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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 MOTION AGAINST THE APPLICATION AT THE ECCC OF THE FORM OF LIABILITY KNOWN AS *JOINT CRIMINAL ENTERPRISE*

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby moves, pursuant to Internal Rule 53.1, against the application of the form of liability known as joint criminal enterprise ("JCE") at the ECCC. This motion is made necessary because it appears that the Office of the Co-Prosecutors ("OCP") is stealthily seeking the application of JCE as reflected in its public press release,[1] wherein it noted that the alleged crimes referenced in the Introductory Submission were "committed as part of a common criminal plan..."[2] JCE imputes criminal responsibility where two or more persons shared a common criminal plan as result of which crimes were committed: the members who formed the criminal plan are responsible not only for those crimes they agreed to, but for all other crimes that would be considered the natural and foreseeable consequences of the plan, irrespective of whether those crimes were committed by persons outside the criminal plan.[3] JCE is inapplicable before the ECCC as a form of liability because: a) it is not specified in the ECCC Establishment Law; b) it is not part of Cambodian law; c) it is not recognized in customary international law and even if it were today, it was not customary international law in 1975-79, nor is customary international law directly applicable in Cambodian courts; d) it is not recognized by an international convention enforceable at the ECCC. Therefore applying JCE at the ECCC would violate the principle of *nullum crimen sine lege*. The OCP, by seeking to apply JCE before the ECCC, is inexorably casting a wide shadow of liability on a variety of distinguished members of Cambodian society and others, such as

[14 names of individuals redacted]

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

[2] The concept of JCE has been variously and interchangeably labeled as "common criminal plan", "common criminal purpose", "common design or purpose", "common criminal design", "common purpose", "common design", or "common concerted design". The common purpose has been more generally described to form part of a "criminal enterprise", a "common enterprise, and a "joint criminal enterprise". *See Prosecutor v. Brđanin & Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 24.

[3] *See Prosecutor v. Haradinaj et al.*, IT-04-84-T, Judgement, 3 April 2008, para. 135. "The *Tadić* Appeals Chamber found in broad terms that a person who in execution of a common criminal purpose contributes to the commission of crimes by a group of persons may be held criminally liable subject to certain conditions."

[redacted]

[redacted]

I. Evolution and Definition of JCE liability

1. JCE is a judicial construct created through a selective analysis of a limited number of post-World War II cases and international conventions,[17] leading the ICTY Appeals Chamber in *Tadić* to the very controversial conclusion[18] that JCE "is firmly established in customary

[redacted]

[17] This issue will be more extensively discussed in section III B *infra*.

[18] "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).

international law."[19] "In so holding, it scoured through the post-World War II jurisprudence, locating cases in which it believed the doctrine had been employed."[20] Furthermore, it relied upon two international conventions not yet in force at the relevant time period.[21] Even though not explicitly listed in the ICTY Statute, the *Tadić* Appeals Chamber found JCE to be a form of "committing."[22]

2. JCE, as currently applied at the *ad hoc* tribunals, has three distinct forms:
   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]."[23]
   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."[24]
   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 and foreseeable consequence of the effecting of that common purpose."[25]
3. The required *actus reus* elements, common to all three forms, are: (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 Statute"; and (3) "Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute"[26] which appears to be "significant".[27]
4. The *mens rea* differs for the three forms. The *mens rea* required for JCE I is the shared intent of all members to commit a certain crime.[28] For JCE II, the required *mens rea* is (a) the personal knowledge of the system of ill-treatment and (b) "the intent to further this common

[19] *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 [hereinafter *Tadić* Appeal Judgement], para. 220.
[20] *Prosecutor v. Brdjanin*, IT-99-36-A, Amicus Brief of Association of Defence Counsel – ICTY, 5 July 2005, para.14. *See id.*, paras 15-38 for a cogent analysis of the cases relied upon by the Appeals Chamber in *Tadić*.
[21] *Tadić* Appeal Judgement, paras. 221-22; discussed more fully herein at paras. 18-20.
[22] *Id.*, paras. 187-93.
[23] *Id.*, para. 196. *See also Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, [hereinafter *Vasiljević* Appeal Judgement], para. 97.
[24] *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005 [hereinafter *Kvočka* Appeal Judgement], para. 82.
[25] *Vasiljević* Appeal Judgement, para. 99. *See also Tadić* Appeal Judgement, para. 204.
[26] *Tadić* Appeal Judgement, para. 227.
[27] *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007 [hereinafter *Brđanin* Appeal Judgement], para. 430.
[28] *Tadić* Appeal Judgement, para. 228. *See also Vasiljević* Appeal Judgement, para. 101.

concerted system of ill-treatment."[29] For JCE III, the required *mens rea* is "the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group."[30] "[R]esponsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstance in the case, (i) it was foreseeable that such a crime might be perpetrated [...] and (ii) the accused willingly took that risk."[31] *Dolus eventualis* (advertent recklessness) is the required standard, which is more than mere negligence.[32]

5. The delineation of the forms of JCE liability and the different elements of each set out above may imply that the contours of this form of liability are clear and fixed. Nothing could be further from the truth.[33] In reality, since the introduction of JCE into the jurisprudence of the *ad hoc* tribunals, its contours have been in a constant state of flux. Indeed, the judicial manufacturing of JCE as a doctrinal form of liability has been robustly denounced. For instance, Judge Per-Johan Lindholm in his Partially Dissenting Opinion in *Simić* noted:

> 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.[34]

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

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[29] *Tadić* Appeal Judgement, para. 228. *See also Kvočka* Appeal Judgement, para. 243.
[30] *Tadić* Appeal Judgement, para. 228.
[31] *Id.* (Emphasis added).
[32] *Id.*, para. 220. *See also Kvočka* Appeal Judgement, para. 83, *citing Tadić* Appeal Judgement, para. 204.
[33] *See*, for example, the various opinions expressed in the *Brđanin* Appeal Judgement.
[34] *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].

cumulative evidence against an accused to find him guilty of some generalized crime, without proof that the accused did 'plan', 'instigate', 'order', 'commit' or otherwise 'aid and abet' any specific criminal act."[35] 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"[36] while Professor Schabas has characterized JCE as the "prosecutor's magic bullet," arguing that its application enables international prosecutors to achieve "discounted convictions".[37] 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.

II. Forms of Liability Applied at the ECCC

6. The ECCC Establishment Law which came into effect in 2004 – well after the *Tadić* Appeal Chamber had created JCE liability in 1999 – does not include JCE as a form of liability. Article 29 of the Establishment Law accords liability to any suspect who "planned, instigated, ordered, aided and abetted, or committed" the crimes enumerated in the Establishment Law. Conversely, the ICC Statute, which was adopted in 1998, explicitly includes JCE.[38] The explicit exclusion of JCE in the Establishment Law denotes that JCE was rejected as a form of liability at the ECCC.

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[35] *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)."

[36] 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."

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

[38] Article 25(3)(d) of the ICC Statute reads in pertinent part: "In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii)

III. Substantive Law Applied at the ECCC

7. The ECCC applies the Establishment Law and the domestic law of Cambodia. Article 2 of the Establishment Law states that:

> 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.[39]

A. Cambodian Law

8. The Cambodian law referenced in Article 2 is the 1956 Penal Code.[40] The 1956 Code sets out the forms of liability applicable to crimes allegedly committed in 1975. The Cambodian penal law is based on direct participation constituting co-perpetration and indirect participation constituting complicity.[41]
9. Co-perpetration covers the situation where two or more persons are all equally considered as principal perpetrators of a crime and each co-perpetrator has the requisite *mens rea* and performs the necessary *actus reus* of the crime allegedly committed. Indirect perpetration or complicity, which is further set out in Article 83,[42] lists "means supplied" and "aid or assistance" as distinct forms.[43]
10. JCE liability is different from both co-perpetration and complicity under Cambodian law.

Be made in the knowledge of the intention of the group to commit the crime." The Special Tribunal for Lebanon, too, explicitly chose to include JCE in its Statute. *See* Article (3)(1)(b) of the STL Statute.

[39] Emphasis added.

[40] Establishment Law, Art. 3.

[41] 1956 Penal Code, Art. 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)

[42] Article 83: "Indirect participation or complicity is only punishable if it is committed by provocation, instruction, means supplied, aid or assistance." (unofficial translation)

[43] 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. Article 121-7 of the French Penal Code defines complicity as follows. "The accomplice to a felony or a misdemeanor is the person who knowingly, by aiding and abetting, facilitates its preparation or commission. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice." French Law appears to consider "fourniture des moyens" (means supplied) as a subset of "aide ou assistance" (aiding or abetting) which appears to be concerned more with providing a tangible assistance to the principal, such as providing a gun, Crim. 17 mai 1962: Bull. crim. No. 200; D.1962. 473; or a car to a drunk driver, Alger, 20 Oct 1965: Gaz. Pal. 1966.1. 133. It is placed in the 105th edition of the Code Pénal, 2008 under "aide ou assistance".

1. Differences between direct liability under Cambodian law and JCE

11. First, co-perpetration requires the presence of each co-perpetrator on the crime scene. This is because for liability to attach, each co-perpetrator must have personally accomplished the material actions constituting the offense.[44] By contrast, it has been held that presence of the JCE member is not required for the accused to be held criminally liable under JCE.[45]

12. Second, as co-perpetration requires each co-perpetrator to have personally accomplished the material actions constituting the offense, the co-perpetrators may not use others who are not co-perpetrators to physically commit the offence. By contrast, it has been held that the principal or physical perpetrators may be outside the JCE if used by JCE members.[46]

13. Third, JCE liability separates the alleged common plan into an objective and the means contemplated to achieve that objective. In contrast, co-perpetration appears not to distinguish the two.[47]

2. Differences between accomplice liability under Cambodian law and JCE

14. First, participation in a JCE has been considered a form of "committing."[48] By contrast, the aider and abettor is an "accessory to a crime perpetrated by another person."[49]

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[44] B. BOULOC, DROIT PÉNAL GÉNÉRAL 267 (Dalloz, 2007), para. 293.
[45] *Prosecutor v. Krnojelac,* IT-97-25-A, Judgement, 17 September 2005, para. 81.
[46] *Brđanin* Appeal Judgement, para. 414.
[47] 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. Firstly, 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 offence, namely a part of the *actus reus* of the offence. BOULOC, *supra* note 44, at 267, para. 293. As noted above, this clearly distinguishes JCE from coaction as for the former, no part of the *actus reus* need have been committed. *Brđanin* Appeal Judgement, para. 427. Secondly, 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. Thirdly, 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. *Prosecutor v. Brima et al.*, SCSL-04-16-A, Judgement, 22 February 2008, 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.
[48] *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 [hereinafter *Ojdanić* JCE Decision], para. 20.
[49] *Tadić* Appeal Judgement, para. 229.

15. Second, unlike JCE, "aid or assistance" or "means supplied" does not require proof of a common plan: the principal perpetrator might not even know about the contribution of the accomplice.[50]

16. Third, the required *mens rea* element of "aid or assistance" or "means supplied" is knowledge that the acts assist in the commission of the crime.[51] By contrast, JCE liability requires that the co-perpetrators intend that the crime be committed (JCE I) or have the "intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed" (JCE III).[52]

B. International Humanitarian Law and Custom

17. Customary international law can only be created through (a) general and consistent state practice[53] and (b) *opinio juris*.[54] JCE, as created in *Tadić*, reflects that the Appeals Chamber did not conduct a thorough analysis of either state practice or *opinio juris*.[55]

1. JCE as created in *Tadić* is not customary international law

18. In reaching the conclusion that JCE is established in customary international law, the *Tadić* Appeals Chamber relied only on a very limited number of cases from a limited number of jurisdictions.[56] A review of only a very limited number of cases from only a few legal

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[50] *Id.*

[51] 1956 Penal Code. Under Article 86, "the means supplied must "be supplied in the knowledge that they are used for that purpose." (Unofficial translation. Emphasis added). Under Article 87, "The aid or assistance must be given in the knowledge of the facts which prepare or facilitate the action." (Unofficial translation. Emphasis added).

[52] *Tadić* Appeal Judgement, para. 229.

[53] In relation to state practice, the ICJ has held that "[t]he party which relies on custom…must prove that this custom is established in such a manner that it has become binding on the other Party …[and] that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question..." *Columbian-Peruvian asylum case*, Judgment of November 20th, 1950, ICJ Reports 1950, p. 276. State practice should be "extensive and virtually uniform in the sense of the provision invoked". *Nicaragua v. United States*, (Merits), ICJ Reports 1986, para. 74.

[54] 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*, (Merits), ICJ Reports 1986, para 14.

[55] 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, *supra* note 34; *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."

[56] 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*; *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

systems does not satisfy the rigorous test for justifying the judicial creation of JCE and its customary status. The Appeals Chamber also relied upon two international conventions: the International Convention for the Suppression of Terrorist Bombing (ICSTB),[57] and the Rome Statute of the International Criminal Court (ICC Statute).[58] Judge Liu in his partially dissenting opinion and declaration in *Orić* noted that "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."[59] Both conventions were drafted, signed and entered into force after the date of commission of the offences in *Tadić*, and hence have very limited value, if any, in assessing the customary status of JCE.[60]

19. Not only did the *Tadić* Appeals Chamber base its findings on the customary nature of JCE on a very limited number of authorities – those that it did review are inconsistent or do not even support this form of liability as alleged. The cases reveal *inter alia* an inconsistent application of *mens rea*, or the failure by the Judge Advocate to state the law.[61] Additionally, with some cases, the *Tadić* Appeals Chamber assumed that the Prosecution's arguments in respect to criminal liability were followed because the accused was convicted.[62] Simply, the

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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,* 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.*

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

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

[59] *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, [hereinafter *Hadžihasanović* Interlocutory Appeal] 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."

[60] 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.

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

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

cases relied upon by the Chamber provide "almost no support for the most controversial aspects of contemporary joint criminal enterprise doctrine."[63]

20. The creation of JCE liability finds no support in the substance of the two international conventions relied upon by the *Tadić* Appeals Chamber. The ICSTB deals with different crimes than the ICTY Statute, and even though the ICC Statute includes JCE liability, the ICC rejected the ICTY's interpretation of the application of JCE.[64] Hence, these two conventions do not serve as a basis for creating JCE.

21. Referring to its previous decisions on the customary status of JCE, as the ICTY does in relation to every judgment or decision involving JCE liability, proves nothing more than that the ICTY Appeals Chamber is internally consistent. Yet, if the creation of JCE in *Tadić* was incorrectly based on an insufficient amount, type, breadth and consistency of sources, then the same institution continually repeating this error does not rectify it.[65]

22. Having created this form of liability, the Appeals Chamber of the ICTY (which also serves as a second instance court for the ICTR) has refused to entertain challenges to its findings in *Tadić* on the customary nature of JCE.[66] Though cogent reasons are in abundance,[67]

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[63] "The cases cited in Tadic ... 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. ... [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." Danner & Martinez, *supra* note 36, at 110-11.

[64] *See Prosecutor v. Lubanga Dyilo,* ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2008.

[65] Justice Sir Isaac Isaacs, in a case before the High Court of Australia, noted, "[i]f, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right. *Australian Agricultural Co. v. Federated Engine-Drivers & Firemen's Assn of Australasia* (1913), 17 C.L.R. 261 at 278 (Isaacs J).

[66] When the customary law basis of JCE liability was challenged directly by the Defence in *Prosecutor v. Milutinović et al.*, the Appeals Chamber simply asserted that it "does not propose to revisit its finding in *Tadić* concerning the customary status of this form of liability. It is satisfied that the state practice and *opinio juris* reviewed in that decision was sufficient to permit the conclusion that such a norm existed under customary international law in 1992 when *Tadić* committed the crimes for which he had been charged and for which he was eventually convicted." *Ojdanić* JCE Decision, para. 29.

[67] The *Aleksovski* Appeals Chamber clearly stated that "the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interest of justice. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*." *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeals Judgement, 24 March 2000, paras 107-08 (Emphasis added).

overturning the JCE holding in *Tadić* would have a catastrophic effect on the prosecutions launched at the ICTY due to the sheer number of which have since been based on JCE.[68]

23. The ECCC, and specifically the OCIJ at this instance, need not and should not take such political considerations into account. Hence, the need for the OCIJ to dispassionately analyze whether JCE liability is part of customary international law. Such an analysis will reveal that it is not.

2. Even if JCE is now considered a part of Customary International Law, it is not applicable at the ECCC

a) It was not part of customary international law in 1975-79

24. 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*.[69] There is no evidence that the jurisprudence of the International Military Tribunal ("IMT") was part of customary international law in 1975-79. The first mention of its customary status was the 1993 Secretary-General's report on the establishment of the ICTY. It 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

[68] The number of indictments that include JCE liability is startling. "The first indictment to rely explicitly on JCE was confirmed on June 25, 2001 – eight years into the ICTY's work. Of the forty-two indictments filed between that date and January 1, 2004, twenty-seven (64%) rely explicitly on JCE." Danner & Martinez, *supra* note 36, at 107-08.

[69] Although the Defence recognizes that many of the sources cited by the *Tadić* Appeals Chamber to support the creation of JCE liability pre-date 1975, it 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. In assessing whether JCE liability was part of customary international law in 1975, these should be disregarded, for the reasons set out in fn 59.

customary law is the law applicable in armed conflict as embodied in … the Charter of the International Military Tribunal of 8 August 1945."[70] The *Tadić* Appeals Chamber cited the Secretary-General's report to show that the IMT jurisprudence was considered customary international law, but cited nothing else to support this proposition.[71] It obviously would have done so, had there been anything else to cite. Thus, even if the Charter might have been considered customary international law in 1993, this cannot serve as a basis to consider it customary international law in 1975-79.

b) Customary international law is not directly applicable in Cambodian courts

25. Whenever customary international law is invoked in a national court, the court should consider if and under what circumstances the national legal system applies 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.[72]

26. The ECCC is established within the existing court structure of the national legal system of Cambodia. It is noteworthy that none of the Constitutions of Cambodia provide a procedure for how customary international law is to be incorporated into domestic law.[73] The 1993

[70] Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993), paras. 34-35. No similar report exists to inform the ECCC as to what could be considered customary international law in 1975-79.
[71] *Id.*
[72] *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." *See also Nulyarimma v. Thompson* [1999] FCA 1192, paras. 22, 26 (Federal Court of Australia) (opinion of Wilcox J.), "[I]t is not enough to say that, under international law, an international crime is punishable in a domestic tribunal even in the absence of a domestic law declaring that conduct to be punishable. If genocide is to be regarded as punishable in Australia, on the basis that it is an international crime, it must be shown that Australian law permits that result." (Emphasis added); *id.*, at para. 26 "[D]omestic courts face a policy issue in deciding whether to recognise and enforce a rule of international law. If there is a policy issue, I have no doubt it should be resolved in a criminal case by declining, in the absence of legislation, to enforce the international norm."; Gabriele Olivi, *The Role of National Courts in Prosecuting International Crimes: New Perspectives*, 18 SRI LANKA J. INT'L L. 83, 87 (2006) *quoting Reportiers sans Frontières v. Mille Collines*, Paris Court of Appeals, Judgment, 6 November 1995, at 48-51 "in the absence of domestic law international custom cannot have effect of extending the extraterritorial jurisdiction of the French courts."; *U.S. v. Yousef*, 327 F.3d 56, 91 (2nd Cir. 2003) "United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law and, in fact, may conflict with both."
[73] It should be noted that between 17 April 1975 and 6 January 1979, two Constitutions were in force. During the period of the Khmer Republic (1970-1975), a Constitution was promulgated on 10 May 1972. The Khmer Republic Constitution is similar to the 1993 Constitution in that it merely provides under Article 38 that the "President of the Republic shall sign treaties and international conventions and shall ratify them pursuant to parliamentary vote".

Constitution merely states that the King shall sign and ratify international treaties and conventions after a vote of approval by the National Assembly and the Senate.[74] No mention of the application or incorporation of customary international law is made at all.

27. Articles 1 and 2 of the Establishment Law state 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..."[75] It is necessary to look to international custom when adjudicating crimes against humanity, as these crimes are based in custom. This does not mean that all customary international law will become directly applicable in Cambodian national law. JCE is a form of liability and not an international crime.[76] It is not possible to violate a form of liability, and therefore this legislation does not oblige the ECCC to look to and apply customary international law to this matter.[77]

C. International Conventions

28. The international conventions mentioned in the Establishment Law are the 1948 Genocide Convention, mentioned in Article 4, the 1949 Geneva Conventions, mentioned in Article 6, the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, mentioned in Article 7, and the 1961 Vienna Convention on Diplomatic Relations,

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Article 72 prohibits the retroactive application of laws "except for special provisions which are expressly stipulated therein". There is no provision within the Constitution to support the contention that international law was directly applicable at this time. A new constitution was not promulgated until 5 January 1976, during the period of Democratic Kampuchea (1975-1979): The text of this constitution was adopted during a command group meeting in the Cambodian Capital from 15 to 19 December 1975, the principles of which had been decided at the end of April. *See* RAOUL M. JENNAR, CAMBODIAN CONSTITUTIONS (1953-1993), (1995). This Constitution includes limited provisions in relation to the legislative framework applicable during this period. There are no provisions dealing with the applicability of international law in Cambodian domestic law. Article 5 merely provides that legislative power was invested in the representative assembly of the people, workers, peasants, and all other Kampuchean labourers. Article 7 confirms that the People's Representative Assembly was responsible for legislation and for defining the various domestic and foreign policies of Democratic Kampuchea.

[74] Article 26 of the 1993 Constitution, as amended in March 1999, states that "[t]he King shall sign and ratify international treaties and conventions after a vote of approval by the National Assembly and the Senate."

[75] Emphasis added.

[76] *Kvočka* Appeal Judgement, para. 91, *citing Ojdanić* JCE Decision, para. 20. *See also Prosecutor v. Brđanin*, IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, para. 5: "The third category of joint criminal enterprise liability is [...] not an element of a particular crime. It is a mode of liability through which an accused may be individually criminally responsible despite not being the direct perpetrator of the offence." (Emphasis added)

[77] 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).

mentioned in Article 8. The Genocide Convention does not apply here, because as already noted by the OCIJ, "IENG Sary is not currently charged with genocide."[78] None of the other conventions listed here discuss forms of liability. As such, JCE may not be applied against Mr. IENG Sary as it has no basis in an international convention ratified by Cambodia and directly applicable against individuals in 1975-79.

IV. Violation of the principle *nullum crimen sine lege*

29. The ECCC, in keeping with the Cambodian Constitution and recognized human rights principles, is prohibited from retroactively applying law that was not applicable and binding in Cambodia in 1975-79. Thus, the only forms of liability for which Mr. IENG Sary may be prosecuted are those which would have been applicable to him in 1975-79. To prosecute Mr. IENG Sary under a form of liability that did not exist at the time the crimes under investigation were allegedly committed would violate the principle of *nullum crimen sine lege,* which prohibits a retroactive application of criminal law.[79] This principle is recognized in domestic Cambodian law[80] and under international law binding on Cambodia.[81]

V. Consequences if JCE would be applied at the ECCC

30. If the collective and fundamentally unfair form of liability created by the ICTY is applied at the ECCC then, by extension, the OCP would be *spreading stain* over many others by implying criminal liability. Consequently, whether intended or not, these individuals, many of whom are distinguished members of Cambodian society, will inevitably be cast as members of the JCE.

31. It is uncontroversial that many still prominent persons were involved in the common plan to retake power in Cambodia in 1975.[82] The OCP has stated that the common plan was carried out by "murder, torture, forcible transfer, unlawful detention, forced labor and religious,

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[78] Case of IENG Sary, 002/19-09-2007-ECCC-OCIJ, Provisional Detention Order, 14 November 2007, para. 8.
[79] The principle of *nullum crimen sine lege* has been applied to forms of liability as well as substantive crimes. *See Hadžihasanović* Interlocutory Appeal, paras. 32-35.
[80] 1956 Cambodian Penal Code, Article 6, para. 1. "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."
[81] Cambodia signed the ICCPR on 17 October 1980 and ratified it on 26 May 1992. Article 15(1) of the ICCPR provides that "No one shall be held guilty of any criminal offence on account of any act of omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."
[82] Presumably, JCE liability flows even if the objective of the JCE is not criminal: the "criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective." *Prosecutor v. Brima et al.,* SCSL-04-16-A, Appeal Judgement, 22 February 2008, para. 76.

political and ethnic persecution."[83] As noted by the OCP in their public press release, "[t]he purported motive of the common criminal plan was to effect a radical change of Cambodian society along ideological lines. Those responsible for these crimes and policies included senior leaders of the Democratic Kampuchea regime."[84]

32. Based on the application of JCE liability, anyone who exercised or exerted influence during the relevant period of time, (i.e., the period leading up to 17 April 1975 when the alleged common criminal plan / JCE was hatched and thereafter when it was being implemented up to 6 January 1979) could be viewed as an un-indicted co-perpetrator. As such, it can be argued, as is normally done in cases where JCE is applied, that any acts taken by these individuals were "acts that in some way [were] directed to the furthering of the common plan or purpose."[85]

33. The Defence uses these examples not to argue that any of the persons listed at the outset in this Motion should, explicitly or implicitly, face criminal liability. Quite to the contrary: none of them should be gratuitously stained by, let alone deemed criminally liable for, any of the crimes alleged by the OCP in the Introductory Submission -- which could be the case if JCE is applied.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the OCIJ to DECLARE that JCE liability is not a form of liability applicable before the ECCC.

Respectfully submitted,

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ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **28th** day of **July, 2008**

[83] "The Co-Prosecutors have identified and submitted for investigation twenty-five distinct factual situations of murder, torture, forcible transfer, unlawful detention, forced labour and religious, political and ethnic persecution as evidence of the crimes committed in the execution of this common criminal plan." Press Release, *supra* fn 1.

[84] *Id.*

[85] *Tadić* Appeal Judgement, para. 228.