D99/3/18

**BEFORE THE PRE-TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**IENG SARY'S MOTION TO DISQUALIFY PROFESSOR ANTONIO CASSESE AND SELECTED MEMBERS OF THE BOARD OF EDITORS AND EDITORIAL COMMITTEE OF THE JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE FROM SUBMITTING A WRITTEN *AMICUS CURIAE* BRIEF ON THE ISSUE OF JOINT CRIMINAL ENTERPRISE IN THE CO-PROSECUTOR'S APPEAL OF THE CLOSING ORDER AGAINST KAING GUEK EAV "DUCH'**

**Filed by:**

**Co-Lawyers:**
ANG Udom
Michael G. KARNAVAS



**Distribution to:**

**The Pre-Trial Chamber**
**Judges:**
PRAK Kimsan
NEY Thol
HUOT Vuthy
Katinka LAHUIS
Rowan DOWNING

**Co-Prosecutors:**
CHEA Leang
Robert PETIT

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby moves pursuant to Internal Rules 33 and 34 to disqualify Professor Antonio Cassese and Selected Members of the Board of Editors and Editorial Committee of the Journal of International Criminal Justice from submitting a written *amicus curiae* brief on the issue of Joint Criminal Enterprise ("JCE") in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch".[1] This motion is made necessary because neither Professor Cassese, nor certain members of the Board of Editors and Editorial Committee ("Selected Editorial Members") of the Journal of International Criminal Justice ("Journal") qualify as *amicus curiae* due to their lack of impartiality on the issue of JCE. Professor Cassese, in particular, is subject to a notorious conflict of interest due to his previous role as a Judge at the ICTY in the Appeals Chamber which was responsible for creating the so-called JCE doctrine.[2] Neither Professor Cassese nor other Selected Editorial Members should be permitted to draft, supervise or in any way contribute to the written brief to be submitted to the Pre-Trial Chamber. Moreover, neither Professor Cassese nor other Selected Editorial Members should be involved in the selection of other members of the Journal who do qualify as *amici curiae* and are not subject to a conflict of interest. As argued herein, having Professor Cassese and others who are the primary authors, defenders, and promoters of JCE (as well as any others who have directly or indirectly been involved in the issue of JCE – *pro* or *con*) act as *amicus curiae* will secure nothing other than *result-determinative submissions*. Thus, having Professor Cassese or other Selected Editorial Members participate as *amici curiae* before the ECCC on any issues related to JCE would be manifestly unjust, undermining the reputation of the Cambodian judicial system, and in particular, the ECCC.

## I. INTRODUCTION

1. The OCP filed an appeal against the Closing Order by the OCIJ on 5 September 2008.[3]

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[1] IENG Sary's Motion to Disqualify Professor Antonio Cassese and Selected Members of the Board of Editors and Editorial Committee of the Journal of International Criminal Justice from submitting a written *amicus curiae* brief on the issue of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch" ("Motion").

[2] While it is conceivable that none of the Judges of the Pre-Trial Chamber were aware of Professor Cassese's past and current role in authoring, championing, promoting and defending the JCE as a criminal form of liability prior to selecting him to file an *amicus curiae* brief, the Senior Legal Officer of the Pre-Trial Chamber indisputably is aware, having been employed as a Legal Officer in Chambers at the ICTY, assigned to a Judge who declined to apply JCE, opting instead to apply perpetration – co-perpetration as a form of liability.

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

2. The IENG Sary Defence filed a request to make submissions on the application of JCE at the ECCC in response to the OCP Appeal.[4] Despite having advanced cogent reasons as to why Mr. IENG Sary is an interested party to the issue of JCE and that to exclude his participation would amount to procedural inequality and injustice, the Pre-Trial Chamber has yet to issue a decision.
3. Subsequent to the filing of this Request, the Pre-Trial Chamber invited Professor Antonio Cassese together with other members of the Board of Editors and the Editorial Committee of the Journal to submit a written *amicus curiae* brief on the following issues:[5]
   (1) the development of the theory of joint criminal enterprise and the evolution of the definition of this mode of liability, with particular reference to the time period 1975-79; and
   (2) whether joint criminal enterprise as a mode of liability can be applied before the ECCC, taking into account the fact that these crimes were committed in the period 1975-79.
4. This Invitation was extended on 25 September 2008 to the Centre for Human Rights and Legal Pluralism of McGill University and Professor Dr. jur. Kai Ambos of the Georg-August University of Göttingen.[6]

## II. SUMMARY OF ARGUMENT

5. The role of *amicus curiae* is an independent and impartial one. The utility of the role is not to restate that which is already available to the ECCC but to engage in an objective, thorough and balanced review and analysis of certain discrete areas that are of concern to it. Due to the notorious and significant ties between JCE and Professor Cassese and the Selected Editorial Members, they are unable to write impartially on the issues raised by the Pre-Trial Chamber. Thus they <u>are not qualified</u> to act as *amici curiae* in this case.

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[4] *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Ieng Sary's Expedited Request to Make submissions on the application of joint criminal enterprise liability in the Co-Prosecutors' appeal of the closing order against Kaing Huek Eav "Duch", 15 September 2008 ("Request").
[5] *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02) D/99/3/12, Invitation to Amicus Curiae, 23 September 2008 ("Invitation"), p. 1.
[6] *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02) D/99/3/13, Invitation to Amicus Curiae, 25 September 2008, *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02) D/99/3/14, Invitation to Amicus Curiae, 25 September 2008.

6. Professor Cassese and the Selected Editorial Members are being asked to write their brief in a judicial capacity rather than as *amici curiae*. As such, they must comply with the ECCC Code of Judicial Ethics and especially the duty of independence and impartiality. If Professor Cassese or the Selected Editorial Members were to accept the Invitation, they would be violating this code, as neither are impartial on this topic. Moreover, Professor Cassese was part of the *Tadić* Appeals Chamber which created JCE[7] and to allow him to address essentially the same questions again before the ECCC would be analogous to a trial judge sitting on the appeal of the same case.
7. To remedy the above situation, the Pre-Trial Chamber must: 1) withdraw the Invitation; 2) reject any written brief on this issue submitted with any contribution from Professor Cassese and the Selected Editorial Members; and (3) prohibit Professor Cassese and the Selected Editorial Members from selecting the remaining members who will write the requested brief; or (4) extend the Invitation to the Association of Defence Counsel Practising Before the ICTY ("ADC-ICTY") to file a brief on these issues.

## III. LAW

### A. The Role of an *Amicus Curiae*

8. Internal Rule 33 provides the following:

> 1. At any stage of the proceedings, the Co-Investigating Judges or the Chambers may, if they consider it desirable for the proper adjudication of the case, invite or grant leave to an organization or person to submit a written *amicus curiae* brief concerning any issue. The Co-Investigating Judges and the Chambers concerned shall determine what time limits, if any, shall apply to the filing of such briefs.
>
> 2. Briefs under this Rule shall be filed with the Greffier of the Co-Investigating Judges or Chamber concerned, who shall provide copies to the Co-Prosecutors and the lawyers for the other parties, who shall be afforded the opportunity to respond.[8]

9. Neither the Internal Rules nor Cambodian law offer any guidance on what the role of *amicus curiae* entails. However, most international courts accept *amicus* briefs to assist them on particular legal matters. The International Court of Justice allows *amicus curiae* in both contentious and advisory proceedings, but has reasonably strict rules on standing for contentious hearings, only allowing interested organizations of

[7] *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), paras. 185-234.
[8] Revision. 2, 5 September 2008.

states to participate.[9] The European Court of Human Rights accepts *amicus curiae* submissions "in the interests of the proper administration of justice" to any person concerned other than the applicant.[10] Similarly, the ICTR,[11] ICTY,[12] ICC[13] and SCSL[14] all provide for *amicus curiae* submissions.

## B. Requirement that an *Amicus Curiae* be Independent and Impartial

10. The term a*micus curiae* means "a friend of the court." This term applies to a bystander, "who *without having an interest in the cause*, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge."[15]
11. Any *amicus* appearing before criminal tribunal where international criminal law is applied should be independent and impartial.[16] Independence means that the *amicus* must be free from outside influences when reaching his decision. Impartiality may be taken to mean that *amici* act in a fair and just manner, without favouring one side more than the other and free from bias. Such bias may be actual or perceived.[17] Independence and impartiality are considered part of the right to a fair trial under Article 14 of the ICCPR.[18] Any brief submitted by an amicus should thus aid the

[9] Article 34(2) of the Statute of the ICJ provides that the Court "subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative." Rule 69(4) restricts such organizations to states, so NGOs do not have standing in contentious proceedings. However, in relation to advisory opinions, Article 66(4) provides that any state or "international organization" can have standing if the Court so agrees or requests. This includes any public or private international organization, including NGOs (Practice Direction XII). Such information can be provided in written or oral form as long as it relates to the question at hand.

[10] Rule 44(2), ECHR Rules of Procedure.

[11] Rule 74 of the ICTR Rules of Procedure and Evidence.

[12] Rule 74 of the ICTY Rules of Procedure and Evidence ("ICTY RPE"). At the ICTY all *amici* are required to make a statement "identifying and explaining any contact or relationship the applicant had, or has, with any party to the case", ICTY Practice Direction, *Information on the Submission of Amicus Curiae Briefs*, IT/122, 27 March 1997, para. 3(f) ("ICTY Information").

[13] Rule 103 of the ICC Rules of Procedure and Evidence.

[14] Rule 74 of the SCSL Rules of Procedure and Evidence. *See also*, Practice Direction on filing *Amicus curiae* applications pursuant to Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, 20 October 2004. It is almost identical to the ICTY Practice Direction, including the right of the SCSL to impose any restrictions or limitations on the *amicus* that it deems necessary.

[15] Abbott's Dictionary of Terms and Phrases Used in American or English Jurisprudence (Little, Brown & Co, Boston 1879) (emphasis added).

[16] *See* Sarah Williams and Hannah Woolaver, *The Role of the Amicus Curiae before International Criminal Tribunals* 6 INT'L CRIM. L REV 151-89 (2006).

[17] *Prosecutor v. Milošević* , IT-02-54, Decision Concerning an *Amicus* Brief, Decision of 10 October 2002 ("Milošević Decision"). The Trial Chamber looked at statements made by the *amicus*, concluding that if taken as a whole they could present a "reasonable perception of bias."

[18] ICCPR Article 14 (1) provides that: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall

court in filling in gaps in the law and not serve as a vehicle for the interests of either party. *Amici* may be nobody's opponent or ally but work neutrally and objectively.[19]

12. The ICTY has not been afraid to remove *amici* when doubts as to their impartiality arise. In the *Milošević* case, the Trial Chamber revoked the assignment of the *amicus* because he had expressed opinions which were unfavourable to the accused. In doing so it remarked that:

> "Implicit in the concept of amicus curiae is the trust that the court reposes in 'the friend' to act fairly in the performance of his duties. In the circumstances, the Chamber cannot be confident that the amicus curiae will discharge his duties (which include bringing to its attention any defences open to the accused) with the required impartiality."[20]

13. A similar approach has been taken by the ICTR. In the *Kayishema* case, the Trial Chamber interpreted Rule 74 of its Rules of Procedure and Evidence (RPE), which allows for *amici curiae* submissions, as requiring impartiality on the part of the *amicus*.[21] The Chamber noted that: "the role of an *amicus* is not to defend any interests other than to assist the Chamber for the proper determination of a case."[22] *Amici* may not use their right of audience to push a separate agenda, particularly their own.

14. Many national legal systems also require *amici* to be independent and impartial. In the United Kingdom and Commonwealth countries, the emphasis is very much on independence and impartiality. English courts have consistently stated that the role of the *amicus curiae* is "to help the court by expounding the law *impartially*."[23] Further, a recent report on the reform of rules of intervention in the British courts said that the *amicus* "has no interest whatever to represent save that of the court, and appears only at the request of the court."[24] In France the role of *amicus curiae* is not expressly

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be entitled to a fair and public hearing by a competent, *independent and impartial tribunal* established by law..." (Emphasis added).

[19] Jona Razzaque, *Changing Role of Friends of the Court in the International Courts and Tribunals* 1 NON STATE ACTORS AND INTERNATIONAL LAW (2001) 169, 171. *See also*, *Vermeulen v. Belgium* (1996) ECHR Application No. 19075/91 where the European Court of Human Rights also upheld the importance of the neutrality of *amici curiae*.

[20] *See* Milošević Decision.

[21] *Prosecutor v. Kayishema,* ICTR-2005-87-I, Decision on the *Amicus Curiae* Request of the Defence of Gaspard Kanyarukiga, 14 September 2007.

[22] *Id.*, para. 6.

[23] *Allen v Sir Albert McAlpine & Sons Ltd.* (1968) 2 Q.B. 229, p.266 (Emphasis added).

[24] Justice and the Public Law Project, A Matter of Public Interest: Reforming the Law and Practice on Intervention in Public Interest Cases (Justice/ Public Law Project, 1996), p. 18.

provided for, but is analogous to that of the *Commissaire du Gouvernement.*[25] The *Commissaire* must be impartial and "explain contentious questions and formulate conclusions in a completely independent fashion."[26]

### C. Procedural Requirements

15. The ICTY offers the following guidance on the submission of written briefs.[27] Paragraph 5(c) of the Practice Directive Information provides that:

> (c) If the Chamber solicits or invites *amicus curiae* briefs, the Chamber shall give each party the opportunity to oppose the *amicus* submission, and in any event shall retain the power to reject the offered submission.[28]

16. Each party to the proceedings before the ICTY therefore has an automatic right to oppose the submission of the *amicus curiae*. The Chamber adjudicating may also reject the actual written submission even if it had invited the putative *amicus curiae* and presumably even if none of the parties had opposed the submission. There is no limit on when this rejection may be issued by the relevant Chamber, although it appears in the interests of judicial economy to reject the brief of the proposed amicus before submission.

### D. Obligations upon Judges

17. Internal Rule 34 provides the following:

> 1. A judge may recuse him/herself in any case in which he or she has, or has had, a personal or financial interest, or concerning which the Judge has, or has had, an association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias. [...] The Judge in question shall immediately cease to participate in the judicial proceedings.

18. The procedure for disqualification and the meaning of the phrases "an association which objectively might affect [...] impartiality" and "objectively give rise to the appearance of bias" in this Rule were addressed by the Pre-Trial Chamber in its decision on the Defence's request for disqualification of Judge Ney Thol submitted

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[25] *See* Dinah Shelton, *The Participation of Non-Governmental Organisations in International Judicial Proceedings* 88 AM. J INT'L L 611 (1994).
[26] *L'arrêt Gervaise* 10 July 1957 (Unofficial translation).
[27] ICTY Information, *Supra* fn.12.
[28] Emphasis added.

by the Co-Lawyers for *Nuon Chea*.[29] The Pre-Trial Chamber held that there is a "presumption of impartiality which attaches to the judges at the ECCC[30] and that the burden is on the party seeking disqualification to adduce sufficient evidence to satisfy the Pre-Trial Chamber that the Judge in question can be objectively perceived to be biased.[31] The Pre-Trial Chamber also held that "a Judge is not impartial if it is shown that actual bias exists"[32] and that there is an appearance of bias if:

- "A judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification for the case is automatic;
- The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[33]

19. The Pre-Trial Chamber clarified that a reasonable observer in the above description is "an informed person, with knowledge of all of the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that Judges swear to uphold."[34]
20. The term "promotion of a cause" in the above description has been interpreted in a broad manner at the national level. In *re Hoffman*, Lord Hoffman, who was a judge sitting on the House of Lords adjudicating upon an appeal concerning the detention of General Augusto Pinochet, shared an interest with Amnesty International, who had intervened in the case, to "establish that there is no immunity for ex-Heads of State in relation to crimes against humanity."[35] This personal interest, which amounted to the promotion of a cause, was sufficient to amount to a conflict of interest and led to his automatic disqualification from the case.
21. The duty of impartiality weighing on judges at the ECCC is strengthened by an examination of Article 2 of the Code of Judicial Ethics which requires that:

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[29] *Case of NUON Chea*, 002/19-09-2007-ECCC-OCIJ(PTC01), Public Decision on the Co-Lawyers Urgent Request for Disqualification of Judge Ney Thol Pending the Appeal Against the Provisional Detention Order in the Case of Nuon Chea, 4 February 2008 ("*Nuon Chea* Decision").
[30] *Id.*, paras. 15-17.
[31] *Id.*, para. 19.
[32] *Id.*, para. 20.
[33] *Id.*, citing with approval *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 189 ("*Furunzija* Appeal Judgement). According to the Pre-Trial Chamber, this jurisprudence is generally applied by international tribunals.
[34] *Id.*, para. 21, citing with approval *Furundžija* Appeal Judgement, para. 190.
[35] *In re Hoffman*, UK House of Lords, Oral Judgement 17 December 1998, Reasons: 15 January 1999, at 11.

> 1. Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.
> 2. Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest.[36]

22. It is also instructive to consider how conflict of interest issues have been dealt with at the ICTY. The Tribunal has held that if it determines the damage that could be caused by a conflict of interest is such as to endanger the right of the accused to a fair and expeditious trial or proper administration of justice, then it can take the necessary and appropriate measures to restore and protect the fairness of the trial and integrity of proceedings.[37] In this respect, it is important to prevent potential conflicts before they arise.[38]

## IV. ARGUMENT

### A. *Amicus curiae*

23. Professor Cassese is not impartial on the issue of the existence of JCE in customary international law and on its application at the ECCC for the reasons set out below. In the context of the issues posed in the Invitation, impartiality means the following: First, impartiality means a lack of any interest in a conclusion in favor or against the application of JCE in 1975-79. Second, impartiality means an ability to address the issues posed in the Invitation with an open mind. Third, impartiality means the ability to objectively identify, characterize and examine the views of others. Professor Cassese is not impartial when judged against these most basic criteria.

24. As a preliminary remark, the Defence highlights that the fact that Professor Cassese has been invited to submit a written *amicus curiae* brief "in his capacity as editor-in-chief" of the Journal[39] does not dispose of challenges to his impartiality. Whether writing in his personal capacity or in his capacity as a Judge at the ICTY the

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[36] Adopted at the Plenary Session of the Extraordinary Chambers in the Courts of Cambodia on 31 January 2008. *See also* Article 4 of the ICC Code of Judicial Ethics, which describes the judges' duty of impartiality in exactly the same terms.

[37] *Prosecutor v. Prlić et al.*, IT-04-74PT, Decision on Request for Appointment of Counsel, 30 July 2004, para. 16.

[38] *Prosecutor v. Gotovina et al*, IT 06-90-AR73.2, Decision on Ivan Čermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 29 June 2007, para. 16.

[39] Invitation, at 3.

application of JCE as a customary international law norm goes to the core of Professor Cassese's reputation. Therefore his written conclusions on this issue will be the same regardless of the capacity in which he drafts the brief.[40] The fact that his written brief may be signed as editor-in-chief of the Journal makes no difference to the issue of impartiality.[41] The professional capacity of Professor Cassese as the ex-ICTY Judge who invented JCE and his present capacity as the editor-in-chief of the Journal are indistinguishable in terms of the substance of the written brief he will submit. To suggest otherwise is unsound

**1. Professor Cassese and the Selected Editorial Members have a demonstrable interest in answering the question of whether JCE applies at the ECCC for crimes allegedly committed in 1975-79 in the affirmative**

25. Professor Cassese has a clear and demonstrable interest in providing an affirmative answer at the very least with regard to the second issue proposed by the Chamber, namely "whether joint criminal enterprise as a mode of liability can be applied before the ECCC, taking into account the fact that these crimes were committed in the period 1975-79"[42].

26. The use of customary international law to create JCE as a mode of liability in *Tadić* has been subject to much criticism.[43] Reliance upon obscure Italian cases and a

[40] Indeed as Professor Cassese is editor of the forthcoming Oxford Companion to International Criminal Justice. *See* ANTONIO CASSESE (ED.) THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE (OXFORD, 2008), due to be published on 9 October 2008. The section concerning JCE in this book has been drafted by Katrina Gustafson of the ICTY Office of the Prosecutor, who has previously penned articles in favour of retaining and expanding JCE liability. *See* Katrina Gustafson, *The Requirement of an 'Express Agreement' for Joint Criminal Enterprise Liability: A Critique of Brdanin,* 5 Journal of International Criminal Justice 134-158 (2007). To permit such an important section in a supposedly impartial reference book such as the Oxford Companion to be drafted by someone who is far from impartial on the subject is nothing less than intellectually dishonest. It also confirms beyond any doubt that Professor Cassese's lack of impartiality on this topic extends to his present capacity as the Journal's editor-in-chief.

[41] In this respect the Pre-Trial Chamber's distinction in the *Nuon Chea* Decision between the appointment of Judge Ney Thol in his personal rather than professional capacity does not apply in the same way here. *See Nuon Chea* Decision, para. 24.

[42] Invitation, at 1.

[43] *See* ALEXANDER ZAHAR & GÖRAN SLUITER, INTERNATIONAL CRIMINAL LAW: A CRITICAL INTRODUCTION (Oxford, 2007) ("ZAHAR & SLUITER"); Stephen Powles, *Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?* 2 JICJ, 606 (2004); Mohamed Elewa Badar, *'Just Convict Everyone!' Joint Perpetration: From Tadic to Stakic and Back Again,* 6 ICLR (2006); Atilla Bogdan, *Individual Criminal Responsibility in the Execution of a 'Joint Criminal Enterprise' in the Jurisprudence of the Ad Hoc International Tribunal for the Former Yugoslavia* 6 ICLR (2006) 63; *Prosecutor v. Stakić*, IT-97-24-T, Judgment, 31 July 2003 ("*Stakić* Trial Judgement"), para. 433 where the Trial Chamber warned that an extensive interpretation of JCE might lead to a "flagrant infringement of the principle of *nullum crimen sine lege*"; *Prosecutor v. Simić,* IT-95-9/2-T, Judgment, 17 October 2002, Separate Opinion of *ad-litem* Judge Per-Johan Lindholm, paras 2-5, where Judge Lindholm

scattering of World War II jurisprudence to declare the existence of JCE in customary international law demonstrates a less than accepted understanding of how custom is formed.[44] Incredibly, the Appeals Chamber found a customary norm despite acknowledging that municipal legal systems differ significantly on the validity of the third category of JCE.[45] Such an unwillingness to accept generally recognized principles of how custom is formed is obviously problematic given the nature of the questions Professor Cassese has been asked to clarify before the ECCC.[46] Customary

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said he wanted to "disassociate" himself from JCE, remarking that "The concept or 'doctrine' has caused confusion and a waste of time, and is in my opinion of no benefit to the work of the Tribunal or the development of international criminal law."

[44] *See* ILIAS BANKETAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 33 (3rd ed. 2007), proclaiming it "unacceptable for the tribunal to claim the validity of this legal construction on conspicuously declared customary law...it should not be lightly assumed that (stating JCE as a customary norm) is also true and final outside the ICTY framework." Some criticism of this aspect of the decision has even come from within the ICTY itself. For example, in *Stakic*, the Trial Chamber applied *de novo* the doctrine of co-perpetration as a distinct form of liability, while expressing doubts over the legitimacy of JCE as created in *Tadić*. *Stakić* Trial Judgement, paras. 438, 441.

[45] Judgment, para. 224. Article 38(1)(b) of the ICJ Statute refers to "international custom, as evidence of a general practice accepted as law." State practice essentially means the general and consistent practice by states, while *opinio juris* means that the practice is followed out of a belief of legal obligation *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-11 (5th ed. 1998). This definition is widely accepted and has been applied by the International Court of Justice (ICJ) in numerous cases, including: *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, 44 (Feb. 20 1969); *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua V. United States) Merits, 1986 I.C.J. a14 (June 27, 1986) at 98, where the ICJ stated that *opinio juris* must be confirmed by state practice. JCE has been criticized for not fulfilling these two criteria. Judge Schomburg in his Dissenting Opinion in *Simić* noted 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, (Dissenting Opinion *Simić*), para. 14. Judge Schomburg listed 24 countries, spread all over the world, to exemplify the use of co-perpetratorship. *See* Dissenting Opinion *Simić*, paras. 13, 14. He based his findings *inter alia* on a study conducted by the Max-Planck institute, commissioned by the ICTY Office of the Prosecutor, showing that most states use co-perpetration rather than JCE. *See* Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion, Commissioned by the United Nations – International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor Project Coordination: Prof. Dr. Ulrich Sieber., Priv. Doz. Dr. Hans Georg Koch, Jan Michael Simon, Max Planck Institut für ausländisches und internationales Strafrecht, Freiburg, Germany.

[46] The application of other general principles of public international law by Professor Cassese may also be called into question. As part of the Appeal Chamber in *Tadić*, he relied upon a teleological interpretation of the ICTY Statute, yet omitted important provisions in doing so. The explanation of this point has been described as "one of the most remarkable assertions in tribunal history" ZAHAR & SLUITER, p.226. This is not the only occasion where Professor Cassese has offered a somewhat controversial interpretation of customary international law. In the context of whether or not there is a generally accepted definition of terrorism in international law, most scholars accept that state practice and *opinio juris* is too divided on the subject for this to be the case. Professor Cassese would ignore this. The existence of treaties on the subject is sufficient. He offers the justification that "[i]t is warranted to believe that (existing treaties) either deliberately or unwittingly were referring to a general notion underlying treaty provisions and laid down in customary rules." To say that such an assertion takes some liberties with the notion of what constitutes a customary norm is something of an understatement. *See* ROBERT BARNIDGE JR. NON-STATE ACTORS AND TERRORISM, APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILLIGENCE PRINCIPLE 27 (Cambridge, 2007). For a response to this see Ben Saul, *Crimes and Prohibitions of 'Terror' and 'Terrorism' in Armed Conflict: 1919-2005,* 18 Humanitäres Völkerrecht 264 at 270-71(2005).

international law in *Tadić* has thus unsurprisingly been described as a "very malleable notion."[47]

27. If the written brief asserts that JCE was part of customary international law in 1975-79, one of the crucial issues in the OCP Appeal, this would insulate Professor Cassese against this sustained criticism. It would also ensure Professor Cassese's legacy. That does not mean it is necessarily a correct statement of the law.

### 2. Professor Cassese and the Selected Editorial Members are unable to address the issues posed by the Pre-Trial Chamber with an open mind

28. Professor Cassese's position on JCE is notoriously clear from *Tadić* and his subsequent academic writings supporting and endorsing the doctrine and longevity of JCE.[48] Professor Cassese has written that the ICTY has contributed to "general international criminal law" by "spelling out" important issues such as JCE.[49] This leaves no room for any doubt over the validity of JCE as a mode of liability; he is clearly attached to the concept as expounded in *Tadić,* where JCE was essentially created.[50] Professor Cassese was a member of the Appeals Chamber sitting in that case.[51] Despite the criticism of JCE, Professor Cassese remains a vociferous and consistent advocate of this controversial form of liability which he fathered.

29. In a recent article on the subject, penned by Professor Cassese as a "Member of the Board of Editors,"[52] he asserts that all three forms of JCE are now "widely accepted" by international courts and tribunals, and that it is a "well-defined" concept.[53] Furthermore, he entirely dismisses the argument that JCE was not established according to a proper analysis of customary international law and that it was an example of the judiciary exercising too much discretion. He does this without the

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[47] ZAHAR & SLUITER, p. 231.
[48] See, for example Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise* 5 Journal of International Criminal Justice (2007) 109 ("Cassese Article"); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (Oxford, 2003) ; Antonio Cassese, *The ICTY, A Living and Vital Reality* 2 Journal of International Criminal Justice (2004) 585.
[49] *Id* (2004) pp. 594-95
[50] *Tadić* Appeal Judgement, paras. 185-234.
[51] The *Tadić* Appeals Chamber was presided over by Judge Mohamed Shahabuddeen. The other three judges were Judge Wang Tieya, Judge Rafael Nieto-Navia and Judge Florence Ndepele Mwachande Mumba. The Defence would be shocked if the Honourable Judges of the Pre-Trial Chamber and indeed the Senior Judicial Affairs Coordinator of the Pre-Trial Chamber were not aware of this fact when issuing the Invitation based on their experience. It is presumed therefore that the Invitation was issued in full cognizance of Professor Cassese's role in creating JCE and his subsequent pronouncements on the issue.
[52] Cassese Article, at 109.
[53] *Id.*, at 110.

need for any discussion as to the nature of customary law, stating that: "[t]he Appeals Chamber rightly stressed that the word 'commit' has a broad purport that can legitimately be identified on the basis of customary international law."[54]

30. It is impossible for Professor Cassese to address the issues posed by the Pre-Trial Chamber with an objective and open mind. The evidence shows *beyond peradventure* that his position on JCE is set in stone.

### 3. Professor Cassese is unable to impartially identify, characterize and examine alternative conclusions on the application of JCE liability

31. Given the reliance increasingly placed on *amicus* briefs by courts and tribunals dealing with issues of international criminal law, it is crucial that such briefs serve the interests of justice and are not used to push either the agenda of the *amicus* or that of either party.[55]

32. To serve the interests of justice on this issue, Professor Cassese must be able to identify, characterize and examine the arguments of those who take a different view to him. His academic writings show a clear inability to do so. In a recent article attempting to countermand the many arguments against JCE, he strenuously rejected almost all of the criticisms made against it.[56] His sole response to the argument that co-perpetration was a more appropriate form of liability than JCE and may actually have some support in customary international law was that "it is a fact that the ICTY Appeals Chamber dismissed it."[57] His later dismissal of the objection that the *Tadić* Appeals Chamber, in creating JCE, "relied on common law concepts while concomitantly using terms typical of the civil law tradition" was that although "this is no doubt true [...] the fundamentals of the doctrine are solid, and the use of slightly misleading language does not detract from the basic soundness of the concept."[58] Professor Cassese provides no discernable authority – legal or otherwise - for this one line response to a fundamental argument. If Professor Cassese were permitted to file a written brief on the issues posed by the Pre-Trial Chamber it would no doubt contain similarly dismissive assertions.

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[54] *Id.*, at 114.
[55] See, *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, SCSL-2004-14-AR72(E) UNICEF.
[56] *See* Cassese Article.
[57] Cassese Article, at 115.
[58] Id.

**B. Judges**

**1. Professor Cassese and the Selected Members are being asked to act in a judicial capacity**

33. The Pre-Trial Chamber invited Professor Cassese and the Editorial Members to file a written brief on two issues regarding the status of JCE in customary international law and whether it could be applied at the ECCC for crimes allegedly committed in 1975-79. In asking for a written brief on these central and complex issues, the Pre-Trial Chamber appears to have abrogated its central duty to decide itself upon the ultimate issue of whether the ECCC can apply JCE as a form of liability for those crimes within its jurisdiction. Instead, it has outsourced the judicial resolution of this issue directly to Professor Cassese.

34. While it is often difficult to determine what the ultimate issue of litigation is, assistance may be provided by the ICC's consistent jurisprudence on what constitutes an appealable issue in discretionary appeals. For leave to appeal to be granted, the party seeking to appeal must identify an issue which "is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination."[59] Simply, an issue will only be appealable if it had to be resolved by the Judge or Chamber in order to make a final decision on the matter at hand. Resolving these central issues is the prime function of a judge.

35. In the present case, resolution of the subjects set out in the Invitation is essential to determining whether or not JCE liability may be applied at the ECCC. By extending this judicial function to Professor Cassese and the Selected Editorial Members, and by asking them to resolve these issues in its place, the Pre-Trial Chamber has exposed them to the same obligations as the other ECCC Judges.

36. As ECCC judges, Professor Cassese and the Selected Editorial Members must comply with the obligations weighing upon Judges under the ECCC's Code of Judicial Ethics, Internal Rule 34 and the jurisprudence relating to impartiality already set down by this Pre-Trial Chamber, as well as the *ad hoc* tribunals.

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[59] *Situation in the Democratic Republic of Congo*, ICC-01/04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 9.

**2. Professor Cassese and the Selected Editorial Members are neither independent nor impartial**

37. The Defence has explained in detail above why Professor Cassese and the Selected Editorial Members are not impartial on the issue of JCE.[60] Professor Cassese's fixed position on this issue, his inability to properly characterize and address the equally valid views of those whose position is different to his and his interest in promoting the idea that JCE developed into a customary norm because of its use by other courts prior to *Tadić* show a complete absence of impartiality on this question. Even if the Pre-Trial Chamber concludes that impartiality is not required of an *amicus curiae* it is undoubtedly an ethical obligation required of judges. If Professor Cassese and the Selected Editorial Members accept to write this brief they would be violating this obligation, and as such, must be disqualified from doing so.

**3. Professor Cassese will effectively be acting as a judge of appeal on his own decision**

38. Professor Cassese acting as *amicus curiae* on an issue concerning JCE is analogous to a trial judge also hearing the appeal. This gives rise to a clear conflict of interest that should automatically exclude him from acting as an *amicus*. Professor Cassese would violate the fundamental provision that "no Judge shall sit on any appeal in a case in which that Judge sat as a member of the Trial Chamber"[61] as he would be sitting in review of his previous Judgement in *Tadić*, in clear violation of this rule.

**C. Remedies**

39. There are a variety of available remedies that the Pre-Trial Chamber may order in light of the lack of impartiality shown by Professor Cassese and the Selected Editorial Members.

**1. Withdrawal of the Invitation**

40. The most effective and judicially economic remedy is for the Pre-Trial Chamber to simply withdraw its Invitation to Professor Cassese and the Editorial Members. This would ensure that both Professor Cassese and the Editorial Members would not waste time and effort in conducting the complex and challenging research that would be

[60] *Supra,* paras. 21-30.
[61] *See* Rule 15(D)(ii), ICTY RPE

required to prepare the written brief requested. Such a withdrawal would also ensure that the Pre-Trial Chamber would not be exposed to a brief which was tainted by impartiality.

**2. Exclusion of the written brief submitted by Professor Cassese and Selected Editorial Members**

41. If Professor Cassese and the Selected Editorial Members submit a written brief in advance of a decision by the Pre-Trial Chamber to retract its Invitation, the brief must be rejected. Such a possibility is open to the Pre-Trial Chamber in light of the explanations and arguments set out in this brief. It is within the Pre-Trial Chamber's power to do so, notwithstanding the fact that it was the Pre-Trial Chamber who had extended the Invitation in the first place.[62]

**3. Submission of a written brief by those Editorial Members who remain impartial on the application of JCE liability**

42. The Defence has specified in a detailed annex to this motion those members of the Board of Editors and Editorial Committee of the Journal who, for the same reasons as Professor Cassese, should also be barred from acting as *amicus*.[63] There are several remaining members of the Board of Editors and Editorial Committee of the Journal which would not "lead a reasonable observer, properly informed, to reasonably apprehend bias"[64] based on the information in the possession of the Defence. Consequently, at this stage, the Defence maintains no objections to these other non-tainted members of the Board of Editors and Editorial Committee of the Journal submitting a written brief in response to the Invitation.

43. If Professor Cassese is disqualified from participating in the preparation of the written brief it logically follows that he should not be permitted to select those remaining Editorial Members who will take his place. Although the ECCC Internal Rules do not specify the procedure to be followed when replacing a disqualified judge, guidance may be sought from the ICTY Rules which do directly address this issue. Rule 15 (A) allows for the removal of judges if there is an issue affecting their impartiality. In such cases, the President shall appoint a replacement. Rule 15(B)(iv) states that if the

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[62] ICTY Information, para. 5(c).
[63] *See* Annex A.
[64] *Furundžija* Appeal Judgement, para. 189.

President is the one whose impartiality is in question, the next most senior judge shall take over his duties under Rule 15. Therefore, if the President is accused of bias, he may not appoint his replacement. By analogy, it follows that Professor Cassese is prohibited from selecting a replacement to prepare the written brief requested by the Pre-Trial Chamber, if he is disqualified. Equally all other Editorial Members who are disqualified shall equally be prohibited from selecting their replacements.

**4. Proposition of alternative *amicus curiae***

44. If the Pre-Trial Chamber allows Professor Cassese and certain other members of the Journal an opportunity to vindicate their legal fiction and act in any way that essentially protects and furthers the interests of the OCP by trying to forever fix JCE in international jurisprudence, then it must invite equally armed disputants of the JCE myth to serve as *amicus*, to point up the flaws and fallacies that would be left unchallenged by the purely partial Cassese cabal.

45. Extending the Invitation to the ADC-ICTY to file a written brief on this issue would therefore be appropriate. The ADC-ICTY would manage to bring together the collective views and perspectives of Defence Counsel at the ICTY, the tribunal which created this form of liability and applies it more than any other. The ADC-ICTY has previously been invited by the ICTY Appeals Chamber, the same Chamber of which Professor Cassese was once President, to submit a written brief and make oral submissions in appeal proceedings on JCE.[65] The Defence highlights that Mr. Michael G. Karnavas, Foreign Co-Lawyer for Mr. IENG Sary, is currently President of the ADC-ICTY. Naturally, in keeping with the arguments advanced herein against Professor Cassese and the Selected Editorial Members as being fit to serve as *amicus curiae*, were the ADC-ICTY to be called upon to make *amicus curiae* submissions, Mr. Karnavas would not only be required to recuse himself, but would also be precluded from selecting the ADC-ICTY members who would participate in the drafting of the submissions.

46. In the alternative, there are other experts in international law who would provide a more objective analysis than Professor Cassese. As the issues raised by the Pre-Trial Chamber relate specifically to the status of JCE in customary international law and

[65] *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005. *See also Prosecutor v. Brđanin*, IT-99-36-A, Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005; *see also* ADC Oral Submissions at *Prosecutor v. Brđanin*, IT-99-36-A, Appeal Procedure Transcript, pp. 64-72, 7 December 2006.

the related question of whether customary international law may be applied at the ECCC, an expert in the application of international law would be sufficient rather than a supposed expert in international criminal law. Such an expert should never have prosecuted, defended or adjudicated in a criminal trial involving the application of JCE. It is only with this distance from the subject that an *amicus* would be able to exercise irrelevant considerations such as public policy or the supposed nature of international crimes from swaying his or her determination of this issue.

## V. CONCLUSION & RELIEF SOUGHT

47. The Defence is deeply alarmed by the Invitation to Professor Cassese that has been issued by the Pre-Trial Chamber. It appears to be nothing more than a thinly veiled attempt to subcontract the proper judicial function of the Pre-Trial Chamber to Professor Cassese together with the Selected Editorial Members. Professor Cassese and his cohort are just another fox guarding the henhouse of JCE and, not incidentally, their legacy in the international legal lexicon. No new intellectual product or novel analysis will come from courting the already entrenched advocates of the JCE chorus. It would be far more useful to summon a cadre of sceptics and critics to pry at the framework of JCE and poke their fingers in its holes, to aid in determining whether JCE is a sturdy structure, built upon a solid foundation, or an insubstantial house of straws. If, in the end, the Pre-Trial Chamber actually relies upon such a biased *amicus curiae*, without balance or counterpoint, then it will sacrifice its own impartiality.[66]

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

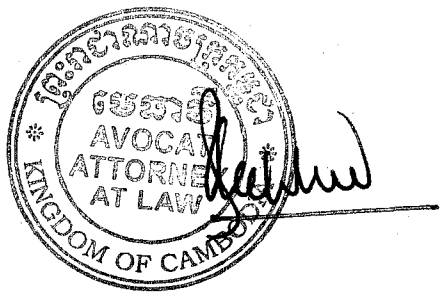
[66] Indeed, the Office of the High Commissioner for Human Rights has frequently called for Cambodia to make greater efforts to develop an independent and impartial justice system. *See* General Assembly Resolution 55/95 (A/Res/55/95) 28 February 2001; Note on Legal and Judicial Reform of the Mid-Term Consultative Group of Donors Meeting, January 2003; Press Release: *The United Nations Special Representative of the Secretary General for human rights in Cambodia and the Special Rapporteur on the Independence of Judges and Lawyers express concern over judicial independence in Cambodia in the light of recent judicial appointments* Joint Statement of The United Nations Special Representative of the Secretary-General for human rights in Cambodia,Yash Ghai, and the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy 23 August 2007.

i. WITHDRAW the Invitation to *Amicus Curiae* directed to Professor Cassese and the other members of the Board of Editors and the Editorial Committee of the *Journal of International Criminal Justice;*

ii. REJECT any written brief submitted by Professor Cassese and the other members of the Board of Editors and the Editorial Committee of the *Journal of International Criminal Justice* who are not impartial on the application of JCE; or

iii. PROHIBIT Professor Cassese and the Selected Editorial Members from selecting those members of the Board of Editors and Editorial Committee of the *Journal of International Criminal Justice* who do not lack impartiality to write the brief requested by the Pre-Trial Chamber; or

iv. INVITE the Association of Defence Counsel of the ICTY to submit a written brief relating to the two issues raised in the Pre-Trial Chamber's Invitation to Amicus Curiae, issued on 23 September 2008, within one month of the issuance of a decision on this Request.




ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **3rd** day of **October, 2008**