EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA
BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES

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Response of Co-Lawyers for the Civil Parties on Joint Criminal Enterprise

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I. Introduction

1. The Office of the Co-Investigating Judges *("OCJI")* invited[1] the parties to file supplementary observations relating to the motion filed on 28 July 2008 by the Co-Lawyers for IENG Sary requesting that the concept of Joint Criminal Enterprise *("JCE")* not be considered a form of liability applicable before the ECCC.[2]

2. The applicability of the doctrine of JCE before the ECCC has already been discussed in case 1 in three *Amicus Curiae* Briefs submitted by Professor Antonio Cassese et al., Professor Dr. Kai Ambos[3] and the Center for Human Rights and Legal Pluralism, at Mc Gill University.[4]

.3. The Co-Lawyers for the Civil Parties' statement will be limited to the following key issues:

(i) is JCE applicable under ECCC Law and/or under the Cambodian Penal Code 1956 and thus does JCE as mode of liability apply before the ECCC?;

(ii) was JCE at the relevant period 1975-1979 applicable as International Customary Law?;

(iii) is JCE consistent with the principle of legality, the principle of *nullum crimen nulla poena sine lege*[5]*?*

II. Summary of Arguments

4. JCE III is neither encompassed in Article 29 of the ECCC Law nor in the relevant articles of the Penal Code of Cambodia 1956 and thus is not applicable.

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[1] Order on Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, Office of the Co-Investigating Judges, 16 September 2008, Doc. D97/III.
[2] Motion filed on 28 July 2008 by the Co-Lawyers for IENG Sary, requesting that the concept of Joint Criminal Enterprise *("JCE")* not be considered a form of liability applicable before the ECCC, Doc. D97.
[3] hereinafter "Ambos Brief", published on the homepage of the ECCC.
[4] hereinafter "Mc Gill Brief", published on the homepage of the ECCC.
[5] This principle means that nobody can be convicted for a crime that was not defined as a crime in the law.

5. The Co-Lawyers for the Civil Parties submit that the doctrine JCE III is not applicable before the ECCC as it was not customary law at the relevant time, i.e. between 1975-1979.

III. Relevant Facts

6. The idea of JCE as mode of liability can be traced back to the English theory of common purpose. Yet in both domestic and international law a distinction is made between (general) joint perpetration (co-perpetration) and joint perpetration that involves a common purpose or common design. The difference between the two is that where a common purpose has been established and roles have been allocated therein, each member is equally liable regardless of the gravity of the crime of his or her participation and role. In the case of a joint perpetration (co-perpetration), absent a common purpose, on the contrary, the liability of each perpetrator is determined on the basis of the crime that particular person committed.[6]

7. In 1999, the ICTY Appeals Chamber in the *Tadić* case pronounced that JCE existed in Customary International Law[7] at the relevant time, rendering each and every member of a 'common design' equally liable, regardless of the gravity of the crime or contribution of each participant.[8]

8. The Appeals Chamber, relying mostly on post-World War II case law, distinguished three categories of collective criminality:

> (i) The basic form, where the participants act on the basis of a 'common design' or 'common enterprise' and with a common 'intention'

[6] See I. Bantekas and S. Nash, '*International Criminal Law*', third edition, chapter 2, 2.5, p. 29.
[7] *Prosecuter v Tadić,* Appeals Chamber Judgment (15 July 1999), para 194 *et seq.* JCE liability was subsequently adopted unquestionably before the ICTY Chambers. See, eg, *Prosecuters v Vasiljević,* IT-98-32-T, Trial Chamber Judgment (29 Nov 2002), para 63 *et seq. Prosecutor v. Vasiljevic,* IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para 87 *et seq.*
[8] See *Prosecutor v.Vasiljević* Trial Judgment, supra note 7, para. 67.

("JCE I");

(ii) The systematic form, found and described in the so-called concentration camp cases, where crimes are committed by members of military or administrative units, such as those running concentration or detention camps, on the basis of common plan or 'common purpose' *("JCE II")*;

(iii) The so-called 'extended form', where one of the co-perpetrators en gages in acts going beyond the common plan but his or her acts still constitute a 'natural and foreseeable consequence' of the realization of the plan *("JCE III")*.

9. Subsequent ICTY and ICTR case law followed the ruling.[9] In the case of more recent mixed tribunals, the East Timorese Special Penal for Serious Crimes[10] has to date applied the JCE doctrine, as has the Special Court for Sierra Leone *("SCSL")*.[11]

IV. Argument

JCE and the ECCC Law

10. First, it should be determined whether JCE is encompassed by the ECCC Law. JCE is not specified in the ECCC Establishment law. The ECCC Law does not include JCE as an explicit form of liability. Article 29 of the ECCC Law[12] affords liability to any suspect, who "planned, instigated, ordered, aided and abetted, or committed" the crimes enumerated in the ECCC Law.

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[9] See e.g. *Prosecutor v. Stakić,* IT-97-24-A, Appeals Chamber Judgment, para 64, 65; *Prosecutor v. Simba* ICTR-01-76-T, Trial Chamber, Judgment, 13 December 2005, para 386, 388.
[10] See *Prosecutor v. Perreira*, Special Panel for Serious Crimes, 27 April 2005, at para 19-20.
[11] *Prosecutor against Alex Tamba Brima et al*, Case No. SCSL-2004-16-A, Appeals Chamber, 22 February 2008, para 72-87.
[12] Art. 29 ECCC Law corresponds to Art. 7 (1) of the ICTY Statute.

11. The interpretation in *Tadic* that the "commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realization of a common design or purpose"[13] is a broad interpretation to justify the idea that all three categories of JCE can be derived from "committing" a crime. In particular, neither the *mens rea* nor the *actus reus* elements are specified regarding this collective liability in the Statute.

    Although the Statutes of the *("SCSL")* and that of the *(ÏCTR")* do not know JCE as liability the Tribunals derived likewise JCE from „committing"[14]

12. While McGill in its Amicus Curiae Brief does not deal with the issue of whether JCE is encompassed by the ECCC Law, the Ambos Brief[15] states that the specific elements of JCE I, II and III cannot be deduced from the Statute, but only from customary case law.

    The Co-Lawyers of the Civil Parties share this opinion and note that in particular JCE III cannot be derived from the "commission" of crimes according to Art. 29 of the ECCC Law.

13. Furthermore the Tadic' Appeals Chamber used Article 1 of the Statute to justify a more expansive approach holding that the 'object and purpose' is to prosecute those who are responsible for serious violations of International Humanitarian Law.[16] The moral necessity to prosecute those most responsible for mass atrocities cannot justify the enlargement of the clear and literal ECCC Statute and subsume *all* categories of JCE under "committing". This argument suggests to work backwards from the proposition that the defendants must be punished. Since the defendants must be punished, the Statute must be read in such a way that it will yield the desired result. This argument is circular.[17]

    In particular, JCE III holds a person is liable for acts *committed* by another person of the JCE. Thus, those who are held responsible according to JCE III have explicitly not *committed* the crime.

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[13] See supra note 8(Tadic), para 188.
[14] See Article 6 (1) of the ICTR Statute and Article 6 (1) of the SCSL Statute.
[15] Ambos Brief, II.2., p.21, 22.
[16] See supra note 8 (Tadic), para 189.
[17] J. D. Ohlin, Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, Journal of International Criminal Justice 5 (2007), p.72.

14. While the Rome Statute does not explicitly use the phrase "joint criminal enterprise," it effectively provides for such liability when a person contributes to the commission of a crime by a group of persons acting with a common purpose which *involves* the commission of a crime within the jurisdiction of the Court.[18] Despite the existence of ICTY jurisprudence on JCE and Article 25 (3) (d) of the Rome Statute at the time when the ECCC Law was drafted and adopted, the Law does not explicitly mention JCE as a mode of liability. Furthermore, the explicit omission of JCE in the ECCC Law, leads to the conclusion that JCE is not encompassed as a mode of liability.

15. The Co-Lawyers for the Civil Parties conclude that JCE III can neither literally nor implicitly be deduced from Art. 29 of the ECCC Law.

JCE and national Cambodian law at the relevant time

16. The Co-Lawyers for the Civil Parties agree with the conclusion of the Mc Gill[19] and the Ambos Brief[20] that at the time period for which the ECCC has jurisdiction, found in the Cambodian Penal Code of 1956 did not encompass a mode of liability like that of JCE III.[21]

17. Moreover the Co-Lawyers for the Civil Parties rely on the fact that Article 82 of the Cambodian Penal Code means Co-Perpetration and Article 83 complicity, the Code provides only for situations in which the defendant has contributed in one way or another.

There is no provision of the Code that can be read so as to give rise to liability similar to JCE III.

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[18] Art. 25(3), Rome Statute, see also, *Prosecutor v. Thomas Lubanga Dyilo* Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN ICC Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, 29 January 2007, para 326-330, where the Pre-Trial Chamber supports co-perpetration rather than JCE in the sense of Art. 25 (3) Rome Statute.

[19] McGill Brief, para 38-39.

[20] Ambos Brief, II.4., p. 29,30.

[21] McGill Brief, para 38-39: Ambos Brief, II.4., p. 29, 30.

JCE as International Customary Law at the relevant time

18. The Co-Lawyers for the Civil Parties submit that the doctrine of JCE, in particular in its extended form, did not form part of international customary law at the relevant time. JCE I and II can, on the other hand, be considered as such. The existence of a rule of International Customary Law requires (a) general and consistent state practice and (b) *opinio juris*.[22]

19. In this context it is nonetheless questionable that the jurisprudence of the International Military Tribunal *("IMT")* was part of Customary International Law in 1975-79, as the first mention of its customary status could as well be deemed the 1993 Secretary-General's report on the establishment on the ICTY. It stated that the ICTY "should apply rules of international humanitarian law which are *beyond any doubt*[23] part of customary law" (...) and that the part of conventional international humanitarian law which has beyond doubt become part of international customary law is law applicable in armed conflict as embodied in the Charter of the International Military Tribunal (...).[24]

20. It could be argued in this sense that the Appeals Chamber of the ICTY, in introducing the principle of JCE in *Tadić* did not conduct a comprehensive analysis of either state practice or *opinio juris*.

21. The ICTY Appeals Chamber demonstrated in the *Tadic* case that JCE I and JCE II were, at least since World War II, part of International Customary Law. Concerning JCE III, however, the Chamber fails to reach a similarly solid conclusion as a consequence of the examples to which it refers. The cited cases of mob violence reflect more JCE I, in particular that the perpetrators shared a common (spontaneous) design and then contributed by different acts to the killings.

22. The McGill Brief concedes that the WW II jurisprudence cited in *Tadic* is less conclusive and notes concerning JCE III that the *Essen Lynching* case, as well as

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[22] International Review of the Red Cross, Customary Law, Volume 87, Number 857, March 2005, p.178.
[23] emphasis added.
[24] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), para 34-35.

the *Borkum* case, are not clear on the role or intentions of each participant and are thus inferred from the prosecution's arguments and the eventual findings of guilt.[25]

23. The Ambos Brief submits that WW II cases referred to in *Tadic* in order to support that JCE III has been already recognized by WW II jurisprudence do not demonstrate that JCE III was applied.[26] The Co-Lawyers for the Civil Parties submit that in both cases the defendants were present or in the immediate vicinity of the murders and none of them were charged with participation in some larger plan outside of the unlawful treatment of the prisoners involved.

24. In addition, there is no existing common state practice. Germany, the Netherlands and Switzerland, for example, have not included this form of liability in their criminal codes while in other countries, such as Britain, Canada and the United States, where liability for foreseeable, but unintended crimes is included, the doctrine is subject to wide criticism.[27]

25. Similar are the cited Italian cases[28] that are not examples pointing to pure JCE III, as the required *mens rea* was not clearly mentioned and perpetrators were not held liable if the "killing was an exceptional and unforeseen event".[29]

26. It can be concluded, and the Co-Lawyers for the Civil Parties do thus submit that the examples referred to in *Tadic* do not establish JCE III as International Customary Law neither by international nor national jurisprudence. The Appeals Chamber in *Tadic* failed to demonstrate the existence, neither through former jurisprudence nor state practice, of JCE III as "International Customary Law".

International convention(s) and JCE

27. Another question to be considered is whether the doctrine of JCE is so far recognized by an international convention and thus part of international customary law.

[25] McGill Brief, para 15 and para 23-24.
[26] Ambos Brief, II.3.3., p.28-29; see also, Allison Marston Danner and Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law, (2004), Vanderbilt University Law School, Research Paper No. 87, at p. 38-40.
[27] see McGill Brief, at para 35, 36; see also Danner and Martinez, supra note 24, at p. 32.
[28] see supra note 8 (Tadic), para 215-219.
[29] see supra note 8,(Tadic) para 217.

28. The international treaties mentioned in *Tadic*[30], such as the Convention for the Suppression of Terrorist Bombing and the Rome Statute, are not relevant for the period in question that is from 1975 to1979.
Thus, at the relevant time no Convention or Treaty existed that supported the JCE doctrine.

The Principle of Legality

29. The ECCC Law includes in Article 33 new, referring to Article 15 of the International Covenant on Civil and Political Rights *("ICCPR")*, the provision that:

> *"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was not constitute a criminal offence, under national or international law, at the same time when it was committed. (...)"*

30. It has to be stressed that this principle is recognized under domestic and international law and is binding on Cambodia as a State Party to the Convention, having been ratified by Cambodia on 26 May 1992.[31]

31. The *Principle of Legality,* as a *principle of justice,* requires that the crime *and the form of liability* with which a defendant is charged existed and were foreseeable at the time of the alleged crimes.[32] As it is not established that JCE III existed under Cambodian law nor was part of international customary law by 1975, its retroactive application constitutes a violation of the Principle of Legality.

32. Considering the broad scope of Article 29 of ECCC Establishment Law, grave criticisms[33] leveled against the doctrine of JCE (III) remain and there is no

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[30] see supra note 3 (Tadic) , para 221.
[31] Cambodia signed the ICCPR on 17 October 1980.
[32] The principle *nullum crimen(, nulla poena) sine lege* consists of the four single principles *lex scripta, lex certa, lex stricta,* and *lex praevia.*
[33] See the summaries in: A. Cassese, *"The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise"*, Journal of International Criminal Justice (2007), (109-133) p.114-116.: Elies van Sliedregt, "Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide", Journal of International Criminal Justice (2006), p.4-8, where controversy over scope, nature and applicability are discussed.

reasoned basis to consider JCE III as International Customary Law at the time period in question.

33. The Co-Lawyers for the Civil Parties therefore agree with the above-mentioned criticism found in the amicus curiae of McGill University in paragraphs 35 to37, concerning United States case law; paragraphs 41 to 53, concerning the jurisprudence of international and national Courts and scholars. The broad scale of critical voices within and outside the courts already demonstrate that JCE in its broadest extent is highly disputed.

V. Conclusion

34. In support of the Ambos Brief and of certain elements of the McGill Brief, the Co-Lawyers for the Civil Parties submit that JCE III is not applicable before the ECCC as it was neither codified in the Cambodian Penal Code of 1956 nor in the ECCC statute and therefore not part of International Customary Law at the relevant time, i.e. between 1975 and1979 Applying JCE III at the ECCC would amount to a violation of the general principle of *nullum crimen nulla poena sine lege.*[34]

Respectfully submitted by the Co-Lawyers for the Civil Parties

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[34] see supra Fn 5.

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Signed in Phnom Penh on 30 December 2008