own determinations and follow the literal meaning of Rule 55(10). Moreover, the OCP has failed to explain why this Appeal should not be allowed pursuant to Rule 55(10). By applying the literal meaning of Rule 55(10) – which the Defence submits is controlling – the JCE Order is subject to appeal directly under Rule 55(10).

The JCE Order violates the fair trial rights of Mr. IENG Sary and hence is appealable

10. In paragraph 14, the OCP correctly asserts that the Pre-Trial Chamber shall examine whether Rule 74(3) should be interpreted "broadly in order, pursuant to Rule 21, to ensure that proceedings are 'fair and expeditious.'"[22] Further, the Pre-Trial Chamber should interpret Rule 55(10) pursuant to Rule 21, since it protects Mr. IENG Sary's, as well as all other Charged Persons', fair trial rights. As such, the Pre-Trial Chamber should use its broad discretionary powers in finding admissible the Appeal, as the JCE Order violates Mr. IENG Sary's fair trial rights.
11. In paragraphs 15 and 17, the OCP asserts that the Pre-Trial Chamber will not violate the fair trial rights of the Charged Persons if it finds the Appeal inadmissible, since presently none of the Charged Persons have been indicted for a crime relying on a JCE form of

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[18] Rule 55(5)(d) states in part: "The Co-Investigating Judges may issue such orders as may be necessary to conduct the investigation..."

[19] *See Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ (PTC 26), Decision on Admissibility of the Appeal Against the Co-Investigating Judges' Order on use of statements which were or may have been Obtained by Torture, 18 December 2009, D130/9/21, ERN: 00416830-00416838 ("PTC Decision on Admissibility of Torture Appeal"), para. 19.

[20] *Id.*, para. 19.

[21] *See Case of KAING Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Appeal against the Closing Order Indicting KAING Guek Eav alias "Duch", 5 December 2008, D99/3/42, ERN: 00249846-00249887, paras. 56-58.

[22] Response, para. 14; PTC Decision on Admissibility of Torture Appeal, para. 25.

liability.[23] This argument is supported by the fallacy that JCE is applicable at the ECCC. This fallacy results in a false conclusion, despite the attractive appearance that the OCP's thinking process is sound. This sort of fallacy, known as *petitio principii* or *begging the question*, is aptly described by Aristotle: "That some reasoning are genuine, while others seem to be so but are not, is evident. This happens with arguments, as also elsewhere, through a certain likeness between the genuine and the sham."[24] Through the JCE Order, the OCIJ allows the application of a form of liability beyond the jurisdiction of the ECCC. This leaves the potential for an indictment to be based on a form of liability which the ECCC has no jurisdiction to apply. The OCP have already indicated its intention to apply JCE liability to the Charged Persons in Case 002.[25] Thus, the Appeal is not "academic" as the OCP asserts,[26] but applicable. The worst case scenario is a Charged Person being indicted entirely upon JCE liability. If the Appeal is deemed inadmissible and JCE is applied by the OCIJ – despite it being an impermissible form of liability – Mr. IENG Sary will have suffered an actual violation of his fair trial rights.

12. In paragraphs 16 and 17 the OCP asserts that the fair trial rights of the Charged Person will not be violated as they "will have a valid cause of action to bring a jurisdictional challenge before the Trial Chamber." While the Trial Chamber may have "the authority to change the legal characterization of the crimes," by that stage of the proceedings, it will have effectively deprived Mr. IENG Sary of the ability to seek the sort of protection and relief he is currently entitled to enjoy. This is especially applicable (as opposed to academic) concerning Mr. IENG Sary's right to have "adequate time for the preparation of his defence," as enshrined in Article 14(3)(b) of the International Covenant on Civil and Political Rights ("ICCPR"), which is incorporated explicitly in Article 13 of the Agreement.[27] Since at the Trial stage of proceedings the OCIJ will no longer be seized of the case[28] and the Defence has been warned against conducting its own investigation,[29] this would practicably (as opposed to academically) impact Mr. IENG Sary: he will not

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[23] Response, para. 15.

[24] Aristotle, *De Sophisticis Elenchis, available at* http://etext.virginia.edu/etcbin/toccer-new2?id=AriSoph.xml&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=1&division=div2.

[25] Response, para. 94 states in part: " [t]he rejection of JCE liability would discard a mode of liability which accurately reflects the conduct of the Appellants in respect of the mass atrocities of the Khmer Rouge."

[26] Response, para. 15.

[27] Agreement, Art. 13(1). This Article states in part: "The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process."

[28] *See* Rule 67.

[29] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order issuing warnings under Rule 38, 25 February 2010, D367, ERN: 00478513-00478519, para. 9.

have the facilities[30] to fully prepare his defence to the allegations laid in the indictment. Further, if the Pre-Trial Chamber does not rule upon the applicability of JCE at the ECCC, the scope of the charges will remain uncertain until the judgment in Case 002. This would affect the fair trial rights of Mr. IENG Sary in that he will not be properly informed of the scope of the charges against him until the end of the trial.

It is not procedurally economic to dismiss the Appeal

13. In paragraph 18, the OCP asserts that if the Pre-Trial Chamber entertains the Appeal which is followed by a Trial Chamber decision on the applicability of JCE, this "may lead to a multiplicity – even conflict – of decisions." This suggests that the OCP recognizes the uncertainty which surrounds JCE. Indeed, the OCP has significantly contributed to this uncertainty by raising the matter of JCE before the Trial Chamber in *Duch*[31] after the matter was ruled on by the Pre-Trial Chamber.[32] Further, the fact that conflicts may arise between decisions made by the Pre-Trial Chamber and the Trial Chamber is an inherent characteristic of the ECCC legal system. This should not be seen as a bar for the Pre-Trial Chamber to entertain this Appeal. Following this line of reasoning would not only be contrary to the provisions set out in the Rules, but also eradicate a vast majority of the work-load of the Pre-Trial Chamber, thus making it redundant. The Pre-Trial Chamber can assist in diminishing this uncertainty while being procedurally economic by substantively ruling on the Appeal.
14. In paragraph 19, the OCP asserts that the Trial Chamber in *Duch* is seized with an almost identical challenge, and for jurisprudential conformity, the Pre-Trial Chamber should reject the Appeals. Leaving the challenge to the Trial Chamber in *Duch* would prohibit Mr. IENG Sary from making representations on the applicability of JCE at the ECCC. The Trial Chamber would not have the benefit of a full challenge on the applicability of JCE due to the restrained nature of the Defence in *Duch*. The Trial Chamber's decision on this jurisdictional challenge may be expected before the Closing Order in Case 002, however there is no guarantee this will be the case. Leaving the determination on the applicability of JCE to such a late stage without any guarantee of any determination, not only affects the fair trial rights of Mr. IENG Sary, it also does not advance procedural economy.

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[30] Article 14(3)(b) of the ICCPR states in part that all persons shall "have adequate time and facilities for the preparation of his defence." (emphasis added).

[31] *Case of KAING Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Transcript, 29 July 2009, E1/39.1, ERN: 00345656-00345765, p. 8-9.

[32] *Case of KAING Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Appeal against the Closing Order Indicting KAING Guek Eav alias "Duch", 5 December 2008, D99/3/42, ERN: 00249846-00249887, para. 142.

15. Further in paragraphs 19 and 21, the OCP asserts the best time to determine the applicability of JCE is once Mr. IENG Sary has been indicted. Postponing the decision on the applicability of JCE at the ECCC at this stage is not prudent procedural economy because: 1) of the possibility that Mr. IENG Sary may not even be indicted, and therefore reach the Trial Chamber if it is found that JCE is a form of liability not applicable at the ECCC; and 2) it will not be procedurally economic if part of, or even an entire, indictment is based upon JCE, and subsequently the Trial Chamber finds that JCE is a form of liability not applicable at the ECCC. There is nothing in the Rules which provides for the Pre-Trial Chamber to leave matters, which it has competence to hear, to the Trial Chamber. By leaving the determination of the applicability of JCE to the Trial Chamber, the Pre-Trial Chamber will not be performing its functions "properly and expeditiously" in compliance with Article 5(3) of the ECCC Code of Judicial Ethics.[33]
16. In paragraph 20, the OCP in as much concedes that there remains a possibility that Mr. IENG Sary may not be indicted with JCE liability. This, however, does leave a possibility that Mr. IENG Sary may be indicted with JCE liability. As JCE is not applicable at the ECCC, this possibility means the ECCC is acting outside its jurisdiction. This cannot advance procedural economy as any application of an inapplicable law will be overturned by an appeals chamber, thereby extending the judicial process.
17. In paragraph 22, the OCP asserts "the application of JCE turns on the facts." This suggests that the OCP fails to appreciate the nettles that the Pre-Trial Chamber must grasp. The issue before the OCIJ, and now before the Pre-Trial Chamber, is whether JCE is applicable at all at the ECCC. Once this issue is resolved, and only then, do the facts come into play. Not *vice versa.* Hence, the most procedurally economic way forward is for the Pre-Trial Chamber to find the Appeal admissible.

III. SUBMISSIONS ON PROCEDURE

18. This section of the Response discusses the need for a joint Response, an argument that an oral hearing is not required, and incorporation by reference to previous pleadings. A reply to this section is not necessary.

IV. ARGUMENT

A. JCE HAS NOT BEEN PART OF CUSTOMARY INTERNATIONAL LAW SINCE NUREMBURG

19. In paragraph 32, the OCP provides no authority for its assertion that "numerous international statutes, cases and authoritative pronouncements, as well as domestic cases" support the existence of JCE since Nuremberg. Nor does it provide any authority for the

[33] ECCC Code of Judicial Ethics, 5 September 2008. Article 5(3) states in part: "Judges shall perform all judicial duties properly and expeditiously."

assertion that this constitutes evidence of widespread State practice and *opinio juris* necessary to establish customary international law. The Defence has already extensively shown that no such widespread State practice or *opinio juris* exists.[34]

20. In paragraph 33, the OCP asserts that liability for participation in a common plan existed in "some form in the national legislation or jurisprudence of many common and civil law countries since at least the nineteenth century." Again, no authority is provided for this assertion. Even if the assertion were true, "some form" of common plan liability does not equate to JCE as established by *Tadić*. The OCP asserts that many "advanced" jurisdictions recognized modes of co-perpetration similar to JCE III. This does not demonstrate support for the existence of JCE in customary international law. Co-perpetration differs remarkably from JCE.[35] The OCP fails to explain why the ECCC should not apply co-perpetration, which does exist in Cambodian law (inspired by and modeled after the French system) and which the OCP admits exists in many "advanced" jurisdictions. Two International Criminal Court ("ICC") Pre-Trial Chambers have recently examined the distinction between co-perpetration under the ICC Statute and JCE and have concluded that they cannot be equated.[36] Former ICTY/ICTR Appeals Chamber Judge Schomburg has explained, "[t]he concept of joint criminal enterprise ... is only one possibility to interpret 'committing' ... In various legal systems, however, 'committing' is interpreted differently. Since Nuremberg and Tokyo, national as well as international criminal law has come to accept, in particular, co-perpetratorship and indirect perpetratorship (perpetration by means) as a form of 'committing.'"[37]

21. In paragraph 34, the OCP asserts that a "Grotian moment" occurred with respect to JCE liability following the judgments that emanated from the post-World War II tribunals. Even if customary international law emerges from a Grotian moment, it can only do so in

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[34] *See e.g.*, Appeal, Annex A, Section II, D, 1.

[35] The differences between co-perpetration and JCE have been pointed out repeatedly by the Defence. "The Cambodian law of co-perpetration, as set out in Article 82 of the 1956 Penal Code, materially differs from JCE, for the following three reasons:
First, co-perpetration requires the presence of each co-perpetrator at the crime scene; for liability to attach, each co-perpetrator must have personally accomplished the material actions constituting the offense. By contrast, it has been held that the presence of a JCE member is not required for an accused to be held criminally liable under JCE.
Second, as co-perpetration requires each co-perpetrator to have personally accomplished the material actions constituting the offense, co-perpetrators may not use others who are not co-perpetrators to physically commit the offense. By contrast, it has been held that an accused can be held liable for crimes committed by principal or physical perpetrators who are outside the JCE, if they were used by JCE members.
Third, JCE separates the alleged common plan into an objective and the means contemplated to achieve that objective. By contrast, co-perpetration does not distinguish the two." *Id.*, Annex A, para. 20 (internal citations omitted).

[36] *See* Appeal, paras. 49-58 and accompanying citations.

[37] *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006, para. 16.

limited circumstances. Regardless of how customary international law may emerge, the requirement that it must conform to state practice and *opinio juris* is fundamental.[38] Thus, for doctrines of customary international law to emerge with unusual rapidity and acceptance,[39] practically, Grotian moments are restricted to law which can only be carried out by a limited number of states. For example, any State practice and *opinio juris* on the law of space can only be carried out by those States that have access to space. During the period of the Cold War, this was only possible by the USA and the USSR. Customary international law which is only accessible, by definition, to two States can form much more rapidly and be more easily accepted.[40] In international criminal law, all States can practice and express *opinio juris* for the development of JCE liability. Therefore, applying the Grotian moment argument, it is much harder to develop uniform State practice and *opinio juris* in an area of law where all States[41] will have a say as to the development and acceptance of JCE liability and further, the elements of JCE liability. As is clear from the Appeal, JCE liability is not accepted, nor uniformly defined by all or even most States. Thus, JCE cannot have been the offspring of a Grotian moment.

22. In paragraph 35, the OCP asserts that "the United Nations International Law Commission has recognized that the Nuremberg Charter, Control Council Law Number 10 and the post-World War II war crimes trials (ten of which were cited in *Tadić*) gave birth to the entire international paradigm of individual criminal responsibility." The United Nations ("UN") Law Commission Report cited is from 1996; which is well after the jurisdictional period of the ECCC. Furthermore, it did not make such a broad proclamation. It did not state that it "gave birth to [an] entire paradigm of individual criminal responsibility." It stated that "[t]he principle of individual responsibility for crimes under international law was clearly established at Nurnberg."[42] This statement does not support the OCP's assertion that JCE liability was clearly established at Nuremberg. Furthermore, referring to JCE (especially JCE III) as a form of *individual* criminal responsibility is little more than legal semantics considering the collective elements of this form of liability.[43] The

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[38] "Customary law begins as a customary practice and then ripens into a binding rule when those who follow the rule begin to regard the practice as binding on them." George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 556 (2005). It must be noted that "[i]t is notoriously difficult to establish sufficient consensus to validate a rule as customary international law." *Id.*

[39] Response, para. 34.

[40] *See* MALCOLM N. SHAW, INTERNATIONAL LAW 75-76 (Cambridge University Press 2003).

[41] There are currently 192 member States to the UN Charter.

[42] *Report of the International Law Commission on the Work of its Forty-Fifth Session*, 6 May-26 July 1996, Official Records of the General Assembly, Fifty-First Session, Supplement No. 10, p. 19.

[43] *See* Elies van Sliedregt, *Criminal Responsibility in International Law, Liability Shaped by Policy Goals and Moral Outrage*, 14 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 81-82 (2006).

OCP then asserts that the UN General Assembly ("UNGA") unanimously affirmed the principles from the Nuremberg Charter and judgments. The OCP asserts that this confirmation by the UNGA "affirmed as customary international law both the substantive law and the theory of individual criminal liability (including 'common plan liability') ... render[ing it] just as much a part of customary international law as the other fundamental concepts of international criminal liability..." UNGA Resolutions do not have the power or authority to "render" concepts customary international law. The Defence has already shown that the Nuremberg Principles do not include JCE liability.[44] Common plan liability was recognized only in regard to crimes against peace.[45] As such, even if UNGA Resolutions had the force of authority to create customary international law, it would not have been created with respect to JCE liability.

23. In paragraph 36, the OCP cites a statement made by the UN Secretary General in 1993 and asserts that it would have held true in 1975, "as there were no relevant major developments of international humanitarian law between 1975 and the establishment of the ICTY in 1993." The UN Secretary General stated that the ICTY Statute had been drafted to apply "rules of international humanitarian law which are beyond doubt part of

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[44] *See* Appeal, Annex A, Section II, D, 1, c.

[45] It is clear from a careful reading of the seven principles listed in the International Law Commission Report that common plan liability was envisioned only in regard to crimes against peace. *Report of the International Law Commission on its Second Session*, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No.12 (A/1316). The Principles state in pertinent parts:

Principle VI: The crimes hereinafter set out are punishable as crimes under international law:

(*a*) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(*b*) War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(*c*) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

It is clear that the mention of "participation in a common plan" in Principle VI is in relation only to crimes against peace, since it is listed only under that subsection and *not* in the following subsections referring to war crimes and crimes against humanity. Principle VII deals with "complicity" in relation to crimes against peace, war crimes and crimes against humanity. Terms "common plan liability" and "complicity" are not and cannot be used interchangeably. The mere fact that Principle VI and VII use two different terms shows that common plan liability and complicity are not the same concept: these terms cannot be used interchangeably.

customary international law."[46] The Statute of the ICTY contains no mention of JCE. This was read into the Statute at a later point by the *Tadić* Appeals Chamber. Furthermore, the issue should not be whether there were major developments in international humanitarian law, but whether widespread and consistent State practice existed in 1975. The OCP quotes a commentator who notes that "the origins of the JCE Doctrine can be found in events surrounding the end of World War II."[47] This commentator did not state that it had crystallized into customary international law at that time.

24. In paragraph 37, the OCP asserts that JCE has its origins in the Nuremberg Charter and is a merger of Common Law and Civil Law. It fails to explain why the ECCC, which is not based on a mixture of Common Law and Civil Law traditions as the *ad hoc* tribunals are, should apply such a hybrid concept. The ECCC is part of a Civil Law jurisdiction. The OCP asserts that this merger of Common Law and Civil Law represents a "synthesis between different jurisdictions" formed when "the Great Powers sought to create an approach in the Nuremberg Charter..." The Defence rejects any assertion that a clear and consistent approach was taken at Nuremberg. The post-World War II verdicts were quite short, with limited legal reasoning, which forced the *Tadić* Appeals Chamber to infer the form of liability under which the accused were ultimately convicted based on the prosecution's statements.[48] Any cobbling together of differing approaches only supports the Defence's position that there could be no widespread and consistent State practice regarding JCE liability, since it is not a form of liability which has been applied consistently, if at all, across jurisdictions. It is a novel form which has been created by the judges in *Tadić*.
25. In paragraph 38, the OCP asserts that the "Nuremberg Tribunal and Control Council Law Number 10 developed their own version of the 'common plan' concept, thereby transforming it into what has now become known as JCE." In the sense that these tribunals were not applying settled principles, the Defence agrees with this statement. It is not true, however, that these post-World War II tribunals developed and applied a consistent concept, for the reasons shown in the preceding paragraph. The OCP further asserts that the Nuremberg Tribunal declared that its conclusions were made in

[46] As quoted in the Response, para. 36.
[47] Response, para. 36, *quoting* Ciara Damgaard, *The Joint Criminal Enterprise Doctrine: A "Monster Theory of Liability" or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?, in* INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES 129, 132, 235 (Springer, 2008) ("Damgaard") (emphasis added).
[48] *See* Appeal, paras. 45-46.

accordance with well-settled legal principles. Because the Nuremberg Tribunal declared this, however, does not make it true.[49] The judgments emanating from the post-World War II tribunals have been criticized for their lack of legal reasoning, as pointed out above and in the Appeal.[50] Furthermore, the previous paragraph demonstrates the falsity of this statement. It discusses the creation of a modified form of the American proposal to include conspiracy in the Statute of the Nuremberg Tribunal. This was a new creation, not a well-settled legal principle. The *Tadić* Appeals Chamber would not have had to rely mainly on obscure, unpublished cases if these tribunals had been applying well-settled legal principles.[51]

26. In paragraph 39, the OCP asserts, citing the ICTY *Kupreškić* Trial Judgment, that the case law from the post-World War II tribunals is viewed as an authoritative interpretation of the Nuremberg Charter and Judgment and a reflection of customary international law. First, citing one ICTY Trial Chamber Judgment does not allow for a general statement that the post-World War II case law is viewed as authoritative. More importantly, this is an inaccurate representation of *Kupreškić*. This Trial Chamber actually stated:

> Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight.
> ...
> It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law no. 10, a legislative act jointly passed in 1945 by the four Occupying Powers and thus reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the courts called upon to rule on those crimes.
> ...
> In sum, international criminal courts such as the International Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law.[52]

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[49] "The rules that were applied in this trial were not, as is generally assumed, rules of international law ... No attempt was made to come to a really thorough understanding of what was defensible under international law. The Charter obviously was merely intended to bring certain defendants to prosecution and conviction. As an instance I refer to the discussion aimed at introducing the American concept of conspiracy, *i.e.* a common plan or design to commit criminal acts. The Continental participants at the conference had considerable doubts about including this concept, which was unknown to them, in the rules of the London Charter." Otto Kranzbuhler, *Nuremberg Eighteen Years Afterwards*, *in* GUÉNAËL METTRAUX (ED.), PERSPECTIVES ON THE NUREMBERG TRIAL 436 (Oxford University Press, 2008).

[50] *See* Appeal, paras. 44-45.

[51] *Id.*, para. 40 including relevant footnotes.

[52] *Prosecutor v. Kupreškić*, IT-95-16-T, Judgment, 14 January 2000, paras. 540-42 (emphasis added).

Furthermore, the Defence has already shown the shortcomings of the post-World War II judgments.[53] They cannot be viewed as authoritative, because they contain limited legal reasoning and are considered tainted by victor's justice.[54]

27. In paragraph 40, the OCP asserts that an analysis of several Control Council Law Number 10 cases supports a conclusion that JCE liability was employed by those tribunals in 1946-47. Even if it were unequivocal that these cases did employ JCE liability, its use in these cases would not be enough to demonstrate widespread and consistent State practice. Furthermore, according to one commentator, cases tried pursuant to Control Council Law No. 10 "cannot be deemed part of international law, since it was passed by the legislative authority over Germany (the Allied Control Council). As a result, the judgments rendered in accordance with CCL No.10 do not constitute valid international precedent, and the 'participatory principles of criminal responsibility' annunciated at these trials 'have no subsequent validity in international criminal law.'"[55] The OCP notes that the *Tadić* Appeals Chamber relied in part on ten post-World War II cases and asserts that it has identified 16 additional post-World War II cases that employed JCE liability. The fact that the OCP identified additional cases that the *Tadić* Appeals Chamber was unable to locate demonstrates that it was quite difficult to determine what form of liability was being applied in many post-World War II cases, as the judgments were so short and lacking in legal reasoning. The OCP asserts that these cases clarified the meaning of common plan liability, now known as JCE. It is difficult to imagine how this could be the case, considering that the thousands of national prosecutions under Control Council Law Number 10 were based on a variety of forms of liability and not only the common

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[53] *See e.g.*, Appeal, paras. 38-40.

[54] *See* RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL 16 (1971). "[W]here the present state of international law was unclear or unsatisfactory - as, for example, in regard to individual responsibility for acts of state - then the Big Four would codify international law in such a way that German and Japanese acts became criminal and individual enemy leaders became accountable." *See also* Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 486-87 (2001). "It does not require deep immersion into the study of decisions rendered by post World War II military courts to realize that they are not the most obvious wellspring from which one would expect the demiurges of modern international law to drink for inspiration. That these courts faced unsavory individuals charged with horrendous crimes should not blind us to the fact that the legal standards they crafted (especially in the Far East) were deficient in terms of our current understanding of criminal law with humanitarian aspirations. As a well-known international scholar remarked long ago, these standards were frequently such as 'to make a lawyer wish to forget all about them at the earliest possible moment.' Their general characteristic, most relevant for present purposes, was an unabashed severity that can rightly be regarded as the principal source of the escalations of culpability inherent in imputed command responsibility." *See also* Curt Hessler, *Command Responsibility for War Crimes*, 82 Yale L.J. 1274, 1275 (1972-1973). "Most 'decisions' were attempts by a trial forum to marshal *all* the possible legal, moral, and evidentiary support for its verdict."

[55] Attila Bogdan, *Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the* ad hoc *International Tribunal for the Former Yugoslavia*, 6 INT'L CRIM. L. REV. 63, 100 (2006).

purpose doctrine,[56] which itself differs from JCE liability as it is applied at the *ad hoc* tribunals. The OCP provides a quote from the UN War Crimes Commission Report[57] and asserts that "consistent with this explanation," the *Ojdanić* JCE Decision[58] found that common plan liability and JCE liability are the same. The explanation quoted from the UN War Crimes Commission Report simply explains the difference between conspiracy and acting in pursuit of a common plan. It does not mention JCE liability, much less equate it to common plan liability. The *Ojdanić* JCE Decision did state that these terms could be used interchangeably, but this does not in any way mean "common plan" as it was understood in the Nuremberg Principles (to apply only to crimes against peace) could be equated with JCE liability, as it is applied at the *ad hoc* tribunals.

28. In paragraph 41, the OCP admits that there are "few examples of national jurisprudence applying forms of JCE liability." It then declares that the decisions of the Jerusalem District Court and the Israeli Supreme Court "demonstrate that, as of 1961, domestic courts recognized JCE as developed by the immediate post-World War II laws and jurisprudence." This may demonstrate that two domestic courts at the time recognized a form of collective liability, but it certainly is no evidence of any broad recognition of JCE liability.

29. In paragraph 42, the OCP states that the requisite intent for liability for genocide through a JCE is specific intent. The Defence agrees that if JCE is applied, each participant in the JCE must possess the level of intent required by the underlying crime. As such, a Charged Person/Accused could not be convicted of genocide through participation in a JCE unless that person held the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. This would preclude liability for genocide through JCE III. If the crime of genocide was committed outside the common plan, under JCE III a participant in the plan may be held liable as long as this outside crime was a natural and foreseeable consequence of the effecting common purpose.[59] This is a much lower level of *mens rea* than the requisite specific genocidal intent. The OCP further discusses the *Eichmann* judgments in this paragraph. It misleadingly quotes the Israeli Supreme Court, which stated that "if fifty-eight nations unanimously agree on a statement

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[56] *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 530-35 (2nd ed. Kluwer Law International, 1999).

[57] The quote provided by the OCP is the following: "the prosecution has the additional task of providing the existence of a common design, [and] once that is proved the prosecution can rely upon the rule which exists in many systems of law that those who take part in a common design to commit an offence which is carried out by one of them are all fully responsible for that offence in the eyes of the criminal law."

[58] *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 ("*Ojdanić* JCE Decision").

[59] *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, para. 99.

of existing law, it would seem that such a declaration would be all but conclusive evidence of such a rule, and agreement by a large majority would have great value in determining what is existing law." One might assume that the *Eichmann* Court was discussing JCE liability here. It was not. The *Eichmann* Court was discussing jurisdiction over crimes against humanity and rejecting the defence of superior orders.

30. In paragraph 43, the OCP concludes that JCE existed as customary international law before 1975-79. The Defence rejects this conclusion, for all of the reasons submitted above and in the Appeal.[60] To provide one example shown in the Appeal, if JCE were clearly settled in customary international law as of 1975-79, why would the drafters of the ICC's Statute have opted not to include it?

B. JCE IS NOT APPLICABLE AT THE ECCC

31. In Paragraph 44, the OCP merely offers an introduction to this section. The Defence disputes, however, the OCP's assertion that Mr. IENG Sary had sufficient notice that his alleged participation in a JCE charged in the Introductory Submission would entail criminal responsibility for acts committed pursuant to it and that this form of liability was explicitly or implicitly provided for in the Court's documents.

JCE was not Accessible and Foreseeable During 1975-79

32. In paragraph 45, the OCP merely requests the Pre-Trial Chamber to reject the Defence position that JCE liability was not applicable in Cambodia during the temporal jurisdiction of the ECCC and therefore its application would violate the principle of legality. The Defence requests the Pre-Trial Chamber to accept its position, which is supported by cogent legal authority and reasoning.

33. In paragraph 46, the OCP correctly states that the Establishment Law incorporates Article 15(1) of the ICCPR. The ICCPR is not the only source to consider. As shown in the Appeal,[61] the 1956 Penal Code's prohibition on retroactive application of law applies, requiring that JCE must have been criminalized in national law at the relevant time.

34. In paragraph 47, the OCP once again only discusses the ICCPR, and asserts that it must be established that: 1) JCE existed under Cambodian law or customary international law as of 1975; and 2) that the Appellants had sufficient notice that their participation in a JCE would entail criminal responsibility for acts committed pursuant to it. This ignores the fact that it is not enough for JCE to have existed in customary international law. It must have existed in Cambodian law at the time, consistent with the 1956 Penal Code.[62]

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[60] *See* Appeal, paras. 36-65.
[61] *See* Appeal, paras. 72-73.
[62] *Id.*

35. In paragraph 48, the OCP asserts that the principle of legality requires that liability must be sufficiently foreseeable and accessible at the relevant time. The OCP asserts, citing ICTY jurisprudence, that this does not prevent a tribunal from interpreting or clarifying the elements of a particular crime nor does it preclude the progressive development of the law. The principle of legality does require that criminal liability be sufficiently foreseeable and accessible. However, the OCP's assertion concerning the interpretation or clarification of a crime may more appropriately apply to Common Law jurisdictions.[63]
36. In paragraph 49, the OCP asserts that an individual may be deemed to have had sufficient notice that acts committed by him would attract criminal responsibility under JCE if two factors are shown to exist. The OCP lists these two factors and cites the *Ojdanić* JCE Decision for this proposition.[64] These factors are: (1) the nature and gravity of the atrocities committed; and (2) the existence of judicial decisions, international instruments and domestic legislation recognizing a form of liability similar to JCE. The *Ojdanić* JCE Decision does state that a Court should make these considerations when determining foreseeability. It does not, however, list them as factors, which would imply that there is a specific test. Neither did it state that these were the only considerations, nor that an accused may be deemed to have sufficient notice if these "factors" are found to exist. The *Ojdanić* JCE Decision actually states, "In the present case ... there is a long and consistent stream of judicial decisions, international instruments and domestic legislation which ... would have given him reasonable notice that, if infringed, that standard could entail his criminal responsibility." The Appeals Chamber made no general finding that if these "factors" are met, sufficient notice may be deemed to exist. The OCP further asserts that there was a "broad use of JCE-type liability in both common and civil law systems," but fails to cite any authority to support this proposition. Furthermore, "JCE-type liability" does not equate to JCE liability. The OCP has not demonstrated that the Charged Persons would have sufficient notice that they could be liable under JCE liability based on these two factors. The OCP fails to address the Defence argument that if an objective test as to whether the crimes were sufficiently foreseeable is used with JCE III, an accused may be held liable for crimes he himself did not foresee.[65]
37. In paragraph 50, the OCP mischaracterizes the Defence argument concerning the *Tadić* Appeals Chamber's reliance on unpublished cases and summaries of written verdicts. The Defence discussed this when demonstrating why the *Tadić* Appeals Chamber erred in

[63] *See* Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of the Law?*, 2 J. INT'L CRIM. JUST. 1007, 1012 (2004).
[64] *Ojdanić* JCE Decision, paras. 39-42.
[65] *See* Appeal, paras. 62, 77.

finding the existence of JCE in customary international law, rather than when discussing accessibility. It is true, however, that the Charged Persons would very likely not have had knowledge of these judgments. Furthermore, despite the OCP's assertion that the UN War Crimes Commission Report of 1949 was widely disseminated, it seems extremely unlikely that the Charged Persons would have had a copy of this multi-volume Report, considering the circumstances at the time. The OCP without directly adopting this position itself, points out that the McGill Brief claims that "the approach of the *ad hoc* tribunals has been to presume that the foreseeability and accessibility requirements are met if the conduct is found to be punishable under international law." The McGill Brief states that "[t]he approach in the *ad hoc* tribunals has been to presume that both requirements [foreseeability and accessibility] were met if conduct was found to be punishable under international law."[66] Despite claiming that this is a general approach at the ICTY, it cites only one source,[67] which does not even appear to support this assertion.

38. In paragraph 51, the OCP asserts that it is not relevant to determine whether JCE existed in Cambodian law in 1975-79, but does not explain why it considers this so. It simply cites the McGill Brief, without providing any explanation as to its relevance to this assertion. The cited paragraph of the McGill Brief makes a similar assertion, but does not explain it or cite any authority.[68] The OCP failed to take into account any of the arguments raised in the Appeal in this regard.[69] The OCP then asserts that the Cambodian

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[66] *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Amicus Curiae Brief Submitted by the Centre for Human Rights and Legal Pluralism, McGill University, 27 October 2008, D99/3/25, ERN: 00234856-00234883 ("McGill Brief"), para. 13.

[67] The source cited in the McGill Brief is *Prosecutor v. Martić*, IT-95-11-A, Judgement on Appeal – Separate Judgement of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, 8 October 2008.

[68] Paragraph 13 of the McGill Brief simply states: "The second set of issues relates to the foreseeability and accessibility requirements of the principle of *nullum crimen sine lege*. As indicated above, the foreseeability requirement will be met if it can be shown that it would be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission. The approach in the *ad hoc* tribunals has been to presume that both requirements were met if conduct was found to be punishable under international law. This essentially amounts to a strict application of the doctrine of *ignorantia juris non excusat.*"

[69] For example, the Appeal explained that: "[t]he OCIJ erred when it concluded that application of JCE liability would not violate the principle of legality because elements of JCE liability 'were foreseeable and accessible under international law in 1975 in Cambodia…' The OCIJ used the wrong test when making this determination. The OCIJ concluded that the principle of legality could be satisfied if JCE liability existed in international law by referring to Article 33 new of the Establishment Law, which 'sets out the principle of legality by referring to the provisions of Article 15 of the 1966 International Convention on Civil and Political Rights (ICCPR).' However, the ECCC is a national Cambodian court and '[o]ne has to distinguish between the prerequisites of the principle of legality as it is defined on the international level and the principle of legality of national legal orders. … [M]any national legal systems – for example the German Constitution (art. 103(2)) – require compliance with a stricter principle of legality.' This issue arose in the *Aussaresses* case … The appellant in that case argued that the existence of a rule of customary international law at the time the acts were committed would satisfy the principle of legality. This argument was rejected. Article 6 of the 1956 Penal Code states that 'Criminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law before it was committed.' The 1956 Penal Code thus requires compliance with a

Penal Code of 1956 "generally supports the concepts underlying JCE." It uses the example of co-action, complicity, and co-authorship. These forms of liability found in the 1956 Penal Code, however, differ from JCE, as the Defence has shown repeatedly in past filings.[70] If the OCP asserts that these forms of liability generally support JCE liability, the OCP should also explain why it does not find these forms of liability adequate for use at the ECCC and why it continues to insist that the ECCC should apply JCE – a form of liability foreign to the Cambodian legal practice and jurisprudence.

39. In paragraph 52, the OCP concludes that JCE liability was sufficiently foreseeable and accessible at the relevant time. The Defence rejects this conclusion for all of the reasons submitted above and in the Appeal.[71]

JCE is not Included in Article 29 of the ECCC Law

40. In paragraph 53, the OCP requests the Pre-Trial Chamber to reject the Defence position that the OCIJ erred in holding that JCE is a form of committing. The Defence requests the Pre-Trial Chamber to accept its arguments made in the Appeal in this regard.[72] As shown in the Appeal, "committing" has different meanings in different legal systems.[73] In Cambodia, "commission" is defined as perpetration and co-perpetration.[74] Furthermore, "the view ... that joint criminal enterprise is akin to 'committing' a crime. ... conflicts with the ordinary meaning of 'committing' as the physical perpetration of a crime or a culpable omission contrary to the criminal law and, therefore, the general principle that penal statutes should be interpreted strictly."[75]

41. In paragraph 54, the OCP incorrectly asserts that Article 29 of the Establishment Law exactly mirrors the Statutes of the *ad hoc* tribunals. The wording actually differs. Article 29 refers to any suspect who "planned, instigated, ordered, aided and abetted, or committed the crimes," while Article 7(1) of the ICTY Statute states "or otherwise aided

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stricter principle of legality: JCE liability must have been established in Cambodian law at the relevant time in order for the principle not to be violated." (internal citations omitted).

[70] *See e.g.*, Appeal, Annex A, Section II C.

[71] *See* Appeal, paras. 74-79.

[72] *Id.*, paras. 66-71.

[73] "The concept of joint criminal enterprise is not expressly included in the [ICTY] Statute and it is only one possibility to interpret 'committing' in relation to the crime under the ICTR and ICTY Statutes. In various legal systems, however, 'committing' is interpreted differently. Since Nuremberg and Tokyo, national as well as international criminal law has come to accept, in particular, co-perpetratorship and indirect perpetratorship (perpetration by means) as a form of 'committing'." *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006, para. 16. (emphasis added). For additional explanation of why JCE does not fall under the term "committing" in Article 29 of the Establishment Law, *see* Appeal, Annex A, Section II, B, 2.

[74] *See* Appeal, paras. 63-66.

[75] Shane Darcy, *Imputed Criminal Liability and the Goals of International Justice*, 20 LEIDEN J. INT'L L. 377, 384 (2007)

and abetted." This difference indicates that Article 29 contains an exhaustive list of forms of liability, while the Statutes of the *ad hoc* tribunals do not. The OCP is further incorrect to equate the ECCC with these tribunals. The ECCC, as extensively discussed in the Appeal,[76] is a domestic Cambodian court. The *ad hoc* tribunals are therefore not "sister tribunals." Unlike the *ad hoc* tribunals, the ECCC is based on the existing Cambodian legal system which is modeled after the French Civil Law system. Accordingly, it cannot import Common Law or mixed system legal concepts simply because the *ad hoc* tribunals have done so. Finally, it should be of no concern to the judges at the ECCC, as the OCP suggests, whether there is a consistent body of international humanitarian law. The ICC judges validate this point in their rejection of JCE as established by *Tadić*. The ECCC must only be concerned with applying the appropriate law for this Court. This can differ from the law applied in systems which have adopted a Common Law or mixed approach.

42. In paragraph 55, the OCP asserts that the drafters of the Establishment Law would have been aware of the *Tadić* Appeal Judgment and would have explicitly excluded JCE liability if they had wished to do so. This argument is as speculative as it is absurd. It is more reasonable to consider that by failing to include JCE liability explicitly, the drafters intended to exclude it. Under the Civil Law system – and especially the French model upon which the ECCC system is largely based – all forms of liability *must* be expressly included in written law if they are to be applied.[77] The explicit exclusion of JCE in the Establishment Law denotes that it is not a form of liability applicable at the ECCC. Furthermore, it is certain that the drafters were aware that the *Tadić* Appeals Chamber's creation of JCE liability not set out in the ICTY Statute has caused extensive litigation and is highly controversial.[78] If the Establishment Law's drafters had wished to include JCE liability, knowing of its highly contested and controversial history, they would surely have done so explicitly. The Special Tribunal for Lebanon ("STL"), another court whose founding documents were drafted after the *Tadić* Judgment, specifically provided for

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[76] *See* Appeal, paras. 7-24.

[77] *See* French law on *nullum crimen sine lege scripta*, Crim. 8 Sep. 1809, S 1809-11.1.107. *See also* JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 204 (Oxford University Press 1998). This approach is also followed in Germany. *See Streletz, Kessler & Krenz v. Germany* (German Border Guard Case), Applications Nos. 34044/96, 35532/97 and 44801/98, para. 22. Indeed this is also the approach of the Pre-Trial Chamber in assessing the scope of rights to appeal orders by the OCIJ set out in the ECCC's Internal Rules. *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC08), Decision on IENG Sary's Appeal Against Letter Concerning Request for Information Concerning Legal Officer David Boyle, 28 August 2008, para. 17.

[78] *See e.g.*, Appeal, para. 36.

common purpose liability.[79] This is unsurprising, considering that Judge Cassese – the principle creator of JCE – is the president of the STL.

43. In paragraph 56, the OCP provides the example of the Statute of the East Timor Special Panels for Serious Crimes, which was adopted in 2000, a year later than the Establishment Law. This Statute adopted the language of Article 25 of the ICC Statute. It is true that the Special Panels took a different approach to its Statute than the ECCC's drafters took with the Establishment Law. These two Statutes were adopted so close in time, however, that it is unclear whether the Establishment Law's drafters would have considered the Special Panels' Statute. Furthermore, the fact that the Special Panels followed the ICC approach rather than the approach taken by the *ad hoc* tribunals demonstrates that JCE is not a settled principle. The ICC, as shown in the Appeal,[80] has not followed the jurisprudence of the *ad hoc* tribunals with respect to JCE liability.
44. In paragraph 57, the OCP asserts that the application of JCE liability is supported by the object and purpose of the Establishment Law. However, there are forms of liability explicitly provided for in Article 29 which would adequately support this object and purpose, without importing foreign legal concepts not included in the Establishment Law. Had the drafters believed otherwise, they would have explicitly provided for JCE liability.
45. In paragraphs 58 and 59, the OCP provides some quotes that it asserts demonstrate that the unique nature of large scale crimes justifies applying JCE liability. These quotes do not demonstrate that a form of liability not recognized in Cambodian or customary international law should be imposed. Co-perpetratorship, which is recognized in Cambodian law, is well-suited to the unique nature of large scale crimes. As Judge Schomburg has noted, "Co-perpetratorship suits the needs of international criminal law particularly well. This was recognized upon the establishment of the International Criminal Court whose Statute, in Article 25(3)(a), includes the notion of co-perpetratorship." The ICC is "the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community."[81] The fact that it has declined to employ JCE liability[82] and has chosen co-perpetration, as noted above, demonstrates that JCE liability is clearly not a necessary tool to deal with the unique nature of large scale crimes. Furthermore, as Professor Weigend explains, "The problem, of course, is whether the (understandable) wish to bring all 'perpetrators' to justice is a sufficient basis for

[79] Special Tribunal for Lebanon, Statute, Art. 3(1)(b).
[80] *See* Appeal, paras. 49-58.
[81] ICC Website, About the Court, *available at* http://www.icc-cpi.int/Menus/ICC/About+the+Court/.
[82] *See* Appeal, paras. 49-58.

determining who is a 'perpetrator.' In other words, JCE, in throwing its net very broadly may have a difficulty in explaining why each fish caught deserves punishment for international wrongdoing."[83]

46. In paragraph 60, the OCP asserts that "[a]n overwhelming majority of judicial chambers of international criminal tribunals that have examined the question have applied JCE liability." The OCP cites no authority for this statement. Most chambers at the *ad hoc* tribunals have not actually considered whether to apply JCE. They do so simply because previous chambers have done so. As shown in the Appeal,

> [t]his erroneous conclusion became accepted at the ICTY and ICTR (which, incidentally, share the same Appeals Chamber) without any further independent analysis, despite strong criticism, and despite the fact that the *Tadić* Appeals Chamber made its determination on the issue of JCE liability's customary status without having had the benefit of reasoned arguments from both the Prosecution and the Defence – the *Tadić* Defence did not challenge the application of JCE liability.[84]

The opinions of these chambers are not binding on the ECCC, as this Court is not an international criminal tribunal and it follows a Civil Law system, unlike the *ad hoc* tribunals. The OCP also asserts, without citing any authority for this claim, that "scholarly opinion has been widely supportive" of JCE liability. As the Defence pointed out in the Appeal – with citation to authorities – there has been widespread scholarly criticism of this doctrine. To provide just two examples, Professor Schabas has stated, "[g]ranted these two techniques [JCE and command responsibility] facilitate the conviction of individual villains who have apparently participated in serious violations of human rights. But they result in discounted convictions that inevitably diminish the didactic significance of the Tribunal's judgements and that compromise its historical legacy."[85] Ciara Damgaard has stated, "this doctrine raises a number of grave concerns. It, arguably, inter alia is imprecise, dilutes standards of proof, undermines the principle of individual criminal responsibility in favour of collective responsibility, infringes the nullum crimen sine lege principle and infringes the right of the accused to a fair trial."[86] Professor Ambos, too, has been quite critical of the application of JCE.[87] The Defence notes that the OCP has failed to address and to counter any of the cogent arguments

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[83] Thomas Weigend, *Intent, Mistake of Law and Co-perpetration in the* Lubanga *Decision on Confirmation of Charges*, 6 J. INT'L CRIM. JUST. 471, 477 (2008).
[84] Appeal, para. 37 (internal citations omitted).
[85] William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENGLAND L. REV. 1015, 1033-34 (2002-03).
[86] Ciara Damgaard, at 129.
[87] *See Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), *Amicus Curiae* concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 27 October 2008, D99/3/27, ERN: 00234912-00234942.

Professor Ambos has raised against its status as customary international law, although these were set out in detail in the Appeal.[88] The OCP's over-reliance on Judge Cassese - considering that he was the original author of JCE liability - does not support the OCP's claim of widespread support.

47. In paragraph 61, the OCP quotes Professor Osiel who explains that "[e]nterprise participation ... is more consonant [than command responsibility] with differing dimensions of mass atrocity, where malevolent influence travels through informal and widely dispersed networks." This statement does not show Professor Osiel's support for JCE. Professor Osiel, as the OCP admits, is critical of JCE liability.

48. In paragraph 62, the OCP invites the Pre-Trial Chamber to find that the drafters of the Establishment Law intended Article 29 to include all three forms of JCE liability. The Defence rejects this conclusion, for all the reasons submitted above and in the Appeal.[89] JCE liability does not appear in Article 29. It would have been simple for the drafters to have included an express JCE provision had they wished to do so. They did not.

Customary International Law is not Applicable at the ECCC

49. In paragraph 63, the OCP asserts that "once it is established that the JCE was provided for under the ECCC Statute, it is of no consequence whether it existed separately under Cambodian domestic law." This statement ignores extensive arguments in the Appeal to the contrary.[90] Even if JCE liability were included in the Establishment Law, the Establishment Law cannot create new law to be retroactively applied. This would violate the principle of legality, which requires that the conduct be punishable in Cambodian law at the relevant time.[91] The OCP next asserts that "[a]s a special internationalized tribunal, bound by international law and custom, a domestic mode of liability shall not apply in respect of prosecution of an international crime before this Court." The OCP cites the Pre-Trial Chamber's Decision concerning the application to disqualify Judge Ney Thol for this assertion. This Decision does not support this statement. The Pre-Trial Chamber discussed the possible "special internationalized" status of this Court, but certainly did not hold that it may not apply domestic forms of liability. The OCP attempts to distinguish the ECCC from other Cambodian courts. It is correct that the Trial Chamber in Case 001 has stated that the ECCC is "internationalized," but this does not mean that it is not a Cambodian court bound by Cambodian law. The Defence extensively

[88] *See generally* Appeal.
[89] *Id.*, paras. 66-71.
[90] *Id.*, paras. 25-29, 72-73.
[91] *Id.*, paras. 72-73.

demonstrated the ECCC's status as a domestic Cambodian court in the Appeal.[92] It explained that the history of the ECCC's establishment demonstrates that it was envisioned as a domestic court. The OCP notes that the Establishment Law provides that recourse may be had to procedure established at the international level. This may be accurate, but it is not because the ECCC has any sort of special international status. The Establishment Law provides this because Cambodia's Constitution requires that Cambodian courts "shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights."[93]

50. In paragraph 64, the OCP states that the ICCPR reflects the fundamental principle that even domestic courts may try international crimes using internationally recognized forms of liability whether or not they are recognized in domestic law at the time. This is not a fundamental principle and furthermore, the ICCPR provides no authority to domestic courts to do this. It is merely not a bar from doing so. Each State must determine whether its constitution allows such a course of action. Cambodia's dualist system does not permit its courts to directly apply customary international law, without implementing legislation adopted by the National Assembly.[94]

C. JCE LIABILITY TENDS TOWARD GUILT BY ASSOCIATION

51. In paragraph 65, the OCP states that the Defence asserts that JCE liability introduces a form of guilt by association. The Defence did not equate JCE liability with guilt by association, but did show that it tends towards it. It has previously quoted, for example, Judge Schomburg, who has explained that "[t]he Appeals Chamber's constant adjustment of what is encompassed by the notion of JCE raises serious concerns with regard to the principle of *nullum crimen sine lege*. ... [T]he current shifting definition of the third category of JCE has all the potential of leading to a system, which would impute guilt solely by association."[95]

52. In paragraph 66, the OCP distinguishes JCE liability from the crime at Nuremberg of membership in a criminal organization. The Defence does not dispute this difference. The difference at times may, however, be barely perceptible. With JCE III liability, "[e]ssentially an accused can be determined guilty of, for example, murder or even genocide, even though he never had the requisite intent to commit such crimes and even

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[92] *Id.*, paras. 7-24.
[93] 1993 Cambodian Constitution, as amended in 1999, Art. 31.
[94] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion against the Applicability of the Crime of Genocide at the ECCC, 30 October 2009, D240, ERN: 00401925-00401940, paras. 17-20, 25-30.
[95] *Prosecutor v. Martić*, IT-95-11-A, Judgement, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, 8 October 2008, para. 7 (emphasis added).

though they were committed outside the JCE and by persons that he, perhaps, had no control over. His guilt is arguably based on the principle of collective responsibility. He is being punished for a crime that he did not personally perpetrate and with respect to which he never had the requisite intent to commit; he is being punished for his *association* with the perpetrators of the crime. This is a worrying development in the law."[96]

53. In paragraph 67, the OCP states that JCE is founded on public policy considerations. The OCP fails to give any reason why the forms of liability expressly provided for in the Establishment Law and other Cambodian law would not equally meet public policy considerations. The OCP has previously stated that it finds the forms of liability set out in Cambodian law to be similar to the concept of JCE,[97] yet it gives no explanation as to why it considers these forms to be inadequate. The OCP fails to show why public policy might prefer JCE liability. Co-perpetration, as explained above, is well suited to the unique nature of large scale crimes and will thus serve the same public policies goals that the OCP asserts justify JCE. Furthermore, as the ICTY *Brđanin* Appeals Chamber explained, "the Appeals Chamber rejects the teleological argument by the Prosecution that the Tribunal should endorse the doctrine of joint criminal enterprise because it would allow the Tribunal 'to prosecute and punish those who participate in international crimes as leaders and not only as subordinates.' Such policy considerations are inapposite as a basis for a theory of individual criminal responsibility."[98]

54. In paragraph 68, the OCP states that JCE liability "is dependent on, and incidental to, a common criminal plan. The 'incidental crime' is the outgrowth of, rendered possible by, and premised on the existence of prior joint planning to commit the concerted crime or primary criminal acts of the JCE." This statement seems to contradict Special Court for Sierra Leone ("SCSL") jurisprudence. The AFRC Appeals Judgment states that "[a]lthough the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute."[99] One commentator notes:

> The Appeals Chamber ... neglected to articulate why it chose to adopt new language, and how it interprets the word 'contemplate' in this context. ...
> While *Tadić* clearly indicates that the common plan must include (or amount to) crimes within the ICTY Statute, the AFRC Appeal Judgment suggests that the common plan must only consider a criminal route to its objective. This judgment

[96] Damgaard, at 238 (emphasis added).
[97] *See* Response, para. 51.
[98] *See Prosecutor v. Brđanin* IT-99-36-A, Judgement, 3 April 2007, para. 421 (emphasis added).
[99] *Prosecutor v. Brima et al.*, SCSL-04-16-A, Judgement, 22 February 2008, para. 84 (emphasis added).

> may thereby open the door to common plans that do not actually consist of the commission of crimes within the Statute, although the commission of such crimes is considered as a possibility.[100]

It appears that the OCP rejects this interpretation by the SCSL Appeals Chamber. The Defence agrees that the SCSL approach should not be followed at the ECCC. It notes, however, that this further demonstrates JCE liability's lack of clear contours and the difficulty of applying such an amorphous concept in practice. The OCP further states that "[a]lthough the secondary offender did not share the intent of the participant that engaged in the incidental crime, his or her culpability lies in the fact that s/he could anticipate such conduct, but willingly took the risk that it might occur. S/he could have prevented the further crime or disassociated him or herself from its likely commission and his/her failure to do so entails that s/he too must be held responsible for its commission." This, too, contradicts recent SCSL jurisprudence. The majority in the RUF Appeal Judgment collapsed the distinction between the *mens rea* required for JCE I and the *mens rea* applicable to JCE III, resulting in the criminal liability of an accused for crimes *within* the common purpose that the accused did not intend and that were only reasonably foreseeable to him. As such, the Majority, effectively eliminates the core requirement for any JCE form (I, II, or III), for a shared common criminal purpose. Irrespective of an accused's intentions or even agreement, under the Majority, an accused is likely to be held responsible for all crimes pursuant to the common purpose despite not having any intentions, means or actual contribution to those crimes.[101] The Defence in no way supports this Judgment, but refers to it here simply to illustrate that the concept of JCE is not as well-settled as the OCP suggests.

55. In paragraph 69, the OCP states that the Court can take into account different degrees of culpability at sentencing. This statement is true; however, this does not cure the application of an invalid form of liability.

56. In paragraph 70, the OCP states that the Defence questions the imprecision of the foreseeability standard of JCE III. The OCP provides no reference for its assertion that "national and international judges have historically applied such a standard with rigor and fairness in numerous contexts in criminal law." The OCP then asserts that JCE III is based on an "objective test" of foreseeability, as – it claims – is aiding and abetting. This is in contrast to the OCIJ's statement in footnote 40 of the JCE Order and the JCE Order's

[100] Cecily Rose, *Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-based Crimes*, 7 J. INT'L CRIM. JUST. 353, 362-63 (2009).
[101] *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgement, 26 October 2009, Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, paras. 1-46.

conclusion, in which the OCIJ requires a subjective standard. This demonstrates yet again that the standard is in fact not settled, but is imprecise. The serious problem with employing an objective test is that a person could be convicted of crimes he did not agree to and did not himself even foresee.[102]

57. In paragraph 71, the OCP asserts that what remains contentious is not that JCE liability exists in international law, but under what conditions it should be applied. The Defence rejects the OCP's conclusion that JCE liability exists as a concept of customary international law, but agrees that there is much contention about how it is applied, in those few tribunals that apply it at all.[103] The OCP asserts that the *ad hoc* tribunals have delineated the contours of JCE III so that it is sufficiently precise. This is false. There are still unsettled elements of JCE III liability at the *ad hoc* tribunals, as the Defence has shown above and in the Appeal.[104] Furthermore, even if the contours of JCE liability *could* be considered precise now, they were not in precisely defined in 1975-79 – further proof that JCE as established by *Tadić* could not have been settled customary international law at that time. The OCP asserts that the requirements of JCE III are:

> [I]n addition to a defendant's significant contribution to the execution of the criminal plan, s/he also: (a) shares the criminal intent or, at a minimum, (b) is aware of the possibility that a crime might be committed as a consequence of the execution of the criminal act and willingly takes the risk. Accordingly, the crime must not only have been a natural and foreseeable consequence of the requisite participation in the plan (which involves an objective test requiring *dolus eventualis* or advertent recklessness), the accused must also have "willingly" taken the risk despite knowing of the foreseeable consequences.

The OCP's statement that participation in the common plan involves an objective test and requires *dolus eventualis* or advertent recklessness departs from established ICTY jurisprudence that an accused must have intended to participate in the common plan.[105] The OCP's final sentence of this paragraph is unclear. To require that an accused "knew" of the foreseeable consequences is not consistent with the argument the OCP put forth[106] that an objective standard of foreseeability should be employed. If an objective standard is used, the accused himself need not have known of the foreseeable consequences. This further demonstrates that the standard is unclear.

58. In paragraph 72, the OCP states that an ICTY Appeals Chamber has "deliberately sought to prevent the JCE liability from expanding in an amorphous manner." The Defence

[102] *See* Appeal, paras. 60-63.
[103] *Id.*, para. 36.
[104] *Id.*, para. 77.
[105] *See Tadić* Appeal Judgement, para. 228.
[106] Response, paras. 70, 85.

supports such an effort at the ICTY, but this has no bearing on the issue of JCE's applicability before the ECCC.

D. JCE LIABILITY EXTENDS TO NEITHER NATIONAL NOR INTERNATIONAL CRIMES UNDER THE ECCC LAW

59. In paragraph 73, the OCP simply lays out the positions taken in the KHIEU Samphan Appeal and the Civil Parties' Appeal concerning the OCIJ's determination that JCE only applies to international crimes, due to a theory of autonomous legal regimes.

60. In paragraph 74, the OCP asserts that the OCIJ's determination that JCE does not apply to national crimes is *obiter dicta* and should be ignored. It asserts that the Defence "did not seek a declaration regarding the applicability of JCE before Cambodian municipal courts." It further asserts that the OCIJ did not find that there were autonomous regimes under ECCC Law and it was therefore beyond its scope of inquiry to determine whether JCE applied to national crimes. The Defence position, as demonstrated extensively in the Appeal,[107] is that the ECCC is a domestic Cambodian court. Although the Defence rejects the notion that a concept of autonomous legal regimes is applicable before the ECCC, it does submit that it was not beyond the scope of inquiry to determine whether JCE applied to national crimes. Whether JCE applies, how it applies, and to what extent it applies, is the heart of the issue. The Defence must have this information in order to have sufficient notice, as the OCIJ has explained.[108] Hence the Appeal.

61. In paragraph 75, the OCP asserts that there is no dichotomy created by autonomous legal regimes at the ECCC. The Defence agrees that the OCIJ's discussion of autonomous legal regimes is flawed and unnecessary. The OCP then asserts that whether a dichotomy of autonomous legal regimes governing national and international crimes exists in French or Cambodian law, the ECCC "has a *sui generis* jurisdiction based on its own set of rules of procedure that envisage no such dichotomy." The Defence rejects this assertion, as it has already shown that the ECCC is a Cambodian court.[109] Therefore, if Cambodian law did employ the concept of autonomous legal regimes, the ECCC would be bound to respect that. However, as explained by the Defence[110] and the Civil Parties,[111] Cambodian law does not. Furthermore, the Rules do not allow the ECCC to function outside of Cambodian law. The Rules are simply meant "to consolidate applicable

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[107] *See* Appeal, paras. 7-24.
[108] *See* OCIJ Order, para. 10.
[109] *See* Appeal, paras. 7-24.
[110] *Id.*, paras. 32-35.
[111] *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ(PTC37), Appeal Brief Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 January 2010, D97/17/1, ERN: 00428308-00428315, para. 11.

Cambodian procedure for proceedings before the ECCC..."[112] The OCP states that the Pre-Trial Chamber has held that the Rules constitute the primary instrument to which reference should be made in determining procedure before the ECCC when there is a difference between the Rules and the Cambodian Criminal Procedure Code. The Defence notes that the Pre-Trial Chamber made this statement after expressing its opinion that these Rules do not stand in opposition to Cambodian Criminal Procedure.[113]

62. In paragraph 76, the OCP asserts that the Establishment Law is the "*lex specialis* in respect of this *sui generis* tribunal" and that it does not create any dichotomy in respect of national and international crimes. The Defence rejects the characterization of the ECCC as a *sui generis* tribunal. The OCP asserts that Article 29 does not distinguish between forms of liability for national and international crimes and that therefore these forms of liability (including JCE as it considers it to be a form of "committing") can be applied to national and international crimes. The Defence agrees that this Article makes no distinction between national and international crimes, but denies again that JCE can be considered a form of "commission." The OCP asserts that Article 29 should be interpreted "pursuant to standard rules of interpretation of treaties." However, the Establishment Law is not a treaty. It is domestic legislation enacted by the Cambodian Parliament and promulgated by the King of Cambodia. The OCP states that the object and purpose of Article 29 and of the entire Establishment Law is to "bring to trial a specific category of persons for serious violations of 'international humanitarian law and *custom.*'" The OCP asserts that this means "customary modes of liability, like JCE, are clearly envisaged under Article 29." It means no such thing. As repeatedly explained:

> First, the Establishment law does not explicitly provide that it is implementing customary international law to be applied directly against persons brought before the ECCC. Second, JCE is a form of liability and not an international crime. It is not possible to violate a form of liability. Therefore, this legislation does not oblige the ECCC to apply forms of liability based in customary international law. Third, this implementing legislation may only incorporate customary international law as it existed at that date, for crimes committed after its entry into force. The Establishment Law may therefore only incorporate customary international law in 2001 for crimes committed after that date. It may not retroactively incorporate customary international law from 1975 and apply it to crimes that were allegedly committed at that time.[114]

E. WHETHER JCE HAS BEEN PROPERLY PLEADED IN THE INTRODUCTORY SUBMISSION

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[112] Rules, preamble.
[113] *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ(PTC 06), Decision on NUON Chea's Appeal Against the Order Refusing Request for Annulment, 26 August 2008, D55/I/8, ERN: 00219322-00219333.
[114] Appeal, Annex A, para. 102 (internal citations omitted).

63. As this section deals only with arguments raised by the IENG Thirith Defence, it will not be addressed. However, the Defence does not in any way concede that JCE has been properly pleaded in the Introductory Submission.

F. WHETHER THE JCE DECLARATION IS UNREASONED OR VAGUE OR DELAYED

64. As this section deals with arguments raised by the KHIEU Samphan and IENG Thirith Defence teams, the Defence will not address most of the arguments raised in this section of the Response, except for two assertions made in paragraph 85. First, in this paragraph, the OCP asserts that the OCIJ's holding as to the *mens rea* for JCE III is *obiter dicta* and should be ignored. Declaring that a form of liability applies, however, without further defining that form of liability, would be inadequate in providing notice to the Defence. The OCIJ stated that it issued the JCE Order "for the purpose of providing sufficient notice relating to a mode of liability which is not expressly articulated in the Law or the Agreement."[115] The parties cannot have sufficient notice without being informed of the definition of this form of liability, especially when it is so controversial. This is evident from the fact that the OCIJ[116] takes a different position from the OCP[117] regarding whether JCE III requires a subjective test or an objective one. Second, the OCP argues that if JCE is found applicable, "it shall be governed by the law and jurisprudence obtaining at the time when a concrete issue arises before a judicial organ of this Court." This statement is erroneous. The law that must be applied, in accordance with the principle of legality, is the law as it existed in 1975-79.

G. ISSUE OF TRANSLATION RIGHTS

65. The argument raised in this section is in direct response to an argument made by the KHIEU Samphan Defence and is relevant only to that team in this circumstance. This section will thus not be addressed.

H. THE APPEAL DID NOT CONTAIN FACTUAL MISREPRESENTATIONS

66. In paragraphs 89 through 92 of the Response, the OCP asserts that the Defence has misrepresented whether the International Co-Prosecutor, Andrew Cayley, has robustly challenged JCE liability in two cases in which he acted as defence counsel. The Defence made no misrepresentations. The Defence stated that "JCE has been robustly challenged"[118] in two of the cases in which Mr. Cayley acted as defence counsel. The Defence did not assert that Mr. Cayley himself made such a challenge. He has not, to the knowledge of the Defence, ever repudiated any challenges to JCE liability made by his or

[115] OCIJ Order, para. 10.
[116] The OCIJ Order, in para. 10, cites *Prosecutor v. Kvočka et al.*, IT-98-30-1/A, Appeal Judgement, para. 86 for the requirement that an accused be aware of the subjective foreseeability of additional crimes.
[117] *See* Response, para. 70.
[118] Appeal, para. 36.

other Defence teams in these cases. The Defence was merely showing the situational inconsistency taken by the current International Co-Prosecutor concerning the legitimacy of JCE liability. The Defence acknowledges, however, that in *Taylor*, JCE was accepted as a form of liability and was challenged regarding the way it was pleaded in the Indictment.

V. CONCLUSION

67. In paragraphs 93 and 94, the OCP requests that the Pre-Trial Chamber dismiss the Appeals as inadmissible, or if they are deemed admissible, requests that the Pre-Trial Chamber holds all three forms of JCE liability applicable at the ECCC. It states that rejecting this form of liability would discard a form of liability which accurately reflects the conduct of the Charged Persons and would be a "unique" departure from well-established jurisprudence. The Defence requests the Pre-Trial Chamber instead to admit the Appeal and to reject the application of all forms of JCE liability at the ECCC. The Defence further points out that the ECCC would not be unique in rejecting the use of JCE liability. The ICC – as shown extensively in the Appeal[119] yet strangely omitted from discussion in the Response – has also rejected it.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to:

a. DECLARE that the Appeal is admissible under Rule 74(3)(a), Rules 55(10) and 74(3)(b), or Rule 21; and
b. REVERSE the Impugned Order's holding that JCE liability is applicable to international crimes over which the ECCC has jurisdiction.

Respectfully submitted,

AVOCAT ATTORNEY AT LAW KINGDOM OF CAMBODIA

ANG Udom Michael G. KARNAVAS
Co-Lawyers for Mr. IENG Sary
Signed in Phnom Penh, Kingdom of Cambodia on this **18th** day of **March, 2010**

[119] *Id.*, paras. 49-58.