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BEFORE THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' SUPPLEMENTARY OBSERVATIONS ON JOINT CRIMINAL ENTERPRISE

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I. INTRODUCTION

1. Pursuant to the Co-Investigating Judges' Order of 16 September 2008, the Co-Prosecutors file these supplementary observations ("Supplementary Observations") to elaborate on the applicability at the ECCC of the form of liability known as joint criminal enterprise ("JCE").[1] These Supplementary Observations are in addition to the Co-Prosecutor's substantive response filed on 11 August 2008 to the Charged Person Ieng Sary's motion ("Motion") on this issue.[2] Specifically, these Observations detail why the extended form of JCE liability, "JCE III", is applicable before this Court. They also respond to erroneous arguments raised in the Charged Person's Motion[3] and supplementary defence observations ("Defence Observations")[4] on the applicability of JCE.

2. The Motion put forward three main contentions, largely reiterated in the Defence Observations, to support the argument that JCE is not applicable at the ECCC. First, it asserts that JCE, as applied in the *Tadic* decision of the International Criminal Tribunal for the former Yugoslavia ("ICTY") Appeals Chamber, is a judicial construct that does not exist in customary international law or, alternatively, did not exist in 1975–9. Second, it argues that JCE is not applicable before the ECCC because it is not contained in the ECCC Establishment Law and customary international law is not applicable in Cambodian courts. Third, it argues that the doctrine of JCE is so broad that its application before this Court would cast "a wide shadow of liability on a variety of distinguished members of Cambodian society and others", thereby unduly staining their reputations.[5]

3. The Supplementary Observations shall address these contentions in turn, arguing that all three forms of JCE are applicable for the following reasons:

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1 *Case of Ieng Sary*, Order on the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, 16 September 2008, ERN 00224208–00224209, D97/III, p. 2.

2 *Case of Ieng Sary*, Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, 11 August 2008, ERN 00211956–00211970, D97/II.

3 *Case of Ieng Sary*, Ieng Sary's Motion Against the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, 28 July 2008, ERN 00208225-00208240, D97 [*hereinafter* Motion].

4 *Case of Ieng Sary*, Ieng Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC, Case No. 002/19-09-2007-ECCC/OCIJ, 24 November 2008, ERN 00244390-00244418, D97/7 [*hereinafter* Defence Observations].

5 Motion, p. 1.

A. The doctrine of JCE has existed in customary international law since the late 1940s, when it was crystallized by the laws and jurisprudence of the Nuremberg Trials and subsequent post-World War II war crimes tribunals. To the extent that post-1975 sources are cited in support of the Co-Prosecutors' argument, they merely recognize and support this fact, and clarify the contours of the JCE doctrine.

B. All three forms of JCE are applicable at this Court because Article 29 of the ECCC Establishment Law permits this, because customary international law is applicable to an "internationalized court applying international norms and standards"[6] (as it also is to Cambodian courts) and because JCE was a foreseeable form of liability at the time of the commission of the crimes within the jurisdiction of this Court (1975–9).

C. Contrary to the Charged Person's assertion, if the three forms of JCE are applied correctly this would actually entail a limited scope of liability. As such, there would be neither guilt by association nor any "spreading stain" of implied criminal liability on the individuals listed in the Motion.

4. Dozens of cases before the ICTY,[7] the International Criminal Tribunal for Rwanda ("ICTR"),[8] the Special Court for Sierra Leone ("SCSL")[9] and the Special Panels for the Trial

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6 *Case of Nuon Chea*, Public Decision on the Co-Lawyers' Urgent Application for the Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), ERN 00160734–00160742, C11/29, 4 February 2008, para. 30 [*hereinafter* Judge Ney Thol Decision].

7 *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-A, ICTY Appeals Chamber, 15 July 1999 [*hereinafter* Tadic Appeals Chamber Judgment]; *Prosecutor v. Milutinovic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise Liability, Case No. IT-99-37-AR72, ICTY Appeals Chamber, 21 May 2003 [*hereinafter* Milutinovic Decision]; *Prosecutor v. Krnojelac*, Judgment, Case No. IT-97-25-A, ICTY Appeals Chamber, 17 September 2003, para. 96; *Prosecutor v. Simic*, Judgment, ICTY Trial Chamber, Case No. IT-95-9-T, 17 October 2003, para. 149; *Prosecutor v. Kvocka*, Judgment, Case No. IT-98-30/1-A, 28 February 2005, paras. 105, 309; *Prosecutor v. Krnojelac*, Judgment, Case No. IT-97-25-A, 17 September 2003, paras. 96, 100; *Prosecutor v. Brdjanin*, Judgment, Case No. IT-99-36-A, 3 April 2007, para. 395; *Prosecutor v. Brdjanin*, Decision on Interlocutory Appeal, Case No.IT-99-36-A, 19 March 2004; *Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgment, 22 March 2006, paras. 101-104; *Prosecutor v. Krjaisnik*, Judgment, Case No. IT-00-39-T, 27 September 2006, para. 1082; *Prosecutor v. Milosevic*, Decision on Motion for Judgment of Acquittal, Case No. IT-02-54-T, 16 June 2004, para. 291; *Prosecutor v. Krstic*, Judgment, Case No. IT-98-33-A, ICTY Appeals Chamber, 19 April 2004, para. 144.

8 *Prosecutor v. Ntakirutimana*, Judgment, Case Nos. ICTR-96-10-A and ICTR-96-17-A, ICTR Appeals Chamber, 13 December 2004, paras. 461-484; *Prosecutor v. Rwamakuba*, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, Case No. ICTR-98-44-AR72.4, 22 October 2004, paras. 14-30; *Prosecutor v. Kayishema and Ruzindanda*, Judgment, Case No. ICTR-95-1-A, ICTR Appeals Chamber, 1 June 2001, para 193; *Prosecutor v. Nchamihigo*, Decision on Defence Motion on Defects in the Form of the Indictment, Case No. ICTR-20010630R50, 27 September 2006, paras 14, 21.

of Serious Crimes in East Timor[10] have recognized and applied the three forms of JCE liability. These three forms share the following *actus reus* elements: (1) a plurality of persons; (2) the existence of a common plan, design, or purpose which amounts to or involves the commission of a crime provided for in the relevant law; and (3) "significant" participation of the accused in the common design involving the perpetration of one of the crimes provided for in the relevant law.[11] They do, however, entail the following distinct *mens rea* elements:

a) JCE I (basic form) ascribes individual criminal liability when "all co-defendants act [...] pursuant to a common design, [and] possess the same criminal intention [...] even if each co-perpetrator carries out a different role within the [JCE]".[12] The *mens rea* required for this form of JCE is the shared intent of all members to commit a certain crime.[13]

b) JCE II (systemic form) is "characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps".[14] The *mens rea* required for this form of JCE is the personal knowledge of the system of ill-treatment and the intent to further this common concerted system of ill-treatment.[15]

c) JCE III (extended form) ascribes individual criminal liability in situations "involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common plan, is nevertheless a natural

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9 *Prosecutor v. Brima, Kamara and Kanue* (AFRC Case), Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, Case No. SCSL-04-16-T, 31 March 2006, paras. 308-326; *Prosecutor v. Norman, Fofana and Kondewa* (CDF Case), Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, Case No. 04-14-T, 21 October 2005, para. 130.

10 *Prosecutor v. Jose Cardoso Fereira*, Judgment, Case No.: 04/2001, District Court of Dili, 5 April 2003, paras. 367-376 (finding the accused guilty under JCE theory, applying the Tadic Appeals Chamber Judgment and other ICTY judgments in interpreting UNTAET Regulation 2000/15); *Prosecutor v. De Deus*, Judgment, Case No.: 2a/2004, District Court of Dili, 12 April 2005, p. 13. (holding that though the accused did not personally beat the victim, he was guilty "as part of a joint criminal enterprise" because he was part of an organized force intent on killing and contributed by carrying a gun, uttering threats, and intimidating unarmed people, thereby strengthening the resolve of the group).

11 *Prosecutor v. Brdjanin* Judgment, Case. No. IT-99-36-A, ICTY Appeals Chamber, 3 April 2007, para. 430.

12 Tadic Appeals Chamber Judgment, para 196.

13 *Id.*, para. 228.

14 *Prosecutor v. Kvocka*, Judgment, Case No. IT-98-30/1-A, ICTY Appeals Chamber, 28 February 2005, para. 82.

15 Tadic Appeals Chamber Judgment, para. 228.

and foreseeable consequence of the effecting of that common purpose".[16] The *mens rea* for this form is either the shared criminal intent of the perpetrators or, at a minimum, the fact that the defendant is "aware of the possibility that a crime might be committed as a consequence of the execution of the criminal act and [s/he] willingly takes the risk".[17]

5. The Supplementary Observations focus on JCE III as, even though the Charged Person has asked the Co-Investigating Judges to reject the JCE doctrine in all its forms, it is this third form that has attracted the most scholarly criticism. The Co-Prosecutors associate themselves with the three Amicus Briefs sought by the Pre-Trial Chamber in Appeal No. 001/18-7-2007(PTC 2), to the extent that they support the proposition that JCE I and II have been part of customary international law since before 1975 and should be applied by the ECCC.[18]

II. PRELIMINARY OBJECTIONS

6. As stated in the Co-Prosecutors' Response to IENG Sary's Motion on JCE ("the Response")[19], the Motion is improperly filed under Rule 53(1) of the Internal Rules ("the Rules"), which grants neither an actual nor implied right to the Charged Person to move the Co-Investigating Judges on any ground. The Motion also seeks inappropriate relief, as the Rules do not permit the Co-Investigating Judges to provide declaratory relief regarding the applicable law or any mode of liability. Consequently, the Co-Prosecutors submit that the Motion is inadmissible on these grounds.

7. Further, the Motion and the Defence Observations are clearly driven by extra-legal considerations not relevant to the judicial decision-making of the Co-Investigating Judges. This is apparent from the politicized concerns raised about the potential scope of JCE

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16 *Id.*, para. 204.

17 Tadic Appeals Chamber Judgment, para. 228.

18 Three Amicus Curiae submissions were commissioned by the Pre-Trial Chamber in the Duch Closing Order Appeal. The submissions were received from: (1) Professor Antonio Cassese of University of Florence and others (concluding that all three forms of JCE constituted customary international law in 1975); (2) eight professors from the Georg-August Universitat Gottingen Institute for Criminal Law and Justice (concluding that JCE I and JCE II constituted customary international law in 1975), and (3) five professors from McGill University Centre for Human Rights and Legal Pluralism (concluding that JCE I and JCE II constituted customary international law in 1976).

19 *Case of Ieng Sary*, Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, 11 August 2008, ERN 00211956-00211970, D97, paras. 4–6 [*hereinafter* Response].

liability before the ECCC. That this argument is based on an inaccurate construction of JCE makes it all the more misleading, as is apparent from the discussion below.

III. ARGUMENT

8. As a preliminary point, there exists no dispute as to the concept and extent of the principle of *nullum crimen sine lege.* The Defence Observations raise no relevant arguments about why this Court should be concerned as to whether Cambodian law places a stricter prohibition on retroactivity or what this would actually entail. The question at issue is, rather, whether JCE (and particularly its extended form of liability) existed in customary international law as of 1975 and whether it is applicable at the ECCC.

A. The JCE Doctrine has been part of Customary International Law since Nuremberg

9. All three forms of JCE have been part of customary international law since well before 1975–9. This is evident from the numerous international statutes, cases and authoritative pronouncements, as well as domestic cases, supporting the prior existence of JCE. All of this provides cogent evidence of the widespread state practice and *opinio juris* that establish customary international law.[20]

10. The inclusion of the "common plan" mode of liability in the Nuremberg Charter and in the Allied Control Council Law Number 10,[21] as well as the decisions of the post-World War II war crimes tribunals crystallized JCE as customary international law. Prior to this, liability for participation in a common plan had existed in some form in the national legislation or jurisprudence of numerous common law and civil law countries since at least the nineteenth

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[20] For the definition of customary international law, see *North Sea Continental Shelf* (*Federal Republic of Germany v. Denmark*; *Federal Republic of Germany v. Netherlands*), Merits, 20 February 1969, ICJ Rep. 3, para. 77.

[21] This Law was based on the Nuremberg Charter and governed subsequent war crimes trials. Control Council Law Number 10, in *Official Gazette of the Control Council for Germany* (1946), vol. 3, at 50. Because Control Council Law Number 10 sought to "establish a uniform legal basis in Germany for the prosecution of war criminals", Article I of the law explicitly incorporated the Nuremberg Tribunal Charter as an "integral part" of the Law. Pursuant to Article I, all the military commissions (U.S., British, Canadian, and Australian) adopted implementing regulations, rendering a defendant responsible under the principle of "concerted criminal action" for the crimes of any other member of that "unit or group." UN War Crimes Commission, *XV Law Reports of Trials of War Criminals* 92 (1949).

century. Indeed, many advanced jurisdictions recognized modes of co-perpetration similar to JCE III; these included conspiracy,[22] the felony murder doctrine,[23] the concept of *association de malfaiteurs*[24] and numerous other doctrines of co-perpetration.[25]

11. In focusing his critique largely on the *Tadic* decision of the ICTY Appeals Chamber, the Charged Person failed to recognize the significance of these events. The Nuremberg Charter, Control Council Law Number 10 and related jurisprudence constituted what international law scholars term a "Grotian Moment". Such a moment occurs when there is a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.[26] The argument that the finding in *Tadic* that JCE has been part of customary international law since Nuremberg was based on too few cases from too few jurisdictions misses this point, ignoring substantial evidence that supports the ICTY Appeals Chamber's finding.

12. The United Nations' International Law Commission has recognized that the Nuremberg Charter, Control Council Law Number 10 and the post-World War II war crimes trials (ten of

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22 See *Pinkerton v. U.S.*, 328 U.S. 640 (1946) (establishing the Pinkerton rule, in which a conspirator can be convicted of the reasonably foreseeable consequence of the unlawful agreement).

23 The Felony murder doctrine, first enunciated by Lord Coke in 1797, has been applied in the United Kingdom, the United States, New Zealand, and Australia. Antonio Cassese, *International Criminal Law* (Second ed., 2008), at 202. The rule allows a defendant to be "held accountable for a crime because it was a natural and probable consequence of the crime which that person intended to aid or encourage." Wayne LaFave & Austin Scott, *Criminal Law* (1972), at p. 515-516.

24 Professor van Sliedregt notes that the concept of "association de malfaiteurs," which has been used in France and The Netherlands to deal with mob violence by overcoming causality problems, "inspired the drafters of the Nuremberg Statute to penalize membership of a criminal organization." Eliese van Sliedregt, "Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide", 5 *Journal of Int'l Crim. J.* 184, 199 (2006).

25 The Indian Penal Code of 1860 imposed individual liability for unlawful acts committed by several persons in furtherance of a common plan. Walter Morgan and A.G. MacPherson, *Indian Penal Code* (XLV, 1860) (London: GC Hay Co. 1861). Similarly, Section 61(2) of the *Canadian Criminal Code* of 1893 punishes persons who "form a common intention to prosecute any unlawful purpose," and makes each "a party to every offense committed by any one of them in the prosecution of such common purpose". Section 21(2) of the Criminal Code, R.S.C. 1970, C-34.

26 Hugo Grotius is considered to be the "father" of international law as the law of nations, and has been recognised for having "recorded the creation of order out of chaos in the great sphere of international relations". See Charles S. Edwards, *Hugo Grotius, the Miracle of Holland* (1981). The term "Grotian Moment" was apparently coined by Burns H. Weston, in the international law textbook, *International Law and World Order*, 1369 (3d ed. 1997). See also Saul Mendlovitz & Marev Datan, "Judge Weeramantry's Grotian Quest", 7 *Transnational L. & Contep. Probs.* 401, 402 (defining the term "Grotian moment"); Ibrahim J. Gassama, "International Law at a Grotian Moment: The Invasion of Iraq in Context", 18 *Emory Int'l L. Rev.* 1, 9 (2004) (describing history's Grotian moments, including the Peace of Westphalia, the Nuremberg Charter, and the UN Charter); Leila Nadya Sadat, "The New International Criminal Court: An Uneasy Revolution", 88 *Georgetown L. J.* 381, 474 (arguing that the Statute of the International Criminal Court constitutes the most recent Grotian moment).

which were cited in *Tadic*) gave birth to the entire international paradigm of individual criminal responsibility.[27] Importantly, on 11 December 1946, in one of the first actions of the newly formed United Nations, its General Assembly unanimously affirmed the principles from the Nuremberg Charter and judgments.[28] This action affirmed as customary international law both the substantive law and the theory of individual criminal liability (including "common plan" liability) codified in the Nuremberg Charter and applied by the Nuremberg Tribunal. As a consequence, common plan (now known as JCE) liability was rendered just as much a part of customary international law as the other fundamental concepts of international criminal liability reflected in the Nuremberg Principles which the ECCC applies. These concepts include: command responsibility, the principle that obeying superior orders is not a defence, the idea that leaders can be held liable for international crimes despite their official position and the notion that a perpetrator is responsible for an act that constitutes a crime under international law notwithstanding the fact that domestic law does not impose a penalty for this act.

13. In submitting the draft statute for the ICTY to the Security Council in 1993, the United Nations Secretary-General emphasized this customary international law status of the principles and rules emanating from the Nuremberg Trial and other post-World War II jurisprudence. Specifically, he stated that the Statute had been drafted to apply only the "rules of international humanitarian law which are beyond any doubt part of customary international law", which included the substantive law and modes of liability embodied in "the Charter of the International Military Tribunal of 8 August 1945".[29] Contrary to the

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[27] See, *Report of the International Law Commission on the Work of its Forty-Eighth Session*, 6 May–26 July 1996, Official Records of the General Assembly, Fifty-First Session, Supplement No. 10, at p. 19, available at http://www.un.org/law.ilc/index.htm (describing the principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg as the "cornerstone of international criminal law" and the "enduring legacy of the Charter and Judgment of the Nuremberg Tribunal".).

[28] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), UN GAOR, 1st Sess., U.N. Doc A/236 (1946) pt. 2, at 1144. The Resolution affirming the Nuremberg Principles also directed the UN International Law Commission to codify them in an international code of offences against the peace and security of mankind. The ILC's first draft of the Code in 1956 specifically included "the principle of individual criminal responsibility for formulating a plan or participating in a common plan or conspiracy to commit a crime" (art. 2, para. 13(i)). See *Report of the International Law Commission on the Work of its Forty-Eighth Session*, 6 May–26 July 1996, Official Records of the General Assembly, Fifty-First Session, Supplement No. 10, at p. 21 available at http://www.un.org/law.ilc/index.htm.

[29] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, S/25704, 3 May 1993, paras. 34-35.

argument in paragraph 54 of the Defence Observations, this 1993 statement about the content of customary international law also holds true for the time of the crimes in question before this Court (1975–9), as there were no relevant major developments in international humanitarian law between 1975 and the establishment of the ICTY in 1993. As Ciara Damgaard documents, "the origins of the JCE Doctrine can be found in the events surrounding the end of World War II".[30]

14. Arguments made in the Defence Observations (specifically at paragraph 54) fail to recognize the significance of the 1946 affirmation and the Secretary-General's 1993 statement as clear evidence of custom. The Charged Person's assertion about the "limited number" of post-World War II war crimes cases applying JCE is also erroneous. It was the universal and unqualified endorsement of the Nuremberg Principles as early as 1946, rather than the number of cases applying JCE liability at the time, which crystallized this doctrine into a mode of individual criminal liability under customary international law.[31] It is irrelevant if 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".[32] Customary international law recognized in the 1993 report of the Secretary General will undoubtedly be applicable before this Court.[33]

15. Consistent with the doctrine's origins in an international agreement (the Nuremberg Charter) and the jurisprudence of an international tribunal, "JCE is a merger of common law and civil law. JCE in international law is a unique (*sui generis*) concept in that it combines and mixes two legal cultures and systems."[34] It is unsurprising then that the nomenclature of "JCE" is not consistently found in state practice, as its three forms of liability represent a synthesis between different jurisdictions. Specifically, the Great Powers sought to create an approach in the Nuremberg Charter that would combine the Anglo-American conspiracy doctrine with the approach in France and the Soviet Union where conspiracy was not recognized as a

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30 Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes*, (2008), pp. 132 & 235.

31 See Frank Lawrence, "The Nuremberg Principles: A Defense for Political Protesters", 40 *Hastings L. J.* 397, (1989), pp. 397 & 408-410 (disputing the argument that "more than a single event is necessary for a proposed principle to be considered part of customary international law").

32 Defence Observations, para. 54.

33 See also arguments below in Part III concerning the applicability of customary international law to the ECCC.

34 Elies van Sliedregt, "Joint Criminal Enterprise as a Pathway to Convicting Individuals of Genocide", 5 *J. Int'l Crim. Just.* 184, 199 (2007).

crime.[35] Thus, Article 6 of the London Charter (the Statute of the Nuremberg Tribunal) implemented a modified form of the initial American proposal to include conspiracy, providing that "leaders, organizers, 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".[36]

16. During the Nuremberg Trial, Justice Robert Jackson, the Chief U.S. Negotiator of the Nuremberg Charter and Chief U.S. Prosecutor at Nuremberg explained to the Tribunal the meaning of "common plan", as distinct from the U.S. concept of conspiracy:

> The Charter did not define responsibility for the acts of others in terms of "conspiracy" alone. The crimes were defined in non-technical but inclusive terms, and embraced formulating and executing a "common plan" as well as participating in a "conspiracy." It was feared that to do otherwise might import into the proceedings technical requirements and limitations which have grown up around the term "conspiracy." There are some divergences between the Anglo-American concept of conspiracy and that of either Soviet, French, or German jurisprudence. It was desired that concrete cases be guided by the broader considerations inherent in the nature of the social problem, rather than controlled by refinements of any local law.[37]

17. Consistent with this statement, the Nuremberg Tribunal[38] and the Control Council Law Number 10 accepted their own version of the "common plan" concept, thereby transforming it into what has now become known as the doctrine of JCE. These tribunals found that "the difference between a charge of conspiracy and one of acting in pursuance of a common design is that the first would claim that an agreement to commit offences had been made while the second would allege not only the making of an agreement but the performance of acts pursuant to it".[39] In other words, conspiracy is a crime in its own right, while acting in pursuance of a common design or plan, like JCE, was a mode of liability that attaches to

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35 Stanislaw Pomorski, "Conspiracy and Criminal Organizations" in George Ginsburgs & V.N. Kudriavtsev eds., *The Nuremberg Trial and International Law,* 213, (1990), p. 216.

36 Agreement for the Prosecution and Punishment of Major German War Criminals of the European Axis, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279.

37 Robert H. Jackson, "The Law Under Which Nazi Organizations are Accused of Being Criminal", argument by Robert H. Jackson, 28 February 1946, reprinted in *The Nurnberg Case: As Presented by Robert Jackson* (1971), p. 108.

38 *See* International Military Tribunal Judgment, in Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, Vol. 1, 1947, p. 226.

39 *XV Law Reports of Trials of War Criminals 97-98*, UN War Crimes Commission, 1948 (summarizing the jurisprudence of the Nuremberg and Control Council Law Number 10 trials).

substantive offences. In developing JCE liability from pre-existing approaches in domestic jurisdictions, the Nuremberg Tribunal declared that its conclusions were made "in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal and that mass punishments should be avoided".[40]

18. While the Nuremberg Tribunal tried the 22 highest ranking surviving members of the Nazi regime, Control Council Law Number 10 was jointly promulgated by the Allied Powers to govern subsequent trials of the next level of suspected German war criminals by U.S., British, Canadian, and Australian military tribunals, as well as German courts, in occupied Germany. Under the authority of Control Council Law Number 10, the tribunals were to follow the Charter and jurisprudence of the Nuremberg Tribunal.[41] As such, the case law from those tribunals is viewed as an authoritative interpretation of the Nuremberg Charter and Judgment and a reflection of customary international law.[42]

19. An analysis of several of the Control Council Law Number 10 cases supports the conclusion that the JCE doctrine was employed by those tribunals in 1946–7. In reaching its conclusion about the existence of JCE, *Tadic* relied partly on ten different post-World War II cases—six regarding JCE I,[43] two regarding JCE II,[44] and two regarding JCE III.[45] Most of these cases were published in summary form in the 1949 Report of the UN War Crimes Commission.[46]

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40 International Military Tribunal, Judgment in the Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945, 1 October 1947, p.256.

41 Control Council Law Number 10, in *Official Gazette of the Control Council for Germany,* 1946, vol. 3, p. 50.

42 *Prosecutor v. Kupreskic*, Judgment, Case No: IT-95-16-A, ICTY Trial Chamber, 14 January 2000, para 541: "It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg and Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law Number 10, a legislative act jointly passed in 1945 by the four Occupying Powers and thus reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the courts called upon to rule on those crimes. These courts operated under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law."

43 *Trial of Otto Sandrock and three others*; *Hoelzer and others*; *Gustav Alfred Jepsen and others*; *Franz Schonfeld and others*; *Feurstein and others*; *Otto Ohlenforf and others.*

44 *Dachau Concentration Camp Case* (Tral of Martin Gottfied Weiss and thirty-nine others); the *Belsen Case* (Trial of Josef Kramer and forty-four others).

45 *Essen Lynching Case*; *Borkum Island Case.* For JCE III, the Appeals Chamber also cited several unpublished Italian decisions.

46 Notably, the JCE III *Borkum Island Case* was not included in the Report of the UN War Crimes Commission, but the charging instrument, transcript, and other documents of the case have been publicly available from The United States Archives. See Publication Number M1103, "Records of United States Army War Crimes Trials, *United States of America v. Goebel*, et. al., 6 February–21 March 1946. In addition, a detailed account and

In addition to these ten, the Co-Prosecutors have found another sixteen cases published in the 1949 UN War Crimes Commission Report and the U.S. Nuremberg War Crimes Tribunal Report in which the Control Council Law Number 10 tribunals also applied the common plan or design/JCE concept.[47] The ECCC Library has also recently received case files of ten cases from German courts that applied the common plan/JCE concept pursuant to the authority of Control Council Law Number 10 to German indicted war criminals.[48] All of these cases clarified the meaning of Nuremberg's common plan liability, which is now referred to as JCE. Summing up this extensive case law and explaining the difference between common design and simple co-perpetration, the UN War Crimes Commission Report states: "the prosecution has the additional task of providing the existence of a common design, [and]

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analysis of the *Borkum Island Case* was published in 1956 in Maxilimian Koessler, *Borkum Island Tragedy and Trial*, 47 *Journal of Criminal Law* 183–196 (1956).

47 *Trial of Heinz Eck and Four Others,* British Military Court for the Trial of War Criminals, Hamburg, Germany, 17–20 October 1945, UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. I, pp. 1–21 (1947); *Trial of Alfons Klein and Six Others,* United States Military Commission, appointed by the Commanding General Western Military District, Wiesbaden, Germany, 8–15 October 1945, in UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. I, pp. 46–54 (1947); *Trial of Erich Killinger and Four Others,* British Military Court, Wuppertal, Germany, 26 November–3 December, 1945, UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. III, pp. 67–74 (1948); *Trial of Karl Buck and Ten Others,* British Military Court for the Trial of War Criminals, Wuppertal, Germany, 6–10 May, 1946, UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. V, pp. 39–44 (1948); *Trial of Karl Adam Golkel and Thirteen Others,* British Military Court for the Trial of War Criminals, Wuppertal, Germany, 6–10 May, 1946, UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. V, pp. 45–53 (1948); *Trial of Werner Rohde and Eight Others,* British Military Court for the Trial of War Criminals, Wuppertal, Germany, 29 May–1 June, 1946, UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. V, pp. 54–59 (1948): *Trial of Josef Altstotter and Others,* United States Military Tribunal, 17 February–4 December 1947, UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. VI, pp. 1–110 (1948); *Trial of Heinrich Gericke and Seven Others,* British Military Court, Brunswick, 20 March–3 April 1946, UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. VIII, pp. 76–81 (1948); *Trial of Carl Krauch and Twenty-Two Others,* United States Military Tribunal, Nuremberg, 14 August 1947–29 July 1948, UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. X, pp. 1–68; *Trial of Alfried Felix Alwyn Krupp Von Bohlen Und Halbach and Eleven Others,* United States Military Tribunal, Nuremberg, 17 November 1947–30 June 1948, UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. X, pp. 69–181; *Trial of Max Wielen and Seventeen Others,* British Military Court, Hamburg, Germany, 1 July–3 September 1947, UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. XI, pp. 31–53 (1949); *Trial of Hans Renoth and Three Others,* British Military Court for the Trial of War Criminals, Elden, Germany, 8–10 January 1946, in UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. XI, pp. 76–78 (1949); *Trial of Eberhard Schoengrath and Six Others,* British Military Court for the Trial of War Criminals, Burgsteinfurt, Germany, 7–11 February, 1946, UN War Crimes Commission, Law Reports of Trials of War Criminals, Vol. XI, pp. 83–85 (1949).

48 Control Council Law Number 10 Courts (German District Court) of the British Occupation Zone, StS 11/50, 5 September 1950; StS 356/49, 13 March 1950; StS 31/50, 15 August 1950; StS 156/49, 31 May 1949; StS 130/49, 24 April 1950; StS 287/49, 4 August 1949; StS 177/49, 4 October 1949; StS 256/49, 21 March 1950; StS 256 and 257/49, 21 March 1950; StS 514/49, 11 April 1950. All convictions were affirmed by the German Supreme Court of the British Occupation Zone. Complete scanned copies of the German language text of these cases are on file in the ECCC Library.

once that is proved the prosecution can rely upon the rule which exists in many systems of law that those who take part in a common design to commit an offence which is carried out by one of them are all fully responsible for that offence in the eyes of the criminal law".[49] Consistent with this explanation, the ICTY Appeals Chamber in the *Milutinovic* case, after considering extensive filings by the parties on whether JCE is part of customary international law, found that JCE and common plan liability are the same.[50]

20. Given that these Supplementary Observations focus on JCE III, the three Control Council Law Number 10 cases dealing with that mode of JCE liability are summarized below. One example is the trial of Erich Heyer and six others known as the *Essen Lynching Case*, which is mentioned in the Defence Observations albeit with a very narrow focus on only one of the defendants (Heyer). According to the official summary of the trial published in the UN War Crimes Commission Report, this case concerned the lynching of three British prisoners of war by a mob of Germans.[51] Though the case was tried by a British military court, it did so under the authority of Control Council Law Number 10, and it was therefore "not a trial under English law". One of the accused, Captain Heyer, had placed three prisoners under the escort of a German soldier, Koenen, who was to take them for interrogation. As Koenen left, Heyer, within earshot of a waiting crowd, ordered Koenen not to intervene if German civilians molested the prisoners and stated that the prisoners deserved to be and probably would be shot. The prisoners were beaten by the crowd and one German corporal fired a revolver at a prisoner, wounding him in the head. One died instantly when they were thrown over a bridge and the remaining two were killed by shots from the bridge and by members of the crowd who beat them to death. The defence argument that the prosecution needed to prove that each of the accused—Heyer, Koenen and five civilians—had intended to kill the prisoners was not accepted by the court. The prosecution argued that in order to be convicted the accused had to have been "concerned in the killing" of the prisoner. Both Heyer and Koenen were convicted of committing a war crime in that they were concerned in the killing of the three prisoners, as were three of the five accused civilians. Even though it was not proven which of the civilians delivered the fatal shots or blows, they were convicted because

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49 UN War Crimes Commission, Law Reports of Trials of War Criminals, UNWCC, Vol. XV (1949), p. 96.

50 Milutinovic Decision, para. 36.

51 *Trial of Erich Heyer and Six Others*, British Military Court for the Trial of War Criminals, Essen, 18–19 and 21 –22 December 1945, UNWCC, Vol. 1 (1949), p. 88.

"[f]rom the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men".[52]

21. A second example not cited in *Tadic*, which the UN War Crimes Commission specifically found analogous to the *Essen Lynching Case*, is the *Trial of Hans Renoth and Three Others*.[53] In that case, two policemen (Hans Ronoth and Hans Pelgrim) and two customs officials (Friedrich Grabowski and Paul Nieke) were accused of committing a war crime in that they "were concerned in the killing of an unknown Allied airman, a prisoner of war". According to the allegations, the pilot crashed on German soil unhurt, and was arrested by Renoth, then attacked and beaten with fists and rifles by a number of people while the three other defendants witnessed the beating but took no active part to stop it or to help the pilot. Renoth also stood by for a while, and then shot and killed the pilot. "The case for the prosecution was that there was a common design in which all four accused shared to commit a war crime, [and] that all four accused were aware of this common design and that all four accused acted in furtherance of it."[54] All the accused were found guilty, presumably based on the foreseeability that the pilot would eventually be killed during the beating at the hands of the crowd or by one of them.

22. A third example is the case of *Kurt Goebell et. al* (the *Borkum Island Case*). Although not published in the Report of the UN War Crimes Commission, a detailed record of this case is publicly available through the U.S. National Archives Microfilm Publications.[55] Moreover, a detailed report of the trial (based on trial transcripts) was published in the *Journal of Criminal Law* in 1956.[56] According to that report, the mayor of Borkum and several German military officers and soldiers were convicted of the assault and killing of seven American airmen who had crashed-landed. The prosecution argued that the accused were "cogs in the wheel of common design, all equally important, each cog doing the part assigned to it". It

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52 *Id.*, p. 97.

53 *Trial of Hans Ronoth and Three Others*, British Military Court, 9–10 January 1946, UNWCC, Vol. XV (1949), p. 76-77.

54 *Id.*, at 76.

55 The United States Archives, Publication Number M1103, "Records of United States Army War Crimes Trials, *United States of America v. Goebell*, et. al., 6 February–21 March 1946. The Appeals Chamber in *Tadic* states that a copy of these case materials are on file in the ICTY's Library. Tadic Appeals Chamber Decision, p. 93.

56 Maxilimian Koessler, "Borkum Island Tragedy and Trial", 47 *Journal of Criminal Law* 183-196 (1956).

further argued that "it is proved beyond a reasonable doubt that each one of the accused played his part in mob violence which led to the unlawful killings" and "therefore, under the law each and every one of the accused is guilty of murder". After deliberating in closed session, the judges rendered an oral verdict in which they convicted the mayor and several officers of the killings and assaults. From the arguments and evidence submitted, it is apparent that the accused were convicted pursuant to a form of common design liability equivalent to JCE III. Essentially, the court decided that though certain defendants had not participated in the murder nor intended for it to be committed, they were nonetheless liable because it was a natural and foreseeable consequence of their treatment of the prisoners.

23. Given the nature of international crimes and mass atrocities, the rationale behind the existence of JCE and the relative infrequency with which trials for such crimes arise, it is unsurprising that there are few examples of national jurisprudence applying forms of JCE liability. And nor are the examples that do exist likely to entirely mirror JCE given that this doctrine was, as discussed above, a synthesis of common and civil law approaches. Though there were few national war crimes trials in the Cold War period, the Jerusalem District Court and Israeli Supreme Court's decisions in the *Eichmann case* demonstrate that, as of 1961, domestic courts recognized JCE as developed by the immediate post-World War II laws and jurisprudence.[57] The Jerusalem District Court's approach to determining Adolf Eichmann's individual responsibility for participating in a common criminal plan to extinguish the Jews in Europe closely resembled that applied by the Control Council Law Number 10 cases cited above (several of which were cited by the Jerusalem District Court). This can be seen clearly in its statement:

> Hence, everyone who acted in the extermination of Jews, knew about the plan for the Final Solution and its advancement, is to be regarded as an accomplice in the annihilation of the millions who were exterminated during the years 1941-1945, irrespective of the fact of whether his actions spread over the entire front of the extermination, or over only one or more sectors of that front. His responsibility is that of a 'principal offender' who perpetrated the entire crime in co-operation with the others.[58]

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[57] *Attorney-General of Israel v. Eichmann*, 36 I.L.R.5 (11 December 1961) [*hereinafter* Eichmann] affirmed by *Attorney-General of Israel v Eichmann*, 36 I.L.R. 277 (29 May 1962) [*hereinafter* Eichmann II].

[58] Eichmann, para. 194.

The District Court found that Eichmann was made aware of the criminal plan to exterminate the Jews in June of 1941; he actively furthered this plan via his central role as Referent for Jewish Affairs in the Office for Reich Security as early as August of 1941; and he possessed the requisite intent (specific intent here, because the goal was genocide) to further the plan as evidenced by "the very breadth of the scope of his activities" undertaken to achieve the biological extermination of the Jewish people.[59] On the basis of these findings, Eichmann was held criminally liable for the "general crime" of the Final Solution, which encompassed acts constituting the crime "in which he took an active part in his own sector *and the acts committed by his accomplices to the crime in other sectors* on the same front".[60] In so holding, the District Court ruled that full awareness of the scope of the plan's operations was not necessary noting that many of the principal perpetrators, including the defendant, may have possessed only compartmentalized knowledge.[61] The Israeli Supreme Court also cited the 1946 General Assembly Resolution affirming the Nuremberg principles, stating: "if fifty-eight nations unanimously agree on a statement of existing law, it would seem that such a declaration would be all but conclusive evidence of such a rule, and agreement by a large majority would have great value in determining what is existing law".[62]

24. A related issue concerns the question of whether the precedents of Nuremberg and its progeny are applicable given that they arose during an international armed conflict. The ICTY found that JCE applies to international crimes regardless of the type of conflict.[63] Similarly, the ICTR's rationale for rejecting such a distinction in the *Karamera case* is instructive:

> The gravity of the participation in a joint criminal enterprise cannot depend on the nature of the conflict. Furthermore, as the Appeals Chamber in *Tadic* authoritatively held, the structure of international crimes requires that joint criminal enterprise liability be applied in order to assure an efficient prosecution. The Chamber does not perceive any difference between the structure of international crimes committed in the course of international armed conflicts and

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59 *Id.*, para. 182.
60 *Id.*, para. 197 (emphasis added).
61 *Id.*, para. 193.
62 Eichmann II, para. 11 (concerning universal jurisdiction for crimes against humanity), para. 14 (concerning rejection of the act of state defence), and para. 15 (concerning rejection of the superior orders defence).
63 *Prosecutor v. Prlic*, Decision to Dismiss the Preliminary Objections Against the Tribunal's Jurisdiction, Case No. IT-04-74-PT, ICTY Trial Chamber II, 26 September 2005, para. 20.

international crimes committed in the course of internal armed conflicts. Therefore, the same reasoning of the Appeals Chamber in *Tadic* must equally apply to internal armed conflicts. The nature of the conflict is not relevant to the responsibility of the perpetrator. This criterion only goes to the characteristics of the particular crime and not to the responsibility of the potential perpetrator of an alleged act.[64]

25. Given that all three forms of JCE existed as customary international law at the time of the crimes within the jurisdiction of this Court (1975–9), the next step involves determining whether the doctrine is, in fact, applicable at the ECCC.

B. The JCE doctrine is applicable to the ECCC

26. The Co-Prosecutors submit that this Court's defendants had sufficient notice that their participation in a JCE would entail criminal responsibility for acts committed pursuant to it. Sufficient notice is the second requirement of the principle of legality (*nullum crimen sine lege*) and must be satisfied for JCE to be applicable at the ECCC. Further, the mode of liability must have been explicitly or implicitly provided for in the Court's basic instruments. This section discusses these two issues before addressing the argument in the Defence Observations that customary international law does not apply to Cambodian courts and, therefore, cannot be applied at the ECCC.

JCE was Accessible and Foreseeable During 1975-9

27. The application of JCE at the ECCC does not violate the principle of *nullum crimen sine lege* codified in Article 15(1) of the International Covenant on Civil and Political Rights ("ICCPR") and incorporated by reference in Article 33 of the ECCC Establishment Law. As discussed above, JCE was part of customary international law as of 1975 and, as is apparent from the arguments made in paragraphs 31–8 of the Response, it was sufficiently foreseeable and accessible to the Charged Persons when the crimes were committed.

28. Quoting *Tadic*, the Charged Person asserts that the ten Control Council Law Number 10 cases relied upon by the ICTY Appeals Chamber are "unpublished cases" or, in some

64 *Prosecutor v. Karemera*, Decision on the Preliminary Motions Challenging Jurisdiction in Relation to Joint Criminal Enterprise, Case No. ICTR-98-44-T, ICTR Trial Chamber III, 11 May 2004, paras. 32-38.

instances, mere summaries of unwritten verdicts. The suggestion being that the Court should, therefore, not rely on them to glean the substance of customary international law because defendants could not be deemed to have constructive knowledge of unpublished works with respect to the doctrine that ignorance of law is no excuse (*ignorantia juris non excusat*). This position is incorrect as, in fact, most of the relevant Control Council Law Number 10 cases were published in summary form in the official UN War Crimes Commission Report in 1949. According to those Reports' foreword, the "main object of these Reports [was] to help to elucidate the law, i.e., that part of International Law which has been called the law of war".[65] This authoritative and widely disseminated multi-volume account of the trials, in which the war crimes tribunals recognized and applied JCE liability, further supports the Co-Prosecutors' arguments in their Response that individuals had sufficient constructive notice in 1975–9 that their mass atrocity crimes would attract criminal responsibility under the JCE doctrine. Further, as McGill University's Centre for Human Rights and Legal Pluralism points out in paragraph 13 of its Amicus Brief, the approach of other *ad hoc* tribunals has been to presume that the foreseeability and accessibility requirements are met if the conduct is found to be punishable under international law.

JCE is Included in Article 29 of the ECCC Establishment Law

29. The Charged Person contends that by failing to reference the JCE Doctrine in the ECCC Establishment Law—a document adopted after the ICC Statute which expressly included it—this Court's founding documents explicitly rejected JCE as a form of liability.[66] The Co-Prosecutors request the Co-Investigating Judges to reject this argument, *inter alia*, for three reasons.

30. First, Article 29 of the ECCC Establishment Law, which provides for individual criminal responsibility of any "suspect who planned, instigated, ordered, aided and abetted, or committed" the crimes punishable by the Court, is worded identically to mirror provisions of the statutes for the ICTY, the ICTR and the SCSL. All of these international and

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[65] Foreword, *Law Reports of Trials of War Criminals*, XV UNWCC, p. vii (1949). While the UN War Crimes Commission recognizes that where "there is no reasoned judgment [...] it is difficult in some cases to specify precisely the grounds on which the courts gave their decision", the Commission goes on to state: "[t]he difficulty is, however, to a large extent surmounted in [such cases] by examining carefully the indictment, the speeches of the counsel on both sides and the judgment".

[66] Motion, para. 6.

internationalized tribunals have read the word "committed" as including participation in the realization of a common design or purpose.[67] While this Court is not bound by the precedent of its sister tribunals, departures from their interpretation of identically worded statutory provisions will create inconsistency and unpredictability in international criminal law and set the ECCC apart from these internationally respected institutions.

31. Second, when the ECCC Establishment Law was adopted in 2001, its drafters were aware of the ICTY Appeals Chamber decision in *Tadic*. Particularly, they knew that JCE liability was encompassed in Article 7(1) of the ICTY Statute on the basis of the object and purpose of the Statute, the nature of international crimes, a review of the post-World War II jurisprudence and comparative study of several countries' legislation.[68] Therefore, if the drafters had wanted to explicitly exclude JCE, as the Motion argues, they would not have repeated verbatim Article 7(1) of the ICTY Statute in Article 29 of the ECCC Establishment Law. Rather, they would have followed the approach of the drafters of the Rome Statute for the International Criminal Court which deliberately adopted different language. The Rome Statute uses the term co-perpetration rather than JCE and modifies the doctrine by requiring "knowledge" for all three forms of JCE liability.[69]

32. An instructive example of the latter approach is the Statute of the East Timor Special Panels for Serious Crimes adopted in 2000, one year before the ECCC Establishment Law. This Statute used the language of Article 25 of the Rome Statute rather than that of the ICTY,

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67 *CDF Case*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, Case No. SCSL-04-14-T, 21 October 2005, para. 130: "The Chamber recognizes, as a matter of law, generally, that Article 6(1) of the Statute of the Special Court does not, in its proscriptive reach, limit criminal liability to only those persons who plan, instigate, order, physically commit a crime or otherwise aid and abet in its planning, preparation or execution. Its proscriptive ambit extends beyond that to prohibit the commission of offenses through a joint criminal enterprise, in pursuit of the common plan to commit crimes punishable under the Statute."

68 Tadic Appeals Chamber Judgment, paras. 189, 191, 195-226.

69 Unlike the first category of JCE applied by international courts, the ICC does not require that the accused share the *mens rea* of the physical perpetrators and, in contrast to the third category of JCE, the ICC's JCE provision requires knowledge rather than mere foreseeability. See, *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9 (1998), Art. 25. While the ICC has utilized the term "joint perpetration" rather than JCE in its jurisprudence regarding Article 25 liability, its most recent judgment on the issue indicates that it is applying JCE in a different name with only slight modifications. See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No.: ICC-01/04-01/07, 30 September 2008, para. 533. ("The Chamber finds that the co-perpetration of a crime requires that both suspects: (a) are mutually aware that implementing their common plan will result in the realization of the objective elements of the crime; (b) undertake such activities with the specific intent to bring about the objective elements of the crime, or are aware that the realization of the objective elements will be a consequence of their acts in the ordinary course of events.").

ICTR, SCSL Statutes and, subsequently, the ECCC formulation.[70] Consequently, rather than proving an explicit intention to reject JCE, the drafters' decision not to adopt the language of the Rome Statute or to specifically exclude JCE in order to ensure that Article 29 was not interpreted in a manner consistent with the approach of other *ad hoc* tribunals actually proves the opposite: the drafters intended for the ECCC to follow the precedent in *Tadic* rather than the narrower formulation of the Rome Statute.

33. Further, the Defence Observations' suggestion that the distinction between "bring to trial" as the purpose of the ECCC Establishment Law and "prosecute" in the ICTY Statute is fundamental to interpreting Article 29 is neither rational nor supported by any sources.[71] The two are synonymous: it is impossible to imagine how the ECCC could bring to trial senior leaders of the Khmer Rouge and those most responsible for crimes under that regime without also intending to prosecute them and vice versa.

34. Third, the notion that Article 29 encompasses JCE is supported by the object and purpose of the ECCC Establishment Law. Article 1 states that the purpose of the Law is to bring to trial "senior leaders of Democratic Kampuchea and those who were most responsible" for the crimes committed. This statement of purpose makes it clear that the Court is to focus on large-scale international crimes, as well as domestic ones.

35. As has been recognized from the time of the Nuremberg Trials, it is the unique nature of such crimes that justifies and requires JCE liability. This was explained in *Tadic*:

> Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question.

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[70] UN Transitional Administration in East Timor, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15.6, 6 June 2000, Section 14.3(d). The Statute of the Special Tribunal for Lebanon also adopts a similar approach. See Article 3(1)(b) of the Statute of the Special Tribunal for Lebanon, attached to the Agreement between the UN and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, annexed to S.C. Res. 1757, U.N. SCOR, 58th Sess., 5685th mtg., U.N. Doc. S/RES/1757 (30 May 2007).

[71] Defence Observations, para. 17.

> It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.[72]

This passage has been quoted in a number of subsequent judgments of the ICTY,[73] and in *Karemera* the ICTR Trial Chamber articulated a similar rationale for the JCE doctrine:

> To 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. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.[74]

36. The Motion cites a limited number of judicial dissents and academic critiques of the JCE doctrine to support the Charged Person's case for non-application of JCE before this Court.[75] An overwhelming majority of judicial chambers of international criminal tribunals that have examined the question have applied the JCE doctrine. Similarly, scholarly opinion has been widely supportive of the doctrine in the light of the unique requirements of bringing to justice those responsible for mass atrocity crimes. One scholar posits that JCE can "enhance the truth-telling function of international criminal law trials by portraying, more accurately than other theories of liability, how crimes are conceived of, planned and executed in a system-criminality context".[76] Another scholar states that "[i]t is the nature of core international crimes to be mass-scale crimes committed by a plurality of perpetrators and frequently evidence of participation by an accused is scarce".[77] Similarly, Antonio Cassese, the Editor-in-Chief of the *Journal of International Criminal Justice*, has opined:

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72 Tadic Appeals Chamber Judgment, para 191.

73 See, e.g., *Prosecutor v. Kvacka et al.*, Appeal Judgment, Case No. IT-98-30/1-A, 28 February 2005, para 80; *Prosecutor v. Krnojelac*, Appeal Judgment, Case No. IT-97-25-A, 17 September 2003, para 29; *Prosecutor v. Blagojevic and Jokic*, Trial Judgment, Case. No. IT-02-60-T, 17 January 2005, para. 695.

74 *Prosecutor v. Edourad Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and Andre Rwamakuba*, Decision on the Preliminary Motions by the Defence Challenging Jurisdiction in Relation to Joint Criminal Enterprise, ICTY Trial Chamber III, Case No. ICTR-98-44-T, 14 May 2004, para. 36.

75 The Charged Person cites Judge Liu's partial dissent in *Prosecutor v. Oric*, Case No. IT-03-68-A, Appeals Judgment, 3 July 2008, para. 26 and Judge Shahabuddeen's partial dissent in *Prosecutor v. Hadzihasanovic & Kubura*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No. IT-01-47-AR47, 16 July 2003, para. 21.

76 Katrina Gustafson, "The Requirement of an 'Express Agreement' for Joint Criminal Enterprise Liability, A Critique of Brdjanin", 5 *J. Int'l Crim. Jus.* 134 (2007), p. 139.

77 Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes*, (2008) 235.

> International crimes such as war crimes, crimes against humanity, genocide, torture, and terrorism share a common feature: they tend to be expression of collective criminality, in that they are perpetrated by a multitude of persons, military details, paramilitary units or government officials acting in unison or, in most cases, in pursuance of a policy. When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the criminal enterprise or collective crime. [...] The notion of joint criminal enterprise denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan.[78]

Even Mark Osiel, whose writings have been critical of JCE, acknowledges that:

> Enterprise participation, on the other hand, is more consonant with differing dimensions of mass atrocity, where malevolent influence travels through informal and widely dispersed networks[...] Organizational flexibility must be met by doctrinal elasticity so that indictments can mirror the factual contours of defendants' wrongs.[79]

37. Consequently, the suggestion in the Defence Observations that interpreting "Article 29 to include a form of liability which is alien to its legal system constitutes the very opposite" of the Court's object and purpose is erroneous.[80] Clearly, the drafters intended for Article 29 to include all three forms of JCE liability or they would have taken care to clarify otherwise.

Customary International Law is Applicable to the ECCC

38. This Court has consistently found that the ECCC is a special internationalised tribunal applying international norms and standards.[81] The ECCC Establishment Law also expressly indicates that recourse may be had to procedure established at the international level.[82]

39. In addition, Article 15(2) of the ICCPR reflects the fundamental principle that even domestic courts may try international crimes using internationally recognised modes of liability whether or not such crimes or forms of liability were recognized in the domestic law at the time of their commission.[83] It would be juridically incongruous, if this Court were to

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78 Antonio Cassese, *International Criminal Law* (Second ed., 2008), p. 189-191.

79 Mark Osiel, "The Banality of Good: Aligning Incentives Against Mass Atrocity", 105 *Columbia Law Review*, 1751, 1771(2005).

80 Defence Observations, para. 19.

81 Judge Ney Thol Decision, para. 30.

82 See, for instance, Article 33 new.

83 ICCPR, Art. 15(2): "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law

prosecute crimes without being able to apply the forms of liability ordinarily attaching to these crimes in international law. The Defence Observations erroneously asserts, "[the ECCC] may only apply customary international law if permitted or obliged by Cambodian constitutional law".[84]

C. The JCE III neither introduces a form of guilt by association nor risks staining the reputation of named members of Cambodian government and society

40. Aside from seeking to alarm public opinion and to politicize the judicial process, the Charged Person's interpretation of the JCE doctrine and its alleged potential to "cast a wide shadow of liability" overstates its scope and misrepresents the consequences of applying this mode of criminal liability.

41. JCE does not, as the Charged Person asserts, unduly favour the prosecution or unfairly undermines a defendant's position. In particular, there are at least four reasons that negate the argument that the foreseeability standard, on which JCE III is based, introduces a form of guilt by association or strict liability for membership in a criminal organization.

42. First, liability in a JCE is distinguishable from the crime of membership in a criminal organization. The latter was criminalized as a separate offence in Nuremberg and in subsequent trials held under Control Council Law Number 10, where knowing and voluntary membership in an entity deemed to be a criminal organization was sufficient to entail individual criminal responsibility. At Nuremberg, the discrete offence of membership in a criminal organization was adopted to facilitate the later prosecutions of minor offenders.[85] In contrast, criminal liability pursuant to a JCE is not liability for mere membership, but "a form

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recognized by the community of nations." *Prosecutor v. Milan Milutinovic, Nikola Sainovic & Dragoljub Odjanic*, Appeals Chamber Decision on Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No.: IT-99-37-AR72, 21 May 2003, paras. 41-42 [*hereinafter* Ojdanic JCE Decision] (noting that application of JCE to crimes in Bosnia was legitimate even though the former Yugoslavia did not recognize that mode of liability). The Co-Prosecutors note that Cambodian law recognized three types of group liability similar to JCE liability in 1975–79: (1) co-action; (2) complicity; and (3) co-authorship. *Penal Code of 1956*, Book II, Arts. 82 (co-action and complicity), 145 (co-authorship).

84 Defence Observations, para. 63.

85 Law Reports of Trials of War Criminals, XV, p. 98-99.

of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter".[86]

43. Second, the underpinning of the JCE liability is to be found in considerations of public policy. That is, the need to protect society against persons who (1) join together to take part in criminal enterprises, (2) while not sharing the criminal intent of those participants who intend to commit serious crimes outside the common enterprise, nevertheless are aware that such crimes may be committed, and (3) do not oppose or prevent their commission.[87] As the High Court of England and Wales has noted, "[e]xperience has shown that criminal enterprises only too readily escalate into the commission of greater offences".[88] Thus, JCE liability is justified by both the unique threats posed by organized criminality and the unique challenges of prosecuting such perpetrators.

44. Third, incidental criminal liability based on foresight and risk is a mode of liability that is dependent on, and incidental to, a common criminal plan. The "incidental crime" is the outgrowth of, rendered possible by, and premised on the existence of prior joint planning to commit the concerted crime or primary criminal acts of the JCE. In other words, there is a causal link between the concerted crime and the incidental crime. Although, the secondary offender did not share the intent of the participant that engaged in the incidental crime, his culpability lies in the fact that he could anticipate such conduct, but willingly took the risk that it might occur. He could have prevented the further crime or disassociated himself from its likely commission and his failure to do so entails that he too must be held responsible for its commission.[89] This is to be distinguished from situations where a crime is committed as an outgrowth of a plan that is, in the first place, legal. Under those circumstances, for example, when a military unit carries out a legitimate military action, and a member commits a subsequent and unanticipated illegal act, the culpability for that act is considered that of the perpetrator alone.

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86 Ojdanic JCE Decision, para. 25.
87 Antonio Cassese, *International Criminal Law* (Second ed., 2008), p. 202.
88 *Regina v. Powell and another, Regina v. English*, UK House of Lords, 30 October 1997 (Opinion of Lord Steyn) quoted in Antonio Cassese, *International Criminal Law* (Second ed., 2008), p. 203.
89 Antonio Cassese, *International Criminal Law* (Second ed., 2008), p. 202.

45. Fourth, the Court can take into account the different degrees of culpability of the participants in the JCE at sentencing.[90]

46. The Charged Person questions the alleged imprecision in the "foreseeability" standard of JCE III. Yet, national and international judges have historically applied such a standard with rigor and fairness in numerous contexts in criminal law. Indeed, an objective "foreseeability" standard is also applicable in the contexts of proving "aiding and abetting" or "command responsibility". Like JCE III, proof of aiding and abetting is based on an objective test, namely whether the defendant was aware that a crime "will probably be committed".[91] And, like JCE III, liability for command responsibility utilizes a "foreseeability" test, namely whether (1) an act or omission incurring criminal responsibility has been committed by other persons than the accused, (2) there existed a superior-subordinate-relationship between the accused and the principle perpetrator, (3) the accused as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so and (4) the accused as a superior failed to take the necessary and reasonable measures to prevent such crimes or punish the perpetrator thereof.[92] In fact, the command responsibility "had reason to know" standard is an objective test with an even lower *mens rea* requirement than JCE III.

47. What remains contentious is not that JCE liability exists for crimes under international law, but under what conditions such liability should be applied. The Co-Prosecutors submit that the jurisprudence of other *ad hoc* tribunals has systematically and clearly delineated the JCE III doctrine to the point where it is sufficiently precise. Specifically, this is achieved by requiring that in addition to a defendant's significant contribution to the execution of the criminal plan, he or she also: (a) shares the criminal intent or, at a minimum, (b) is aware of the possibility that a crime might be committed as a consequence of the execution of the criminal act and willingly takes the risk. Accordingly, the crime must not only have been a natural and foreseeable consequence of the requisite participation in the plan (which involves

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90 *Id.*, pp. 202-5.
91 *Prosecutor v. Furundzjia*, Trial Chamber Judgment, Case No. IT-95-17/1-T, 10 December 1998, para. 246.
92 *Prosecutor v. Oric*, Judgment, Case No. IT-03-68-T, 30 June 2006, para. 294.

an objective test requiring *dolus eventualis*/advertent recklessness), the accused must also have "willingly" taken the risk despite knowing of the foreseeable consequences.[93]

48. Moreover, the ICTY Appeals Chamber has deliberately sought to prevent the JCE doctrine from expanding and becoming amorphous. For example, in *Krnojelac*, it held that using JCE as a mode of liability "requires a strict definition of common purpose", and that the principal perpetrators who physically commit the crime "should be defined as precisely as possible".[94]

49. Actuated by extra-legal considerations, the Motion names several prominent members of Cambodian government who, according to the Charged Person, may be "stained" as members of the JCE if this form of liability is applied at the ECCC. Such concerns are unjustified. As is apparent from the discussion above, if properly applied all three forms of JCE liability only assign liability to individuals who, while sharing (as opposed to merely knowing) a common purpose with others, *significantly* contribute to the furtherance of that criminal purpose with the direct intent to commit crimes falling within that purpose.[95] The doctrine of JCE is not applicable to the Charged Person or, for that matter, to any of the other four merely because they supported the regime. Rather, they are charged with agreeing to and participating in a common plan that included twenty-five distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labour and religious, political and ethnic persecution committed on a massive scale.

IV. CONCLUSION & REQUEST

50. The Co-Prosecutors submit that the Motion and Defence Observations attempt to politicize the judicial process by seeking to create an unjustified fear of prosecution of named members of Cambodian society. The objective apparently being to discourage the Co-Investigating Judges from using an internationally recognized mode of criminal liability at the ECCC. At the same time, the Co-Investigating Judges must recognize that rejection of JCE liability may well render it impossible for the ECCC to effectively prosecute the mass atrocity crimes of

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[93] See *Prosecutor v. Babic*, Sentencing Judgment, 18 July 2005, ICTY Appeals Chamber, para. 27. (Accused is liable under third-category JCE "so long as the secondary crimes were foreseeable and he willingly undertook the risk that they would be committed, he had the legally required 'intent' with respect to those crimes").

[94] *Prosecutor v. Krnojelac*, Judgment, Case No. IT-97-25-A, ICTY Appeals Chamber, 17 September 2003, para. 116.

[95] *Prosecutor v. Brdjanin*, Judgment, Case No. IT-99-36, ICTY Appeals Chamber, 3 April 2007, para. 430.

the Khmer Rouge. This departure from the jurisprudence of war crimes tribunals since Nuremberg would be seen internationally and domestically as permitting the Charged Persons to escape liability based on a legal technicality unique to the ECCC. Such action has the potential of destabilizing judicial proceedings that the Cambodian people and the international community have waited a long time for. The Motion should be dismissed on these grounds alone.

51. If the Motion is considered to be admissible, then the Co-Prosecutors request the Co-Investigating Judges to dismiss it based on the preliminary objections or, failing that, on its merits, as all three forms of JCE liability are applicable before this Court.

YET Chakriya Robert PETIT
Deputy Co-Prosecutors Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this thirty-first day of December 2008