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BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S SUPPLEMENTARY OBSERVATIONS ON THE APPLICATION OF THE THEORY OF JOINT CRIMINAL ENTERPRISE AT THE ECCC

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), pursuant to the Order of the Co-Investigating Judges ("OCIJ"),[1] hereby submits the following supplementary observations on the application of joint criminal enterprise ("JCE") at the ECCC.

I. SUMMARY OF ARGUMENT

The OCP argues that JCE should be applied at the ECCC because it more accurately reflects the responsibility of participants in international crimes than other forms of liability[2] and captures conduct which might not fit under other forms of liability. It argues that JCE satisfies the relevant criteria for a form of liability to be applied at the ECCC, namely: (1) that it is provided for in the ECCC law; (2) it existed under customary international law at the relevant time; (3) the law providing for JCE was sufficiently accessible at the relevant time; and (4) the law providing for JCE was sufficiently foreseeable at the relevant time.[3] The OCP concludes that the application of JCE would not violate the principle of *nullum crimen sine lege*.[4] Irrespective of whether there is a factual predicate to support a charge of JCE (a factual finding which the OCP is inviting the PTC to make – presumably through the revaluation/re-examination of the evidence viewed by the OCIJ),[5] this form of liability is not applicable before the ECCC for the following reasons:

A. JCE is not applicable at the ECCC because it is barred by the principle of *nullum crimen sine lege*. This fundamental protection prevents the retroactive application of criminal law.

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[1] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, 16 September 2008.

[2] *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" Dated 8 August 2008, 5 September 2008 ("OCP Appeal"), paras. 46, 50.

[3] OCP Appeal, para. 49. The Defence notes at the outset that the four conditions are derived solely from *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 ("*Milutinović* Decision"), para. 21. The blind citation of International Criminal Tribunal for the former Yugoslavia ("ICTY") jurisprudence is inadequate. These conditions merely guide the ICTY as to how it, an international tribunal, should assess whether a form of liability is within its jurisdiction. It cannot resolve the separate question of how the ECCC, a domestic Cambodian court, should assess the question at hand.

[4] OCP Appeal, para. 57.

[5] Such a task appears to be the intention of the OCP Appeal whereby it is requesting the Pre-Trial Chamber to re-evaluate the evidence reviewed by the OCIJ in order to verify whether it makes the same factual assessment as the OCIJ. This appears to be beyond the scope of appeals before the Pre-Trial Chamber, as it would require almost full appellate review before the trial has even started. The scope of appeals before the Pre-Trial Chamber is unclear. However, the recent amendment to Internal Rule 104, which drastically limits the scope of full appeals from trial judgements, implies that this Ground of the OCP Appeal is beyond the scope of an appeal before the Pre-Trial Chamber.

B. JCE is not a form of liability over which the ECCC has jurisdiction by virtue of Article 29 of the Establishment Law.[6] It is neither found explicitly in Article 29, nor can it implicitly be considered a form of "commission."

C. JCE is not recognized by Cambodian law applicable in 1975-79.

D. JCE is not currently established in customary international law nor was it recognized in customary international law during 1975-79.

E. JCE was neither foreseeable nor accessible in 1975-79.

F. Customary international law is not directly applicable in Cambodian courts and so may not be applied at the ECCC.

II. Law

1. Article 29 of the Establishment Law sets out the forms of liability for which a person investigated by the OCIJ may face charges. It provides the following:

> **Article 29**
> Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 New, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

2. In establishing the competence of the ECCC, Article 2 New of the Establishment Law provides the following:

> **Article 2 New**
> Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

3. JCE was created by the ICTY Appeals Chamber in *Tadić*.[7] As neither the term "joint criminal enterprise" nor the precise objective and subjective elements of this form of liability were included in the ICTY Statute they were purportedly identified by the *Tadić* Appeals Chamber.[8]

4. The *Tadić* Appeals Chamber primarily relied upon selected post World War II military cases in creating JCE.

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[6] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004, ("Establishment Law").
[7] *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para.204 ("*Tadić* Appeal Judgement"), paras. 185-234.
[8] *See* Annex A for a review of the JCE elements and its ever evolving nature.

III. ARGUMENT

A. JCE is not applicable at the ECCC because of *nullum crimen sine lege*

1. The concept and extent of *nullum crimen sine lege*

5. Article 15(1) of the International Covenant on Civil and Political Rights ("ICCPR") provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." The OCP accepts that the ECCC is bound by Article 15(1) of the ICCPR.[9] This Article encompasses, *inter alia,* the maxim *nullum crimen sine lege*, requiring criminal rules to unambiguously indicate the prohibited conduct. Based on this principle, criminal law must not be construed expansively to the detriment of the accused.[10]

6. Cambodia has an even stricter prohibition on the imposition of retroactive criminal law. 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."[11] Unlike Article 15(2) of the ICCPR,[12] no exceptions are permitted.[13] This protection against the imposition of retroactive criminal liability is further established by the Paris Peace Accords which led to the 1993 Cambodian Constitution.[14] Thus, Cambodian law provides for a greater protection against retroactive criminal legislation by the State than the ICCPR, which merely sets down minimum guarantees. When a human right protected at the national level is greater than that protected at the international level then the former prevails. Article 5(2) of the ICCPR provides that "There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that

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[9] Establishment Law, Article 33. *See also* Article 31 of the Cambodian Constitution.
[10] *See Prosecutor v. Kayishema*, ICTR-95-1-T, Decision on the Motion of the Prosecutor to Sever, to Join in a Superseding Indictment and to Amend the Superseding Indictment, 27 March 1997, para. 3.
[11] 1956 Cambodian Penal Code, Article 6, para. 1.
[12] ICCPR, Article 15(2), "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."
[13] Similarly, the principle of *nullum crimen sine lege* applies "without exception in Dutch domestic law." *See* J.H.M. Willems, *Treatment of customary international law and use of expert evidence by the Dutch court in the Bouterse case*, 4 NON-STATE ACTORS AND INTERNATIONAL LAW 65, 72 (2004).
[14] *See* Annex 5, Principles for a New Constitution for Cambodia, to the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, 23 October 1991, Principle 2.

it recognizes them to a lesser extent."[15] This is especially true in the present case where the ICCPR was signed and ratified by Cambodia after the alleged crimes occurred.[16]

7. As set out in sections B to E herein, applying JCE for crimes allegedly committed in 1975-79 violate *nullum crimen sine lege* as defined by Cambodian or international law.

2. *Nullum crimen sine lege* and its applicability to international law

8. In addition to the issue of *nullum crimen sine lege*, JCE also raises the issue of applicability of law. The OCP Appeal, and indeed the Cassese, Ambos and McGill briefs all display a fundamental misunderstanding of this issue. They have all assumed that if JCE was part of international law in 1975-79, and was sufficiently foreseeable and accessible, then it may be applied at the ECCC. This is incorrect. Even if a challenge to a form of liability based on *nullum crimen sine lege* fails, the separate obligation remains on the OCP to prove that this rule of international law may be directly applied at the ECCC, a Cambodian court. The OCP's burden cannot be shifted onto the Defence.
9. As set out in Section F herein, there is no lawful basis within Cambodian law to directly apply at the ECCC a form of liability based entirely on customary international law.

B. JCE is not a form of liability over which the ECCC has jurisdiction

10. A law may not retroactively create a crime, or a form of liability by which that crime may be committed;[17] that would breach the *nullum crimen sine lege* principle, upheld in a multitude of human rights instruments,[18] Cambodian law[19] and applied at other

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[15] This provision essentially preserves the sanctity of any laws that provide a higher level of protection for civil and political rights than that set out in the ICCPR. *See* MANFRED NOVAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: ICCPR COMMENTARY 100 (1993).

[16] Cambodia signed the ICCPR on 17 October 1980 and ratified it on 26 May 1992.

[17] *Nullum crimen sine lege* applies to forms of liability as well as to substantive crimes. *See Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras. 32-35; *Prosecutor v. Stakić*, IT-97-24-A, Judgment, 22 March 2006, para. 62.

[18] ICCPR, Article 15; European Convention on Human Rights and Fundamental Freedoms, Article 7; Inter-American Convention on Human Rights, Article 9; African Charter of Human and People's Rights, Article 7(2); Rome Statute of the International Criminal Court, Articles 22, 24; Third Geneva Convention of 1949, Article 99; Fourth Geneva Convention of 1949, Article 67. No derogation from the application of this right is permissible under the ICCPR. See *Puhk v Estonia*, European Court of Human Rights, Application no. 55103/00, Judgment of 10 February 2004, para. 24.

[19] 1956 Cambodian Penal Code, Article 6, para. 1.

courts.[20] A law simply grants the court jurisdiction to apply forms of liability already set out in substantive law at the time of the alleged crimes.[21] Article 29 of the Establishment Law[22] merely sets out the forms of liability over which the ECCC has jurisdiction; it does not create new forms of liability to be retroactively applied.

1. JCE is not explicitly included in Article 29 of the Establishment Law

11. Neither the Initial Establishment Law promulgated in 2001 nor the amended Establishment Law in 2004 explicitly include JCE. Both were passed well after the *Tadić* Appeals Chamber created JCE in 1999. Conversely, both the Rome Statute of the International Criminal Court ("ICC"), which was adopted in 1998, and the Statute of the Special Tribunal for Lebanon ("STL"), adopted in 2006, explicitly include JCE.[23] While the International Criminal Tribunal for Rwanda ("ICTR"), ICTY, and Special Court for Sierra Leone ("SCSL") have been primarily influenced by the Anglo-Saxon, common-law, adversarial system of justice,[24] the ICC, STL and the ECCC follow the civil law, inquisitorial system. Under the Anglo-Saxon model, the founding documents of a tribunal act as a framework; under the civil law system, however – 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.[25] The explicit exclusion of JCE in the Establishment Law denotes that it is not a form of liability at the ECCC.

12. Furthermore, there is no support for the contention that Article 29 is non-exhaustive in nature and thereby may include JCE as a separate form of liability than those listed. The term "or otherwise aided and abetted"[26] found in Article 7(1) of the ICTY Statute

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[20] *See* ICC Statute, Article 22; *Prosecutor v. Vasiljević*, IT-98-32-T, Judgement, 29 November 2002, para. 193; *Prosecutor v Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 92.

[21] *See Prosecutor v. Tadić*, IT-94-01, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

[22] Article 29 of the Establishment Law.

[23] *See* Article 25(3)(d) of the ICC Statute. *See* Article (3)(1)(b) of the STL Statute.

[24] Ruben Karemaker, B. Don Taylor III, & Thomas Wayde Pittman, *Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence*, 21 LEIDEN J. INT'L L. 683, 683 (2008).

[25] *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.

[26] Emphasis added.

and used as partial justification for including JCE within Article 7(1),[27] is not replicated in Article 29 of the Establishment Law.[28]

2. JCE is not a form of "committing" under Article 29 of the Establishment Law

13. The OCP Appeal[29] and Cassese[30] both assert that the *Tadić* Appeals Chamber found JCE to be a form of commission, hence "implicitly" included in the ICTY Statute.[31] They also assert that the ICTY, ICTR and SCSL have all found that "participation in a common criminal plan or purpose is a form of 'committing' a crime"[32] and therefore the ECCC "may also read 'committed' to include liability for commission through a JCE."[33]

14. As highlighted by Ambos, however, the *Tadić* Appeal Judgement was not completely clear on this point.[34] Even if the *Tadić* Appeals Chamber considered that JCE is a form of commission, the ECCC is not bound by this determination. The ECCC is not a subordinate Chamber within the same court structure as any of the courts listed that have applied JCE and is not bound therefore to follow this determination under the principle of *stare decisis*.[35] Moreover, as held by the US Supreme Court, even "*stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision'".[36] The Pre-Trial Chamber is at liberty to follow or depart from the decisions of other courts at will and should do so for the following reasons.

15. First, all three categories of JCE do not fall within the definition of commission envisaged by Article 7(1) of the ICTY Statute.[37] The *mens rea* of commission is intent

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[27] *Milutinović* Decision, para 20.
[28] Instead Article 29 refers to any suspect who "planned, instigated, ordered, aided and abetted, or committed the crimes" (Emphasis added). This simply reflects the correct grammatical approach to listing a closed list.
[29] OCP Appeal, para. 50.
[30] Cassese Brief, para. 69.
[31] *Tadić* Appeal Judgement, paras. 188-93.
[32] OCP Appeal, para. 50.
[33] Cassese Brief, para. 69.
[34] Ambos Brief, p. 21.
[35] *Prosecutor v. Aleksovski,* IT-95-14/1-A, Judgement, 24 March 2000, para. 113. *See also Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006, paras. 116-17.
[36] *Lawrence. v. Texas*, 539 U.S. 558 (2003), at 577, quoting *Helvering v. Hallock,* 309 U.S. 106, 119 (1940).
[37] In an article written by two senior United Nations Legal officials shortly after the creation of the ICTY (and pre-*Tadić*), it was noted that the Statute deliberately omits *inter alia* the participation in a common plan to commit a crime. Rather, the Statute is based on the principle of individual criminal liability: while retaining the notion of complicity, this only extends to the individual criminal responsibility of the accused for acts done by him to the extent of his contribution to the execution of the crime. This is in accordance with Principle VH of the Nuremberg Principles. *See* Daphna Shagra and Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia* 5 EUR. J. INT'L L. 360, 369 fn. 36 (1994). It would therefore appear that the original

or awareness "of the substantial likelihood that the crime would occur as a consequence of his conduct."[38] To find that the third form of JCE falls within this concept of commission when intention is not required, but mere foreseeability suffices, is incorrect.[39]

16. Second, the *Tadić* Appeals Chamber's reliance on the object and purpose of the ICTY Statute to interpret "committing" in Article 7(1) to include JCE was erroneous. Recourse to a teleological interpretation of a provision is not a legitimate reason for altering the plain and unambiguous terms of a Statute. It is only necessary when there is a lack of clarity, or if relying on the text alone would produce a manifestly absurd result. This was not the case with Article 7(1) of the ICTY Statute.[40]

17. If recourse to the object and purpose is made, then the object and purpose of the treaty as a whole must be examined and not just sections of individual provisions therein.[41] Interpreting the Establishment Law in light of its object and purpose mandates strongly against the inclusion of JCE in Article 29. The *Tadić* Appeals Chamber relied heavily on the object and purpose of prosecuting persons responsible for serious violations of international humanitarian law in establishing that Article 7 of the ICTY Statute included JCE. The purpose of the Establishment Law "is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes" under that regime.[42] The distinction between "bring to trial" and "prosecute" is fundamental to interpreting Article 29. In the absence of an expressed purpose to prosecute in the Establishment Law, a wide interpretation of Article 29 to include JCE is untenable.

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intention behind the Statute was not to include forms of joint liability that are so far removed from the notion of individual responsibility.

[38] *Prosecutor v. Limaj et al.*, IT-03-66-T, Judgement, November 30, 2005, para. 509.

[39] Stephen Powles, *Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?* 2 JICJ 606, 611 (2004). *See also* Ambos brief, p.22. Ambos considers that JCE III entails accomplice liability and as such does not amount to commission.

[40] Vienna Convention on the Law of Treaties 1969 ("VCLT"), Article 32. *See also* Ambos Brief, p. 22. Ambos explains that the OCP brief "mixes policy arguments with a literal interpretation of Art. 29 ECCC Law apparently overlooking that the latter cannot be outplayed by the former."

[41] Article 31 of the VCLT obliges the court to interpret a treaty in light of "its" object and purpose, namely the object and purpose of the entire treaty. The *Tadić* Appeals Chamber's mere examination of certain provisions of the ICTY Statute therefore constituted an impermissibly narrow view. Article 1 of the ICTY Statute requires that prosecutions must be "in accordance with the provisions of the present Statute." The object and purpose found in Article 1 of the ICTY Statute is not simply to prosecute all those "responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" but to do so in "accordance with the provisions of the present Statute." These provisions include the right to a "fair and public hearing" required by Article 21 of the ICTY Statute. By failing to take this factor into account, it accorded the object and purpose of securing prosecutions an artificially wide interpretation. *See Tadić* Appeal Judgement, paras. 189-90.

[42] Establishment Law Article 1, (emphasis added).

18. The OCP's assertion that inclusion of JCE as a form of "commission" is "consistent with the ... nature of international crimes"[43] is irrelevant. The *Tadić* Appeals Chamber similarly placed reliance on this argument to justify including JCE within its Statute[44] and yet neither the *Tadić* Appeals Chamber, nor the OCP provided any justification as to why the nature of certain crimes may justify interpreting "committing" to include JCE. The nature of international crimes is not something that should be taken into account during statutory interpretation.[45] Reliance upon the alleged nature of a crime to justify its contours assumes the culpability of the defendant and then works backwards to ensure a form of liability is created which fits that assumption. This is a flagrant violation of the presumption of innocence.[46]

3. On the basis of Cambodian law, Article 29 excludes JCE

19. The ECCC, as a Cambodian Court, is obliged to apply Cambodian law.[47] JCE is not part of Cambodian law. "Commission", according to Cambodian law, is defined as co-perpetration.[48] To interpret Article 29 to include a form of liability which is alien to its legal system constitutes the very opposite of this stated object and purpose.

C. JCE is not recognized in Cambodian law applicable in 1975-79

20. It is clear that "there is no explicit legal basis for JCE in the 1956 Cambodian Penal Code."[49] As recognized by the OCP, the 1956 Cambodian Penal Code "has several articles that criminalize actions undertaken by groups of people acting together."[50] The code provides for a form of liability known as "co-perpetration." Therefore, Cambodian law is able to punish as principals, rather than accessories, those people who jointly carry out crimes. The two concepts cannot be assimilated. The Cambodian law of co-perpetration, as set out in Article 82 of the 1956 Penal Code, materially differs from JCE.

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[43] OCP Appeal, para. 51.
[44] *Tadić* Appeal Judgement, para. 191.
[45] VCLT, Article 31, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
[46] *See* Article 35 new of the Establishment Law, "The accused shall be presumed innocent as long as the court has not given its definitive judgment."
[47] *See* Article 12(1) of the Agreement Between The United Nations And The Royal Government Of Cambodia Concerning The Prosecution Under Cambodian Law Of Crimes Committed During The Period Of Democratic Kampuchea, 6 June 2001. *See also* Preamble to the Internal Rules, Rev. 2, 5 September 2008.
[48] 1956 Penal Code, Article 82: "Any person participating voluntarily, either directly or indirectly, in the commission of a crime or infraction, is liable for the same punishment as the principle perpetrator. Direct participation constitutes co-perpetration, indirect participation constitutes complicity." (*unofficial translation*)
[49] McGill Brief, para. 39.
[50] OCP Appeal, para. 58.

21. 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.[51] 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.[52]
22. 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.[53]
23. Third, JCE separates the alleged common plan into an objective and the means contemplated to achieve that objective.[54] By contrast, co-perpetration does not to distinguish the two.[55]
24. Cassese attempts to prove that based on French law, all three forms of JCE can be found in Cambodian law in 1975-79. First, without any supporting analysis, Cassese asserts that "*Coaction* seems clearly to cover JCE 1 and 2."[56] As demonstrated above, this is incorrect. As for the extended form of JCE, Cassese asserts that this would be

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[51] Since the 1956 Cambodian Penal Code was heavily, if not exclusively, based on the French Penal Code, it is instructive to review the way in which the French provisions on complicity have been interpreted. For this reason, *see* B. BOULOC, DROIT PÉNAL GÉNÉRAL 267 (Dalloz, 2007), para. 293.

[52] *Prosecutor v. Krnojelac,* IT-97-25-A, Judgement, 17 September 2005, para. 81.

[53] *Prosecutor v. Brđanin,* IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement"), para. 414.

[54] *Prosecutor v. Brima et al.*, SCSL-04-16-A, Appeal Judgement, 22 February 2008, ("*AFRC* Appeal Judgement"), para. 76.

[55] The consequences of this distinction are that a person could be liable under JCE liability when the same conduct would not be criminal under co-perpetration. **First**, where "the accused have participated in furthering the common purpose at the core of the JCE" this is sufficient for criminal liability to attach. *Brđanin* Appeal Judgement, para. 427. For co-perpetration, however, it is required that each member personally accomplish the material actions constituting the offense, namely a part of the *actus reus* of the offense. BOULOC, at 267, para. 293. As noted above, this clearly distinguishes JCE from co-action as for the former, no part of the *actus reus* need have been committed. *Brđanin* Appeal Judgement, para. 427. **Second**, by introducing the distinction between the objective and the means used to achieve that objective, liability is possible under JCE when the alleged enterprise is of a "vast scope." *Prosecutor v. Karamera et al.*, ICTR-98-44-AR72.5 & ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, para. 16. This is because in a JCE, the objective may be as vague as "to take any actions necessary to gain and exercise political power and control over the territory." *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgement, 20 June 2007, para. 67. In contrast, as the objective and means of achieving that objective are identical in co-perpetration, only the criminal acts which the accused and the other co-perpetrators have a direct part in and personal knowledge of, may fall under this form of liability. **Third**, one may still be liable under JCE theory when the objective is not an international crime if the means contemplated to achieve that objective are criminal. *AFRC* Appeal Judgement, para. 76. In contrast, co-perpetration in international criminal law could only apply as a form of liability where the objective was an international crime, as it would have to be the same as the means envisaged to achieve the objective.

[56] Cassese Brief, para. 78.

matched in French case law by the notion of "*complicité.*"[57] Cassese completely contradicts his earlier assertion that JCE differs from aiding and abetting.[58] The third form of JCE is nothing more than an extended form of accomplice liability rather than commission.

25. The cases cited by Cassese bear this out. The first involves a conviction for instigation where the instigator was held liable for the aggravated crimes committed by the principals, notwithstanding his lack of knowledge of these aggravating circumstances.[59] The second appears to involve a form of aiding and abetting by inaction for allowing misuse of corporate funds by another director when the accused had the power to stop it.[60] The third case concerns a form of accomplice liability for murders committed by the principal which were not predictable when the offense was planned.[61] These cases are wholly irrelevant in establishing the extended form of JCE as a form of commission liability within French or Cambodian law.
26. The restatement of a variety of different national approaches to collective criminal liability carried out by McGill[62] does not establish whether any or all forms of JCE are part of law binding on Cambodia. Although some form of collective criminal liability may have existed in certain countries, its application has not been uniform. Deference must be shown to each country rather than imposing an alien form of liability.
27. The existence of co-perpetration under the 1956 Cambodian Penal Code also undermines the arguments invoked by the OCP and Cassese that JCE is necessary as only this form of liability will achieve certain policy objectives.[63] Arguments based solely on policy are a notoriously dangerous manner of interpreting the law.[64] Legislatures may create forms of liability based on public policy reasons. Judges may not create law but must simply apply it. As held by Lord Simons, to do so "appears to me to be a naked usurpation of the legislative function under the thin disguise of

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[57] *Id.*
[58] Cassese Brief, para. 28.
[59] *Cour de cassation, Chambre criminelle,* 31 December 1947, *Bulletin criminel* No. 270. No case name is cited in the Cassese Brief.
[60] *Cour de cassation, Chambre criminelle,* 28 May 1980, in J. PRADEL, LES GRANDS ARRETS DU DROIT PENAL GENERAL 4(2001) p. 408.
[61] *Cour de cassation, Chambre criminelle,* 19 June 1984, *Bulletin Criminel No. 231.*
[62] McGill Brief, paras. 25-37.
[63] Indeed for Cassese the extended form of JCE is explicitly founded in considerations of public policy. *See* Cassese Brief, para. 82.
[64] "Public policy is a very unruly horse and once you get on you never know where it may carry you. It may lead you from sound law. It is never argued but when all other points fail." Burrough J in *Richardson v. Mellish* (1824) 1 Bing 229 at 252.

interpretation"[65] echoing a similar concern expressed by a former ICTY judge.[66] Reliance upon policy considerations, as Cassese advocates, is manifestly insufficient in holding that JCE is applicable at the ECCC.

28. Even if the policy arguments expressed by the OCP and Cassese are taken into account, they do not justify holding that JCE should be applied at the ECCC. Cassese asserts that "to obscure responsibility in the fog of collective responsibility and let the crimes go unpunished would be immoral and contrary to the general purpose of law."[67] In advocating, however, that JCE is necessary to protect the interest of "accurately accounting for the full gravity of crimes,"[68] Cassese offers no reasoning as to why the Cambodian law of co-perpetration would be unable to adequately achieve these purposes.

29. The OCP contends that "JCE liability has been employed when prosecuting mass atrocities because it captures conduct which may not constitute the *actus reus* of ordering, planning or instigating of specific crimes but nevertheless is significant for the commission of the atrocities,"[69] enabling an accused to be "convicted of all the crimes committed in furtherance of the joint criminal enterprise" rather than a "handful of specific acts."[70] The clear policy argument here is that prosecutions under JCE would make it simpler for the OCP to gain a greater number and wider breadth of convictions.

D. JCE is not recognized in customary international law

1. JCE is not currently established in customary international law

30. The OCP refers to various cases and conventions to support the contention that the concepts of "common criminal purpose or common criminal plan have existed since at least World War II."[71] It proceeds to list these cases and conventions, presumably

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[65] *Magor & St. Mellons Rural District Council* v. *New Port Corporation*, (1951) 2 All ER 839 : 1952 AC 189. *See also* Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense,* 11 LEWIS & CLARK L. REV. 185 (2007).

[66] Patricia Wald, former ICTY Judge, observed how some judges at the ICTY would legislate from the bench: "The court's image is that it is meant to develop notions of international laws and flesh them out. That's a very academic notion. But in the first place this is an international criminal court." Marlise Simons, *An American with Opinions Steps Down Vocally at War Crimes Court*, N. Y. TIMES, 24 January 2002, *available at* http://query.nytimes.com/gst/fullpage.html?res=9B07E4D7113BF937A15752C0A9649C8B63&scp=9&sq=patricia%20wald&st=cse (last accessed 8 November 2008) (emphasis added).

[67] Cassese Brief, para. 30.

[68] Cassese Brief, para. 70. *See also* OCP Appeal, para. 46.

[69] OCP Appeal, para. 46.

[70] OCP Appeal, para. 46.

[71] OCP Appeal, para. 52.

to convince the Chamber that, because other courts in other countries appear superficially to have applied a common purpose doctrine, JCE is established in customary international law. Meanwhile, Cassese proposes a fundamentally flawed interpretation of how customary international law is established, incorrectly manipulating basic principles of public international law to fit his purpose.[72]

a. The creation of rules of customary international law

31. Customary international law[73] can only be created through (a) general and consistent state practice and (b) *opinio juris*.[74] The two concepts are inextricably linked[75] and may overlap.[76] Moreover, custom may be said to be based on the "tacit agreement" of States through their practice and expression of what they believe to be legally binding amongst themselves.[77] State practice must not necessarily be absolutely consistent, but a substantial level of uniformity is required.[78] The consistency of state practice required may vary according to the subject matter in question.[79] It is for the party seeking to rely on a rule of customary international law to prove its existence.[80] *Opinio juris* may be considered to be the recognition by states that a certain practice is

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[72] Reference to JCE in customary international law is made at several points throughout the Cassese Brief. Those paragraphs which this response will address are: paras. 33-36, 59, 63 (and corresponding footnote 123), 68 and 73.

[73] Customary international law is a source of international law. It is elucidated in Article 38(1)(b) of the Statute of the International Court of Justice ("ICJ") as being "international custom, as evidence of a general practice accepted as law."

[74] State practice should be "extensive and virtually uniform in the sense of the provision invoked." *Nicaragua v. United States*, (Merits), ICJ Reports 1986, ("*Nicaragua v. United States*") para. 74. As for *opinio juris,* the ICJ has held that States "must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." *Nicaragua v. United States*, para 14.

[75] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 9, (6TH ed. Oxford 2004) ("BROWNLIE"). *See also* RESTATEMENT OF THE LAW (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987), which also adopts a two-pronged approach to the formation of. international custom; *Nicaragua v. United States* , para. 202; *North Sea Continental Shelf Cases* ICJ Reports (1969) ("*Continental Shelf*") 3 at 44 stating that the "Frequent, or even habitual character" of state practice is not sufficient to establish custom without *opinio juris*"; *Continental Shelf: Libya v. Malta* ICJ Reports (1985) 13 at 29-30: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states;" *See generally,* International Law Association, London Conference, *Statement of Principles Applicable to the Formation of General Customary International Law* (2000).

[76] *See* P. Haggenmacher, *La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale*, 5 Rev. Général du Droit Public International (1986) 114.

[77] *The Lotus Case* PCIJ Series. A, no. 10, at p. 18 ("*Lotus Case*") here, the Permanent Court of International Justice stated that customary international law is an expression of the free will of States.

[78] *Anglo-Norwegian Fisheries Case* ICJ Reports (1951), 116 at para. 131.

[79] *Id.*

[80] *Asylum Case (Columbia v. Peru)* ICJ Reports (1950), paras. 276-77. This case may be considered as the leading pronouncement made by the ICJ on the establishment of customary international law. *See* BROWNLIE, at p.7. *See also* DAVID HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW(6TH ed. Oxford 2004), Chapter 2; HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW IN MALCOLM EVANS (ED.) INTERNATIONAL LAW, 2ND ED. (Oxford 2006); J. Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems* 15 EUR. J. INT'L L. 523 (2004).

"required" by law.[81] The ICJ has been reluctant to presume its existence in the absence of evidence to the contrary.[82] Reliance on international agreements and resolutions alone cannot be enough to establish a consistency of *opinio juris* and state practice.[83]

32. The duration over which the customary rule is alleged to have formed is not prescribed by international law.[84] However, the shorter the period of time over which the customary rule is said to be formed, the stricter the requirement of uniformity of practice and *opinio juris*.[85] If no "settled practice" has emerged and if States do not show any "feeling" that they were conforming to what they believed to be a legal obligation, the existence of a customary international law norm becomes impossible.[86]

b. The use of the Martens Clause to create customary international law

33. Cassese asserts that the Martens Clause is an alternative means of establishing a norm of customary international law.[87] The Martens Clause is a provision of International Humanitarian Law ("IHL"), intended to provide protection to civilians and combatants in times of armed conflict.[88] It provides that:

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[81] JL BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 61 (6TH ed. Oxford 1963).

[82] *Lotus Case,* at 28; *Nicaragua v. United States,* at 14.

[83] *See Advisory Opinion on the Threat or use of Nuclear Weapons* ICJ Reports (1996) ("*Nuclear Weapons Advisory Opinion*"), at 66; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* ICJ Reports (1971) at 50 (discussing the difference between a binding and a non-binding resolution and their relative normative quality).

[84] On the accelerated establishment of customary international law see e.g. Dissenting Opinion of Judge Tanaka in the *South West Africa Cases*, ICJ Reports (1966) 248, at 291; R. Jennings, *Recent Developments in the International Law Commission: Its Relation to the Sources of International Law*, 13 I.C.L.Q. 385 (1964).

[85] *Continental Shelf,* at 43. According to the ICJ: "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensible requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law of legal obligation is involved."

[86] *Id.*

[87] Cassese Brief, para. 36.

[88] The Martens Clause was based upon and took its name from a declaration read by Professor von Martens, the Russian delegate at the Hague Peace Conferences 1899. Martens introduced the declaration after delegates at the Peace Conference could not reach agreement on the status of civilians who took up arms against an occupying force. Large military powers argued that they should be treated as *francs-tireurs* and subject to execution, while smaller states suggested that they be treated as lawful combatants. Although it was originally designed to deal specifically with this matter, it has been subsequently re-produced, albeit sometimes in different forms, in several major IHL treaties that regulate the means and methods of warfare. It remains of military significance and has been cited in the military manuals of several states e.g. the United Kingdom, the United States, and Germany. *See* Preamble, 1907 Hague Convention (IV) respecting the laws and customs of war on land, reprinted in A. ROBERTS AND R. GUELF, DOCUMENTS ON THE LAWS OF WAR 45 (2ND ed. Clarendon Press Oxford, 1989); the four 1949 Geneva Conventions for the protection of war victims (GC I: Art. 63; GC II: Art. 62; GC III: Art. 142; GC IV: Art. 158), *Id.* p. 169-337; 1977 Additional Protocol I, Art. 1(2), *Id.*, p. 390, and 1977 Additional Protocol II, Preamble, *Id.*, p. 449; 1980 Weapons Convention, Preamble, *Id.*, p. 473. *See* Christopher

> "Until a more complete code of the laws of war issued, the High Contracting Parties think it right to declare that in cases not included in the Regulation adopted by them populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations,[89] from the laws of humanity and the requirements of public conscience."

34. An ordinary reading of the Martens Clause shows that its role is residual; it seeks to fill any gaps in protection under IHL. This ensures that the absence of a relevant treaty or customary norm does not prevent IHL from offering any protection in armed conflicts. Cassese interprets the clause to mean that a norm of customary international law is not a pre-condition for the application of the Martens Clause. Cassese concludes paradoxically:

> "It can be inferred from the Clause that customary international law does not derive only from widespread and consistent state practice. Rather, the social and moral need for observance of rules, and the expression of legal rules by a number of states or international entities about the binding value of the principle or rule, may suffice to establish the principle or customary rule even if there is no widespread or consistent State practice."[90]

35. Thus, Cassese seeks to circumvent the need for a consistency of state practice to create a rule of customary international law whenever he deems it morally desirable. This conclusion is arrived at without legal authority, barring a single journal article authored by Cassese himself, which itself lacks any legal authority.[91]

i) There is no accepted interpretation of the Martens Clause

36. Although it is generally accepted that the Martens Clause is part of customary international law, there is no generally accepted interpretation of its meaning with both narrow and broad interpretations being proffered by states.[92] Even the most restrictive interpretation of the Martens Clause serves as a reminder that customary international law applies in armed conflict where treaty laws do not. It does not

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Greenwood, *Historical Development and Legal Basis, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 28 (Dieter Fleck ed. 1995).

[89] "Usages established between civilised nations was replaced with 'established custom' in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 reprinted in ROBERTS AND GUELF, at p. 390.

[90] Cassese Brief, para. 35.

[91] It is noteworthy that scholarly articles are not considered to be a main source of international law. Article 38(1) (d) of the Statute of the ICJ acknowledges that the Court is entitled to refer to "judicial decisions" and the most highly qualified juristic writings "as subsidiary means for the determination of rules of law." (Emphasis added.) To use only one academic article, written by the author of the Brief as a basis for arguing the existence of a new method of forming customary international law is questionable at the very least.

[92] *See* Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict* INT'L REV. RED CROSS 125-34 (1997).

necessarily follow that where no customary international law rule exists, it is permissible to use the broader provisions of the Martens Clause to create one.

37. Although the Martens Clause has not been widely applied in international jurisprudence, the ICJ was called upon to consider it in its *Advisory Opinion on the Threat or use of Nuclear Weapons.*[93] Two key points are discernable from this decision. First, the attempt to use the Martens Clause to establish a customary norm against the use of nuclear weapons failed. Second, this case involved issues of weaponry and warfare and is therefore clearly distinguishable from the present discussion. Nonetheless, it offers one of the few interpretations of the Martens Clause and so is worth considering, albeit briefly. The submissions of the United Kingdom and the United States are noteworthy. The UK argued that a norm of customary international law cannot be based on such vague concepts as "principles of humanity" and "public conscience."[94] Similarly, the United States argued that the clause cannot transform public opinion into customary international law.[95]

38. The Martens Clause represents a conflict between natural and positive law theories of international law.[96] This directly contradicts Cassese's assertion that the Martens Clause represents an "ingenious blend" between the two concepts.[97] Positivism, first put forward by the international legal theorist Hugo Grotius, is the theory of international law which is most generally accepted today. It is predicated on the notion of consent and state sovereignty. The two principle sources of international law are treaty and custom: states can consent to be bound or object and be released from obligation.[98]

39. Cassese argues that because JCE does not exist (or did not exist at the relevant time) according to the accepted method for establishing customary international law, one must turn to vaguer concepts.[99] To follow Cassese's approach would completely override Cambodian sovereignty and consent, reverting to natural law in its most expansive form. Not only does this theory trample on one of the most generally accepted sources of international law, but it is a questionable application of a clause

[93] *See Nuclear Weapons Advisory Opinion.*
[94] Written statement of the United Kingdom, Nuclear Weapons (1996) I.C.J. Pleadings (2 June, 1994), *reprinted in* BRIT. Y.B. INT'L L 712 (1995), para. 32.
[95] *See* Meron, at 86.
[96] *See* Ticehurst, at 127.
[97] Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky,* 11 EUR. J. INT'L L. 187, 189 (2000).
[98] BROWNLIE, at 10.
[99] *See Nuclear Weapons Advisory Opinion.*

intended to offer protection in the absence of a codified body of substantive international humanitarian law. The consequences flowing from Cassese's approach leads to legal uncertainty and judicial fiat.[100]

ii) The Martens Clause may not be used to create forms of liability

40. Even if it is accepted that the Martens Clause offers authority for treating "principles of humanity" and "public conscience" as being capable of creating principles of international law, using the Martens Clause to create JCE in customary international law is absurd. Although the crimes over which the ECCC has jurisdiction arise out of IHL and armed conflict, a careful distinction must be drawn between *substantive protection in armed conflict* and the application of modes of liability in criminal trials.[101] The Martens Clause is a protective principle of IHL designed to apply in times of armed conflict; it is not a way to facilitate the establishment of forms of criminal liability.

41. Customary international law in the context of IHL and international human rights law must be distinguished in its application to criminal trials. International human rights bodies have often placed greater emphasis on *opinio juris* to make up for a woeful lack of state practice.[102] The possibility that greater reliance might be placed on *opinio juris* in the case of certain well-recognized norms was more generally recognized by the ICJ in the *Nicaragua* decision. In the context of the prohibition on aggression, the Court remarked that:

> "If a state acts in a way prima facie incompatible with a **recognized rule**, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state's conduct is in fact justifiable on that basis, the significance of that attribute is to confirm rather than to weaken the rule." [103]

42. This statement does not amount to a denial of the requisite elements of state practice and *opinio juris*. Indeed, the ICJ refers to rules which are already recognized, not norms whose existence is in question. As the current President of the ICJ, Professor

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[100] Indeed, Judge Jessup succinctly remarked in the *Barcelona Traction* case that: "one is entitled to test the soundness of a principle by the consequences which would flow from its application." *Barcelona Traction Light and Power Co.* ICJ Reports (1964), Separate Opinion of Judge Jessup, para. 106.

[101] For example, the Trial Chamber in *Furundzjia* cited the Martens Clause as support for the notion that the prohibition on torture had become part of customary international law. *See Prosecutor v. Furundzjia,* IT-95-17/1-T, Judgement, 10 December 1998, para. 137. This is a *substantive* protection, distinct from a mode of liability.

[102] *See* Frederic Kirgis, *Custom on a Sliding Scale*. 81 AM. J. INT'L. L. (1987) 146. Kirgis essentially argues that where the customary norm at stake is peremptory in nature, e.g. the prohibition on aggression, *opinio juris* may be given more weight than state practice.

[103] *Nicaragua v. United States,* at 98 (emphasis added).

Rosalyn Higgins points out, "[n]ew norms require both state practice and *opinio juris* before they can be said to represent customary international law."[104] Thus, if a concept is not shown to exist in customary international law pursuant to a consistency of state practice and *opinio juris* it cannot be elevated to such status because it is thought desirable to do so.

43. Moreover, in *criminal* trials, tribunals must be careful to follow traditional rules of customary international law in apportioning responsibility. Professor Theodore Meron has criticized the over-reliance on *opinio juris* by international criminal tribunals:

> "Customary international law is thus a major vehicle for alignment, adjustment and even reform of the law. In many other fields of international law, treaty making is faster than the evolution of customary law. In international humanitarian law, change through the formation of custom might be faster, but less precise in content, than the adjustment of law through treaty making. It is all the more necessary , in view of the critical role of customary law, that its currency not be devalued by facile assumptions and sweeping generalizations. The test for the advancement of humanitarian norms lies in their acceptability."[105]

44. It must follow that the Martens Clause cannot apply to create a rule of customary international law in order to establish JCE liability at the relevant time.

c. The creation of JCE as a rule of customary international law

45. JCE, as created by the *Tadić* Appeals Chamber, was based on a lack of sufficient state practice or *opinio juris*.[106] In reaching the conclusion that JCE is established in customary international law, the *Tadić* Appeals Chamber relied on a very limited number of cases from a limited number of jurisdictions.[107] The composite of these cases does not satisfy the rigorous test for determining customary status.

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[104] ROSAYLIN HIGGINS, PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT 22 (Oxford 1994).

[105] Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L. L. 238, 246 (1996) (emphasis added).

[106] In an expert opinion commissioned by the ICTY Office of the Prosecutor, it was determined most states use co-perpetration rather than JCE. *See* Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion, Commissioned by the United Nations – International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor Project Coordination: Prof. Dr. Ulrich Sieber., Priv. Doz. Dr. Hans Georg Koch, Jan Michael Simon, Max Planck Institut für ausländisches und internationales Strafrecht, Freiburg, Germany ("Participation in Crime"); *See also 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. 24. "[W]hen interpreting the meaning of 'committing' based on imputed liability, it is the noble obligation of an international criminal tribunal to merge and harmonize the major legal systems of the world and to accept also other recognized developments in criminal law over the past decades."

[107] In relation to JCE I, the *Tadić* Appeals Chamber merely relied on six cases in total, four from British military tribunals, one from a Canadian tribunal and one from an American tribunal: *Otto Sandrock and three others*;

46. The OCP seemingly attempts to compensate for this limited support for JCE provided by the *Tadić* Appeals Chamber by referring to "thousands of national prosecutions" without providing any citations to these cases.[108] The implication is that these prosecutions were also based on JCE, as this statement is used to justify the assertion that "they help establish that JCE was part of customary international law."[109] This is misleading. 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 purpose doctrine.[110] For his part, Cassese asserts that a norm of customary international law can be formed "through case law based on (i) the Charter of the International Military Tribunal ('Nuremberg Charter'), and (ii) Control Council Law No. 10 of 1945."[111] He asserts that *Tadić* was merely "an attempt to rationalize a vast array of disparate decisions and to set out their rationale."[112]

47. The substance of the cases cited by the *Tadić* Appeals Chamber and invoked by the OCP and *amici curiae*, is inconsistent or does not support JCE as a form of liability. The cases reveal a failure by the Judge Advocate to state the law[113] or were based on assumptions that the Prosecution's arguments in respect to criminal liability were followed because the accused was convicted.[114] The cases highlighted by the OCP mix those that supposedly support the basic form of JCE with those which support the systemic or extended form. Reference is made to the *Essen Lynching Case* as applying a form of JCE[115] followed by reference to the *Almelo* and *Jepsen* cases[116] and finally back to the *Borkum* Island case.[117] In fact, *Borkum Island* and *Essen*

Hoelzer et al.; Gustav Alfred Jepsen and other; Franz Schonfeld and others; Feurstein and others; Otto Ohlenforf et al. With respect to JCE II, the *Tadić* Appeals Chamber relied upon two cases in the body of the judgment: the Dachau Concentration Camp case (*Trial of Martin Gottfried Weiss and thirty-nine others*) and the Belsen case (*Trial of Josef Kramer and forty-four others*) For JCE III, the *Tadić* Appeals Chamber relied upon the *Essen Lynching Case, Borkum Island Case* and numerous *unpublished* decisions from post World War II Italian jurisprudence: *Repubblica Sociale Italiana; D'Ottavio et al; Aratano et al; Tossani; Ferrida; Bonati et al, Mannelli.*

[108] OCP Appeal, para. 53.

[109] *Id.*

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

[111] Cassese Brief, para. 33.

[112] *Id.* para. 35.

[113] *Tadić* Appeal Judgement, paras. 208, 212.

[114] In reviewing the *Essen Lynching* case, for example, the Appeals Chamber inappropriately assumed that as the accused was convicted, the court must have accepted the Prosecution's arguments in respect of criminal liability. *Tadić* Appeal Judgment, para. 208.

[115] OCP Appeal, para. 53.

[116] OCP Appeal, para. 54.

[117] OCP Appeal, para. 56.

Lynching were the only post-Second World War cases cited by the *Tadić* Appeals Chamber in support of the extended form of JCE.[118]

48. Certain cases cited by the OCP in support of the basic form of JCE conspicuously fail to do so.[119] Certain other cases cited by the *Tadić* Appeals Chamber to support the creation of the systemic form of JCE do not do so. The McGill Brief highlights that *Mulka*,[120] "in fact supports the application of aiding and abetting principles more strongly."[121]

49. As for the cases cited by the *Tadić* Appeals Chamber as support for the extended form of JCE, these are even more problematic. There were only two post World War II cases by the *Tadić* Appeals Chamber in support of this most controversial form of JCE. These were *Essen Lynching* and *Borkum Island*.[122] As explained by Ambos, and admitted by the *Tadić* Appeals Chamber, *Borkum Island* supports the basic form of JCE rather than the extended form.[123] In *Essen Lynching*, the principal defendant, Heyer, had instigated the murder of three British airmen who were in his custody. He was convicted as an accessory for manslaughter as it was held that he lacked the sufficient *mens rea* for murder, following the form of liability set out in *Franz Schonfeld and others*.[124] This form of liability does not require that the ultimate act is foreseeable despite this being the central conclusion by the *Tadić* Appeals Chamber on the strength of this case.[125]

50. Similar criticisms are applicable against the other cases cited by the *Tadić* Appeals Chamber but not relied upon by the OCP.[126] Unsurprising, the cases cited by the *Tadić* Appeals Chamber, and repeated by the OCP, provide "almost no support for the most controversial aspects of contemporary joint criminal enterprise doctrine."[127]

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[118] *Tadić* Appeal Judgment, paras. 205-213.
[119] For example, relying upon *Almelo* to support liability for *Tadić* is misplaced as the conviction in the former case was dependent on proof of a concerted action to commit a war crime whereas no proof was provided that *Tadić* was involved in a concerted action to kill villagers. *See Trial of Otto Sandrock and three others,* (26 November 1945), 1 LRTWC 43. *See Tadić* Appeal Judgement, para. 231 which held that the common plan to which *Tadić* was a party was to "rid the Prijedor region of the non-Serb population, by committing inhumane acts."
[120] *Tadić* Appeal Judgment, para. 203, fn. 254.
[121] McGill Brief, para. 22.
[122] *Tadić* Appeal Judgment, paras. 207-13.
[123] Ambos Brief, p.29; *Tadić* Appeal Judgement, para. 211.
[124] ZAHAR & SLUITER, INTERNATIONAL CRIMINAL LAW, (2007) OXFORD at 231.
[125] *Tadić* Appeal Judgement, para. 209.
[126] *Id.*, at 227-31.
[127] "The cases cited in Tadić … do not support the sprawling form of JCE, particularly the extended form of this kind of liability, currently employed at the ICTY. Instead, the cases discussed in Tadić fall into one of two types. The first involves unlawful killings of small groups of Allied POWs, either by German soldiers or by German soldiers and German townspeople. The second group of cases concerns concentration camps. …

51. Reliance upon various Italian cases to support the creation of the extended form of JCE is similarly misplaced. As advocated by Ambos, these cases applied exclusively national law rather than international law.[128] In so doing, they did not create any support for this form of liability in customary international law beyond the state practice of one individual country. Furthermore, the state practice of that country was less than consistent, due to two dissenting decisions of the Italian Supreme Court on this issue.[129]

52. The *Tadić* Appeals Chamber, in support of JCE, also placed reliance upon two international conventions: the International Convention for the Suppression of Terrorist Bombing (ICSTB),[130] and the Rome Statute of the International Criminal Court (ICC Statute).[131] This reliance was misplaced "because customary international law has to be assessed as of the date of commission of the offenses, the fact that ... texts were adopted subsequent to these dates, further limit their weight and usefulness as sources of customary international law at the time the crimes were committed."[132] Both conventions were drafted, signed and entered into force after the date of commission of the offenses in *Tadić*, and hence have little, if any, value in assessing the customary status of JCE.[133] Moreover, the creation of JCE finds no support in the substance of these two conventions.[134]

[T]here is no indication in [*Essen Lynching*] that the prosecutor explicitly relied on the concept of common design, common purpose, or common plan. The Tadić court nevertheless cited this case as support for Category Three of JCE." Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 110-11 (2005) ("Danner and Martinez").

[128] Ambos Brief, p.29.

[129] *Id.*

[130] G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998).

[131] July 17, 1998, Art. 25, 2187 U.N.T.S. 3, 105.

[132] *See Prosecutor v. Orić*, IT-03-68-A, Appeals Judgement, 3 July 2008, Partially Dissenting Opinion and Declaration of Judge Liu, para. 26, referring to the texts of the Draft Code of Crimes Against the Peace and Security of Mankind and Article 28 of the ICC Statute being adopted subsequent to the adoption of the ICTY and ICTR Statute. *See also Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction In Relation To Command Responsibility, Partially Dissenting Opinion of Judge Shahabuddeen, 16 July 2003, para. 21, where Judge Shahabuddeen noted that "weight has of course to be given to the texts as indicative of the state of customary international law as it existed when they were adopted. But, as the texts [Draft Code of Crimes Against the Peace and Security of Mankind] were adopted subsequent both to the making of the Statute of the Tribunal and to the dates on which the alleged acts ... were committed, on the question what was the state of customary international law on these occasions they do not seem to speak with the same authority as do the earlier provisions ... of the 1977 Additional Protocol I to the Geneva Conventions 1949."

[133] The offenses in *Tadić* were committed in 1992. The ICSTB was adopted by consensus by the United Nations General Assembly through resolution 52/164 of 15 December 1997, opened for signature on 12 January 1998, and entered into force on 23 May 2001. The ICC Statute entered into force in 2002.

[134] The ICSTB deals with different crimes than the ICTY Statute, and even though the ICC Statute includes JCE, the ICC rejected the ICTY's interpretation of the application of JCE. *See Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2008.

53. The OCP also claims that the London Charter of the International Military Tribunal ("IMT Charter") "provided that a person who participated in a common plan or conspiracy to commit any crime under the IMT Charter would be liable for all acts performed in execution of that common plan or conspiracy."[135] What the OCP did not point out was that in the Judgements by the Nuremburg and the Far East Military Tribunals, those tried were only convicted for conspiracy as a crime against peace and not as a war crime or crime against humanity.[136] Thus, the IMT Charters for Nuremburg and the Far East provide no support for the creation of JCE and were not even cited in support by the *Tadić* Appeals Chamber.

2. JCE was not part of customary international law in 1975-79

54. Even if JCE could be considered to be a part of modern-day customary international law, it was not a part of customary international law in 1975-79, and therefore cannot be applied as a form of liability for the crimes allegedly committed during that period. To establish what was considered customary international law in 1975-79, the ECCC must look to the jurisprudence that pre-dates that time period to search for general and consistent state practice and *opinio juris*.[137] There is no evidence that the jurisprudence of the International Military Tribunal ("IMT") or of subsequent

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[135] OCP Appeal, para. 52. Article 5 of the Charter for the International Military Tribunal for the Far East contains the same provision. *See also* Cassese Brief, paras. 36-37.

[136] Judgment of the International Military Tribunal, for the Trial of German Major War Criminals, Nuremberg, 30th September and 1st October 1946, London H.S.S.O. Miscellaneous No.12 (1946), ("IMT Judgment"), at 44. The IMT held that "the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides: 'Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.' In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war" (emphasis added). *See also* Judgement of the International Military Tribunal for the Far East, at 34, which held that "the Charter does not confer any jurisdiction in respect of a conspiracy to commit any crime other than a crime against peace. There is no specification of the crime of conspiracy to commit conventional war crimes. This position is accepted by the Prosecution and no conviction is sought under these counts. These counts, accordingly, will be disregarded."

[137] Although the Defence recognizes that many of the sources cited by the *Tadić* Appeals Chamber to support the creation of JCE pre-date 1975, the *Tadić* Appeals Chamber also made many references to subsequent jurisprudence or domestic statutes to ground this form of liability. For example, footnotes 285-87 in the *Tadić* Appeal Judgement cite the following statutes and cases which post-date 1975: (1) France, fn. 285 - Decision of 19 June 1984, *Bulletin, ibid.*,1984, no. 231; (2) Italy, fn. 286 - Court of Cassation, 3 March 1978, *Cassazione penale,* 1980, pp. 45 *ff*; Court of Cassation, 4 March 1988, *Cassazione penale,* 1990, pp. 35 *ff*); Court of Cassation, 11 October 1985, *Rivista penale,* 1986, p. 421; Court of Cassation, 18 February 1998, *Rivista penale,* 1988, p. 1200; (3) England and Wales, fn. 287 - *R. v. Hyde* [1991] 1 QB 134; *Hui Chi-Ming v. R.* [1992] 3 All ER 897; (4) Canada, fn 288 - *R. v. Logan* [1990] 2 SCR 731; *R. v. Rodney* [1990] 2 SCR 687; (5) United States, fn 289 – Maine Criminal Code § 57 (1997), Minnesota Statutes § 609.05 (1998), Iowa Code § 703.2 (1997), Kansas Statutes § 21-3205 (1997),Wisconsin Statutes § 939.05 (West 1995); *State of Connecticut v. Diaz,* 237 Conn. 518, 679 A. 2d 902 (1996); (6) Australia, fn 290 - *McAuliffe v. R.* (1995) 183 CLR 108.

prosecutions under Control Council Law Number 10 was part of customary international law in 1975-79. The first mention of the customary status of this jurisprudence was in the 1993 Secretary-General's report on the establishment of the ICTY. The report stated that the ICTY "should apply rules of international humanitarian law which are beyond any doubt part of customary law" and that "[t]he part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in ... the Charter of the International Military Tribunal of 8 August 1945."[138] The *Tadić* Appeals Chamber cited the Secretary-General's report to show that the IMT jurisprudence was considered customary international law, in lieu of any other supporting evidence.[139] This would not have been the case had there been anything else to cite. The ECCC has no equivalent Secretary-General's Report to aid the Pre-Trial Chamber in determining whether JCE was part of customary international law between 1975-79. Thus, the possibility that the Charter was considered to be customary international law in 1993 does not make it customary international law in 1975-79.

E. JCE was neither foreseeable nor accessible in 1975-79

1. JCE was not sufficiently foreseeable in 1975-79

55. The OCP submits that the principle of *nullum crimen sine lege* "requires that the law used to prosecute an accused was sufficiently foreseeable and sufficiently accessible at the time of the allegedly criminal acts."[140] According to the OCP, JCE was sufficiently foreseeable in Cambodia in 1975 to be applied at the ECCC.[141] Support for this assertion is supposedly drawn from the atrocious nature of crimes charged against Duch.[142] This may be relevant in assessing whether the crimes of execution, systematic torture or inhuman detention were foreseeable, but is irrelevant to establishing whether an individual could be prosecuted on the basis of JCE for those crimes.

56. As explained herein, the Cambodian criminal system is heavily based on the French civil-law system. The Cambodian system therefore follows the principle that for any

[138] Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993), paras. 34-35. No report exists informing the ECCC what could be considered customary international law in 1975-79.
[139] *Id.*
[140] OCP Appeal, para. 57.
[141] OCP Appeal, paras. 57-58.
[142] OCP Appeal, para. 58.

form of liability to be applied against an individual, it must be explicitly set out in the law. The only foreseeable forms of liability must therefore be included within the Cambodian Penal Code of 1956. As JCE is not set out in that code and differs from the forms of commission that are explicitly set out therein, it would not have been foreseeable in 1975 that a Cambodian citizen could face prosecution under this form of liability.

57. Moreover, the very constituent elements of JCE are not manifestly illegal *per se*. It has been held that the common purpose of a JCE need not be illegal.[143] It addition, the accused need not have performed any part of the *actus reus* of the perpetrated crime, but it is required "that the accused have participated in furthering the common purpose at the core of the JCE."[144] Thus it would have been insufficiently foreseeable that lawful behavior would constitute the *actus reus* of a form of liability in a legal system which views conspiracy liability as barbarous.[145]

2. JCE was not sufficiently accessible in 1975-79

58. The OCP argues that "the instruments and judgments emanating from the post-Second World War efforts to prosecute war criminals, coupled with the broad use of JCE-type liability in both common law and civil law systems, are sufficient to support a finding that defendants before this Court had notice that participation in a JCE would entail criminal liability."[146] Several objections to this assertion are pertinent.

59. First, the form of liability that became JCE did not exist in civil law systems. Instead, civil law systems tend to include co-perpetration as a form of liability within their legal systems, which is a similar, but different form of carrying out a crime.[147]

60. Second, the date and context in which accessibility is to be assessed was Cambodia in 1975 – namely after five years of full-blown civil war and after an international conflict involving Cambodia, North Vietnam and the USA. The cases and

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[143] *AFRC* Appeal Judgement, paras. 76, 84.
[144] *Brđanin* Appeal Judgement, para. 427, *citing Tadić* Appeal Judgement, para. 192: "[T]o hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act." (emphasis added). *See also Vasiljević* Appeal Judgement Case No. IT-98-32-A, Judgement of 25 February 2004, para. 119.
[145] Danner and Martinez, at 115, discussing the deliberations of the judges at the IMT at Nuremburg explain that "During much of the discussion, the Russians and French seemed unable to grasp all the implications of the concept; when they finally did grasp it, they were genuinely shocked. The French viewed it entirely as a barbarous legal mechanism unworthy of modern law, while the Soviets seemed to have shaken their head in wonderment - a reaction, some cynics may believe, prompted by envy."
[146] OCP Appeal, para. 58.
[147] *See* Participation in Crime.

international conventions cited by the OCP to support the accessibility of JCE are manifestly insufficient in those circumstances.

61. Finally, the OCP claims that the provisions of the 1956 Cambodian Penal Code have "several articles that criminalize actions undertaken by groups of people acting together."[148] However, as explained herein, these forms of liability are substantively different from the three forms of JCE and as such may not be used in support of the contention that they provide for the accessibility of JCE.

F. Customary international law is not directly applicable in Cambodian courts

62. Whenever customary international law is invoked in a national court, the court is under an obligation to consider if and under what circumstances the national legal system is permitted or obliged to apply customary international law. In the absence of specific directives in its Constitution, legislation or national jurisprudence, a national court is under no obligation to apply customary international law.[149]

63. A fundamental difference between the ECCC and the ICTY is that, as an international court, the ICTY considers itself to be able to directly apply customary international law.[150] This is entirely logical. The ICTY is not a domestic Yugoslav court and does not have to choose between forms of liability found in Yugoslav domestic law and customary international law. It is only obliged to take note of the domestic law of the former Yugoslavia with regards to sentencing.[151] By contrast, the ECCC is established within the existing court structure of the national legal system of Cambodia;[152] it may only apply customary international law if permitted or obliged by Cambodian constitutional law.

64. None of the *amici curiae* invited to assist the Pre-Trial Chamber in resolving these complicated and crucial issues analyzed this essential question of whether a domestic

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[148] OCP Appeal, para. 58.

[149] *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 303 (Oxford University Press 2003) "Normally national courts do not undertake proceedings for international crimes only on the basis of international *customary* law, that is, if a crime is only provided for in that body of law. They instead tend to require either a national *statute* defining the crime and granting national courts jurisdiction over it, or, if a treaty has been ratified on the matter by the State, the passing of *implementing legislation* enabling courts to fully apply the relevant treaty provisions."

[150] *See Prosecutor v. Tadić*, IT-94-01, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 60 where the Trial Chamber held that "unlike contracting parties to treaties, the International Tribunal is not called upon to apply conventional law but instead is mandated to apply customary international law."

[151] *See* Rule 101(B)(iii) of the ICTY Rules of Procedure and Evidence, 28 February 2008, IT/32/Rev. 41, 28 February 2008.

[152] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), Ieng Sary's Submissions Pursuant to the Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues, 7 April 2008, fn. 19.

court may apply a form of liability based solely in customary international law. The *amici curiae* simply followed the criteria established by the ICTY in the *Milutinović* Decision to verify whether *nullum crimen sine lege* would prevent the application of JCE at the ECCC[153] but did not conduct the necessary analysis whether the ECCC could apply JCE.

65. An extensive analysis of the application of customary international law generally in Cambodia and in other countries[154] shows that if the Pre-Trial Chamber holds that JCE was part of customary international law in 1975-79, the ECCC is not permitted, let alone obliged, to directly apply customary international law in the absence of implementing legislation. Customary international law may only be directly applied in Cambodia to the extent it relates to civil law duties and not forms of international criminal responsibility or if it has been explicitly implemented by Cambodian law.

66. The only provisions of the Establishment Law that could be considered by the Pre-Trial Chamber to implement or incorporate customary international law are Articles 1 & 2 new. These provide that the ECCC has been established to "bring to trial … those who were most responsible for the crimes and serious violations of … international humanitarian law and custom…"[155] This provision, however, does not implement JCE through customary international law.

67. 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.[156] 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.[157] 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

[153] *See* Ambos Brief, p. 21; Cassese Brief, paras. 71-72; McGill Brief, paras. 12-14.
[154] *See* Annex B for a condensed commentary on the application of customary international law in domestic courts.
[155] Emphasis added.
[156] *Kvočka* Appeal Judgement, Case No. IT-98-30/1-A, Judgement of 28 February 2005, para. 91, *citing Ojdanić* JCE Decision, para. 20. *See also Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, para. 5.
[157] At the Nuremberg Tribunal, there was discussion as to whether criminal conspiracy should be considered a substantive crime, as it is in Anglo-American law, which would make membership in a conspiracy sufficient for proof of guilt. French judge, Donnedieu de Vabres, believed that this would be introducing ex post facto law, as conspiracy as a substantive crime was not recognized in French law. In the end, conspiracy was not considered a substantive crime, except as to crimes against peace. For a historical analysis of this issue *see* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 34-41, 550-53, 637-38, (Little, Brown & Co. 1992).

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.[158]

IV. CONCLUSION & RELIEF SOUGHT

68. JCE is the most controversial form of liability applied in cases involving war crimes, crimes against humanity and genocide.[159] No other form of liability has provoked a similar range and depth of critical academic literature.[160] The OCP simply glosses over these criticisms by pronouncing, without any supporting authority, that JCE is a "widely accepted mode of liability ... routinely used at other international tribunals,"[161] an approach followed by Cassese[162] and McGill.[163] Even if JCE is considered to be part of customary international law in 1975-79, the inherent problems with this form of liability militate strongly in favour of the Pre-Trial Chamber exercising its discretion to refuse to apply this form of liability.
69. The legal basis and objective and subjective elements of forms of liability must be certain. If they are too broad or unclear, there is too much scope for political considerations to supplant the rational application of law. The continual evolution of the elements of JCE[164] shows that almost ten years after this doctrine was created, its elements are in a constant state of flux and it is still ripe for abuse.[165] Indeed, the judicial manufacturing of JCE as a doctrinal form of liability has been robustly denounced. Professor Dershowitz has described JCE as "a conglomeration, coupled with an expansion, of the five defined modes, allowing prosecutors and judges illegitimately to aggregate the cumulative evidence against an accused to find him

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[158] *Bourterse*, paras. 4.4 and 4.7 (Supreme Court of the Netherlands, Chamber of Criminal law, decision of 18 September 2001). *See also R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, ex parte Pinochet Ugarte (No 3)*, 24 March 1999, [2000] 1 AC 147, at 276.

[159] "Since the *Tadić* appeal judgement of 15 July 1999, joint criminal enterprise (JCE) as a mode of international criminal responsibility has developed into one of the most controversial elements of substantive international criminal law." Göran Sluiter, *Guilt by Association: Joint Criminal Enterprise on Trial*, 5 J. INT'L CRIM. JUST. 67 (2007).

[160] *See Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Ieng Sary's Expedited Request to make submissions on the application of joint criminal enterprise liability in the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" dated 8 August 2008, 15 September 2008, para. 12, fn. 20, 21.

[161] OCP Appeal, para. 46.

[162] Cassese Brief, paras. 81-84.

[163] McGill Brief, paras. 40-56.

[164] See Annex A.

[165] In the recent *Brđanin* Appeal Judgement, out of the five judges sitting in the Appeals Chamber there were two separate opinions and a declaration all related to JCE. *See Brđanin* Appeal Judgement, Declaration of Judge van den Wyngaert; Separate Opinion of Judge Meron; and Partly Dissenting Opinion of Judge Shahabuddeen.

guilty of some generalized crime, without proof that the accused did 'plan', 'instigate', 'order', 'commit' or otherwise 'aid and abet' any specific criminal act."[166] Professors Danner and Martinez have found that JCE "raises the specter of guilt by association and provides ammunition to those who doubt the rigor and impartiality of the international forum"[167] while Professor Schabas has characterized JCE as the "prosecutor's magic bullet," arguing that its application enables international prosecutors to achieve "discounted convictions".[168]

70. Former ICTY Judge Per-Johan Lindholm aptly correctly rejected JCE liability, noting:

> I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally. The so-called basic form of joint criminal enterprise does not [...] have any substance of its own. It is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration.[169] (emphasis added)

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[166] *Prosecutor v. Krajišnik*, IT-00-39-A, Brief on Joint Criminal Enterprise on Behalf of Momčilo Krajišnik, 4 April 2008, para. 4. For a similar observation *see also* Mohamed Elewa Badar, *"Just Convict Everyone!" – Joint Perpetration: From Tadić to Stakić and Back Again*, 293 INT'L CRIM. L. REV. 301 (2006). "A major source of concern with regard to the applicability of JCE III ... is that ... the participant is unfairly held liable for criminal conducts that he neither intended nor participated in. It is also unjust that the liability of the actual perpetrator (the one who carried out the crime outside the common plan) is tested subjectively whereas that of the participant is tested objectively. Moreover, if the accused had actually participated in crimes outside the initial plan 'common purpose' as an aider or abettor they would arguably have an increased chance of acquittal, as the Prosecution would be confronted with having to prove a higher level of mental awareness, namely, that the accused knew that the principal perpetrator had the state of mind required for the crime at issue. Finally, and more dramatically, this extended category of JCE serves to convict the participant in a common plan for crimes carried out by the actual perpetrator even if the former lacks the state of mind or the mens rea required for the crime in question (particularly specific purpose crimes)."

[167] Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 137 (2005). Danner & Martinez further noted that "if conspiracy is the darling of the U.S. prosecutor's nursery, then it is difficult to see how JCE can amount to anything less than the nuclear bomb of the international prosecutor's arsenal."

[168] William A. Schabas, *Mens Rea and the International Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1025, 1032-34 (2003).

[169] *Prosecutor v. Simić et al.*, IT-95-9-T, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, 17 October 2003 [hereinafter Judge Lindholm Opinion], para. 2. Co-perpetratorship was also relied upon by the *Stakić* Trial Chamber but subsequently rejected by the *Stakić* Appeals Chamber. *See Prosecutor v. Stakić*, IT-97-24-T, Trial Judgement, 31 July 2003, paras. 438–42 and *Prosecutor v. Stakić*, IT-97-24-A, Appeals Judgement, 22 March 2006, para. 62. However, Judge Schomburg (the Presiding Judge in the *Stakić* Trial Chamber) maintained his position in *Stakić* in his Dissenting Opinion in *Simić*: that the concept of JCE is "only one possible interpretation of 'committing' in relation to the crimes under the Statute" and that "in many other legal systems, committing is interpreted differently from the jurisprudence of the Tribunal. Since Nuremberg and Tokyo, both national and international criminal law have come to accept, in particular, co-perpetratorship as a form of committing." *Prosecutor v. Simić*, IT-95-9-A, Dissenting Opinion of Judge Schomburg, 28 November 2006, paras. 12, 14. Judge Schomburg based his findings *inter alia* on a study carried out by the Max-Planck-Institute, examining States which include co-perpetratorship in their national jurisdictions. This report had been prepared by the Max-Planck-Institute at the request of the ICTY Office of the Prosecutor. *See* Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion, Commissioned by the United Nations – International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor Project Coordination: Prof. Dr. Ulrich Sieber., Priv. Doz. Dr. Hans Georg Koch, Jan Michael Simon, Max Planck Institut für ausländisches und internationales Strafrecht, Freiburg, Germany [hereinafter Participation in Crime].

71. Current ICTY Appeals Judge Wolfgang Schomburg most recently noted alarmingly:

> The 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.[170] (emphasis added)

72. JCE, as a supposed customary international law doctrine, expands or contracts based on a need to cover unforeseen factual situations of a given case, and more ominously, when expedient to achieve desired results. The supposed safeguards against this abuse highlighted by Cassese – that international trials are predicated on full respect of rights of the accused and that professional judges determine whether the culpability of the offender is proved beyond a reasonable doubt – are nothing more than the minimum standards for any criminal trial for a serious offense. These safeguards do not adequately protect an accused faced with a form of liability that can criminalize practically any conduct.

73. The ECCC is a domestic Cambodian Court that has clear jurisdiction over forms of liability under the 1956 Cambodian Penal Code. This code includes a collective form of liability known as co-perpetration. It also includes various other forms of accomplice liability. In analysing JCE and co-perpetration it has been held that "only one of the two theories can prevail in the same legal system."[171] Due to the considerable flaws of JCE, the Pre-Trial Chamber should exercise its discretion to reject the application of JCE at the ECCC and apply the forms of liability provided for in the 1956 Cambodian Penal Code.

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to DECLARE that all three forms of Joint Criminal Enterprise liability are not forms of liability within the jurisdiction of the ECCC.

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Signed in Phnom Penh, Kingdom of Cambodia on this **24th** day of **November, 2008**

[170] *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.

[171] *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, Separate Opinion of Judge Shahabuddeen, 7 July 2006, para. 50.