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BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

IN THE MATTER OF THE CO-PROSECUTORS' APPEAL OF THE CLOSING ORDER AGAINST KAING GUEK EAV "DUCH" DATED 8 AUGUST 2008

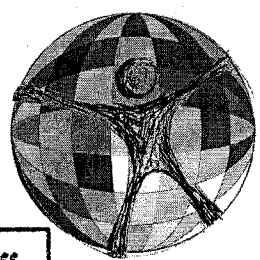
Case File No.: 001/18-07-2007-ECCC/OCIJ (PTC 02)

Amicus Curiae Brief

Submitted by the Centre for Human Rights and Legal Pluralism, McGill University

Montreal (Québec) Canada

McGill Centre for Human Rights and Legal Pluralism



Centre sur les droits de la personne et le pluralisme juridique de McGill

I. INTEREST OF AMICUS CURIAE

1. **The McGill Centre for Human Rights and Legal Pluralism** (CHRLP) is submitting an amicus curiae brief further to the invitation issued by the ECCC Pre-Trial Chamber by its decision dated 25 September 2008. The CHRLP is a focal point for innovative legal and interdisciplinary research, dialogue and outreach on issues of human rights and legal pluralism. A key objective of the CHRLP is to deepen transdisciplinary collaboration on the complex social, ethical, political and philosophical dimensions of human rights. Since 2004, the Centre has operated the Sierra Leone Special Court Clinic providing support to Chambers of the SCSL.

2. **The Faculty of Law of McGill University** has long been renowned for its research and teaching in human rights. The Faculty is also distinctive for its bilingualism and bijuridical teaching and research, and its longstanding engagement with comparative law, multiple legal traditions and legal pluralism.

3. **Professor René Provost** is the founding Director of the CHRLP, created in the fall of 2005. He teaches several courses in the area of human rights and social diversity, including International Law of Human rights, International Humanitarian Law, and Public International Law. He is the author of International Human Rights and Humanitarian Law (Cambridge University Press, 2002), the leading text on the interaction between these two fields.

4. **Professor Payam Akhavan** teaches and researches in the areas of public international law, international criminal law and transitional justice, with a particular interest in human rights and multiculturalism, war crimes prosecutions, UN reform and

the prevention of genocide. He was the first Legal Advisor to the Prosecutor's Office of the International Criminal Tribunals for Former Yugoslavia and Rwanda.

5. **Professor Frédéric Mégret** holds the Canada Research Chair on the Law of Human Rights and Legal Pluralism at the McGill Faculty of Law and is the Director of the McGill Clinic for the Sierra Leone Special Court. He is the author of *Le Tribunal pénal international pour le Rwanda* (Pedone, 2002) and was a member of the French delegation at the Rome conference that created the International Criminal Court.

6. **Maureen T. Duffy**, **Carlos Iván Fuentes**, **Amar Khoday** and **Melissa Martins Casagrande** are McGill Faculty of Law doctoral candidates, are affiliated with the CHRLP and are former researchers for McGill's Clinic for the Special Court for Sierra Leone. **Malcolm Dort**, **Jake Hirsch-Allen** and **Sophie Tremblay** are McGill L.L.B. / B.C.L. candidates and Jake Hirsch-Allen is the current Executive Director of the Clinic. **Sébastien Jodoin** is a graduate of the McGill BCL/LLB programme and a former member of the Special Court for Sierra Leone Clinic. He has worked in Trial Chamber III of the ICTR and in the Appeals Chamber of the ICTY.

II. SUMMARY

7. Liability for participation in some form of common plan has existed in international law since at least 1945.[1] The leading contemporary case on the concept of Joint Criminal Enterprise (JCE) is the International Criminal Tribunal for the Former Yugoslavia's (ICTY) decision in *Prosecutor v. Tadic.*[2] A substantial number of international criminal cases subsequent to this decision have relied on its interpretation of

[1] In some national jurisdictions it has existed for many years before the Second World War, see below.
[2] *Prosecutor v. Dusko Tadic*, IT-94-1-A, Judgment on Appeal, (15 July 1999) (International Criminal Tribunal for the Former Yugoslavia).

this mode of participation. The majority of the precedents relied upon by the Tribunal in *Tadic* existed prior to the time period relevant to the Extraordinary Chambers in the Courts of Cambodia's (ECCC) jurisdiction (1975-1979). As a result, an ECCC determination that JCE applies to the relevant time period would be consistent with international criminal law.

8. This review of national and international jurisprudence and doctrine confirms the applicability of this form of participation to the cases before the ECCC. The results of this review confirm that this form of liability can be applied judiciously and that, in particular, its third, extended form can be defined in a manner that does not infringe on the rights of defendants.

III. ISSUE PRESENTED

9. Do the development of the theory of JCE and the evolution of the definition of this mode of liability suggest that it be applied before the ECCC, taking into account the fact that the crimes were committed in the period 1975-1979?

IV. JCE HAS EXISTED AS MODE OF LIABILITY IN INTERNATIONAL LAW SINCE AT LEAST 1945

10. The principle of *nullum crimen sine lege* is both a fundamental principle of criminal law and a norm of customary international law. It requires that a person may only be found guilty of a crime in respect of acts which constituted a violation of the law

at the time of their commission.[3] The principle applies both to the substance of crimes as well as to modes of participation.

11. According to the ICTY Trial Chamber in the *Hadzihasanovic* case, the proper focus of the enquiry is thus on the actual conduct of the accused at the time of commission:

> In order to meet the principle of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission. Whether his conduct was punishable as an act or an omission, or whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanctions is not of material importance.[4]

12. There are two sets of questions that arise in relation to the application of the principle of *nullum crimen sine lege* in the context of the application of joint criminal enterprise. The first set of issues relates to whether the conduct prosecuted pursuant to the mode of liability of joint criminal enterprise was in fact punishable at the time of the commission of the offence under national law or international law. A number of scholars have been critical of the ICTY Appeals Chamber's finding that joint criminal enterprise existed as a mode of liability under customary international law in the indictment period for this case. They argue that the case-law in question simply does not provide support for the doctrine of joint criminal enterprise as elaborated by the Appeals Chamber.[5]

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[3] See *Universal Declaration of Human Rights*, 10 December 1948, G.A. Res 217A (III), U.N. Doc. A/811 (1948) at art. 11 (2); *International Covenant on Civil and Political Rights*, 16 December 1966, 993 U.N.T.S. 171 at art. 15, 6 I.L.M. 368; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 U.N.T.S. 609 at art 6(2)(c); *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90 at art 22, 37 I.L.M. 1002.

[4] *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002, para. 62 (footnote omitted).

[5] Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, (2005) 93 Cal. L. Rev. 75 at 110-120; Machteld Boot, *Genocide, crimes against humanity, war crimes : nullum crimen sine lege and the subject matter jurisdiction of the international criminal court* (Antwerpen: Intersentia, 2002) at 297-304.

13. The second set of issues relates to the foreseeability and accessibility requirements of the principle of *nullum crimen sine lege*. As indicated above, the foreseeability requirement will be met if it can be shown that it would be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission. The approach in the *ad hoc* tribunals has been to presume that both requirements were met if conduct was found to be punishable under international law.[6] This essentially amounts to a strict application of the doctrine of *ignorantia juris non excusat*.

14. For the case at hand, the requirement of the principle of *nullum, crimen sine lege* will be met if JCE is found to have been accepted as a mode of participation under either international law or Cambodian law at the relevant time (1975-1979). It will be shown that JCE is a doctrine of international criminal law which was relied upon in several cases relating to the Second World War. In addition, a consideration of a representative set of domestic jurisdictions supports the conclusion that JCE as a general principle of international criminal law had emerged at the relevant time.

1. Emergence of international recognition of individual liability for collective criminal endeavors in the military tribunals following the Second World War

15. In *Tadic*, the ICTY Appeals Chamber essentially relied on post-World War II case-law to establish that "the notion of common design as a form of accomplice liability is firmly established in customary international law."[7] Much of the explicit support for JCE is drawn from statements made at military tribunals by the prosecution or found in

[6] See *e.g.*, *Prosecutor v. Martic*, IT-95-11-A, Judgment on Appeal - Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martic (8 October 2008) (ICTY).
[7] *Tadic, supra* note 2 at para. 220; for the Appeals Chamber's analysis of this case-law, see paras. 195-219.

United Nations War Crimes Commission's "Notes on the Case" rather than the Judge Advocate's decisions, which tended to be very brief. Many of the decisions are now difficult to obtain and the ICTY relied heavily on unofficial translations which therefore cannot be verified. JCE category 1 ("simple") or 2 ("systematic") are most clearly supported by the military tribunals while the facts of the cases referenced in support of JCE 3 ("extended"), resemble less closely the scenarios with which this latter category is most commonly associated. While the post-Second World War jurisprudence cited in *Tadic* is less conclusive than national jurisprudence, each of the three categories of JCE finds some support amongst the World War Two military tribunals' jurisprudence.

16. *Schonfeld,* cited in support of JCE 1, is a prototypical example. The best support for JCE lies in the prosecution's argument that Regulation 8 (ii) of the Royal Warrant, of 14th June, 1945 should apply to this case:

> Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime.[8]

17. This is only an evidentiary rule, however, and the majority of the tribunal's discussion revolves around aiding and abetting with only passing references to "common design." Nonetheless, the Judge Advocate cited a rule of English substantive law instead of this rule of evidence, which suggests some affinity between the evidentiary and substantive standards. He explained the law on common design as follows:

> if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them, in carrying out the purpose, kills a man, it is murder in all who are present, whether

[8] *Trial of Franz Schonfeld and Nine Others* (1946), XI Law Reports of Trials of War Criminals 64 at 68.

> they actually aid or abet or not, provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly.[9]

18. The facts of the *Almelo* trial present a classic JCE-like scenario: three individuals each played a different role in two killings: one fired the lethal shot, another gave the order and a third remained by the car to prevent people from coming near. The Judge Advocate, acknowledging that all three individuals knew what they were doing and that each was present to kill the victim, stated:

> if people are all present together at the same time taking part in a common enterprise which is unlawful, each one in their (sic) own way assisting the common purpose of all, they are all equally guilty in point of law.[10]

While all the accused were found guilty, those who had ordered or carried out the shooting were sentenced to death. The others were sentenced to fifteen years imprisonment.[11] This is indicative of how sentences can be varied according to an individual's role in a JCE, but also suggests that they were all guilty.

19. Recent developments before Italy's military courts are also relevant to the same time period. Former members of the German military and S.S. have been tried for crimes committed during World War II.[12] The defendants were found guilty for their individual participation in the crimes committed in formal and continuous concurrency. In the case of Nordhorn and Seifert, the Courts stressed the fact that the crimes were committed through "many actions executed under the same criminal design, in

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[9] *Ibid.*

[10] *Trial of Otto Sandrock and Three Others (Almelo case)* (1945), I Law Reports of Trials of War Criminals 36.

[11] *Ibid.* at 41.

[12] Including the cases of Gerhard Sommer et al. (2005) and Heinrich Nordhorn (2006) at the Military Tribunal of La Spezia, the case of Michael Seifert (2000) at the Military Tribunal of Verona and the case of Siegfried Engel (1999) at the Military Tribunal of Torino.

concurrency with other members of the military of the same rank."[13] In the case of Sommer et al., the Military Tribunal of La Spezia found that ten officers that formed part of the SS were "guilty of complicity in multiple murder for having deliberately conceived, planned and executed the massacre" of 560 civilians.[14]

20. The *Tadic* court cited the *Dachau Concentration Camp* and *Belsen* cases in support of imposing liability under JCE 2, both of which held senior concentration camp officials responsible for the crimes that took place in such camps. The passages from *Dachau* cited in Tadic are clear: "there was in the camp a general system of cruelties and murders of the inmates...and ... this system was practiced with the knowledge of the accused...and with their active participation." This was held to constitute "acting in pursuance of a common design to violate the laws and usages of war". The court clarified: "Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary".[15]

21. *Belsen* is similarly straightforward and the passages the ICTY cites from the case, while again drawn from the prosecution's arguments, are representative of the Military Tribunal's findings:

> all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the court to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were

[13] Tribunale militare della Spezia, 3 novembre 2006, 50/2006 N. 551/2002 R.G.N.R. N. 16/2006 R.G. DIB

[14] Rosa Dinusi, "Proceedings against Gerhard Sommer et al., Military Tribunal of La Spezia, Judgement of 22 June 2005" in A. McDonald, *Yearbook of International Humanitarian Law – 2005* (Cambridge: CUP, 2007) at 465.

[15] *Tadic, supra* note 2 at para. 202.

> satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened.[16]

More specifically, the criteria for JCE 2 proposed by the prosecution and adopted by the Judge Advocate in *Belsen* are repeated and adopted in Tadic. They are: "(i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system".

22. The last case that the ICTY cited in support of JCE 2 in fact supports the application of aiding and abetting principles more strongly. *Mulka* should therefore be distinguished by future courts because, as the ICTY admits, "if it could not be proved that the accused actually identified himself with the aims of the Nazi regime, then the court would treat him as an aider and abettor because he lacked the specific intent to 'want the offence as his own'".[17]

23. The decisions cited by the ICTY in support of JCE 3 are deservedly the most controversial evidence for the existence of JCE in international criminal law. The facts in both the *Essen Lynching* and *Borkum Island* cases involve mobs of civilians and omissions related to foreseeable harm. The link between the violence perpetrated and the defendants is most clear in the *Essen Lynching* case, though it should be noted that the support for JCE in the *Borkum Island* case, is if anything, weaker.

24. In the *Essen Lynching* case, three British prisoners of war were lynched by a German mob. The accused included German serviceman who ordered in a voice, loud

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[16] *Joseph Kramer and 44 Others (Belsen trial)* (1945) II Law Reports of Trials of War Criminals 1 at 121; *Tadic, supra* note 2 at para. 202.

[17] See in particular *Stefan Baretzki at al.*, XXI Justiz und NS-Verbrechen, at 838 and 881 (Bundesgerichtshof, F.R.G.).

enough for the German mob to hear, that the prisoners' escort should not interfere with German civilians' treatment of the prisoners because they ought to be shot. The accused also included three members of the mob. In this case, once again, one has to assume the court accepted the prosecution's arguments that, though there was no conclusive evidence that any one of the defendants inflicted a fatal blow, their liability should instead depend on the fact that "every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims[18]

The two fundamental problems with the use of such cases in support for a broad principle of extended JCE are that the circumstances of this case are not clear on the role or intentions of each participant and that the court's findings must be inferred from the prosecution's arguments and the eventual finding of guilt. Nevertheless, there is some evidence to support the general existence of the third category of JCE already in the early years after the Second World War.

2. General Principle of Individual Liability based on Collective Criminal Endeavors

a. Jurisdictions Other Than Cambodia

25. Liability for participation in a common plan has existed in some form in the national legislation of numerous countries since at least the 19th century. Aspects of domestic criminal law common to many legal systems have become a key way of elucidating the content of international criminal norms as evidence of general principles of international law. The notion of individual liability based on a common plan or enterprise continued to develop in national jurisdictions after World War II. The

[18] See *Tadic, supra* note 2 at para. 208, fn 259.

developments among a number of national jurisdictions continued through the relevant dates before the ECCC, thus lending further support to the general notion that JCE may be applied as a mode of liability before the ECCC for crimes committed during the period 1975-1979.

26. The French Penal Code, first adopted in 1810, foresaw individual liability for collective participation in a criminal act when the presumption of participation can be deduced from the individual's membership in a criminal group.[19] One example of this mode of liability is article 313, which states that crimes against persons committed: "*en réunion séditieuse, avec rébellion ou pillage, sont imputables aux chefs, auteurs, instigateurs et provocateurs de ces réunions, rébellions ou pillages, qui seront punis comme coupables de ces crimes ou de ces délits, et condamnés aux mêmes peines que ceux qui les auront personnellement commis.*"[20]

27. In a law that was no longer in force at the time of the ECCC alleged offences, having been repealed in 1953, France addressed the issue of liability in a common plan or scheme, and illustrated some of the difficulties of defining its exact meaning. Motivated by the crimes commited during World War II, France enacted the *Loi du 15 Septembre 1948*, which established a presumption of individual liability for collective criminal acts deduced from the membership in a group, with the objective of assimilating the membership in the group with participation in the crime. The law, repealed on 30 January 1953, established that all persons who have been members of a group declared criminal by the International Military Tribunal of Nuremberg – for example, the Waffen SS or the

[19] Art. 313 C. pén. (1810-1994).
[20] Roger Merle & Andre Vitu, *Traité de Droit Criminel: problèmes généraux de la science criminelle*, 3d ed. (Paris : Editions Cujas, 1978) at 611.

Gestapo – could be indicted as perpetrators of the crimes committed by the organization, except if these persons had been forcefully incorporated into the organization or could produce evidence of their non-participation in the crimes.[21] In the short period of time that the exceptional law was in force, it was the target of severe criticism for potentially violating universal human rights principles, such as presumption of innocence, due process and *nullum crimen sine lege*.[22]

28. Italian criminal doctrine is unique in that there is no legislative description of the modes of participations. Most of Italian criminal law theory is centered on the concept of the offense, which would regularly be found under modes of participation in common law jurisdictions. The relevant topics are the concurrency of crimes and the concurrency of participants, which are contained in arts. 81 and 110.[23]

29. Although art. 81 constitutes an aggravating circumstance in the case of formal concurrency of crimes, it evidences the idea that a person can be held responsible for a multiplicity of criminal acts forming part of a single criminal design (*disegno criminoso*). Recent clarifications of the sense of this norm have established that after the reform to this article in 1974 "the requisite of the homogeneity of violations, has acquired great importance in the identity of a criminal design, which is now oriented in a subjective sense as ideation and will of a unitary purpose that gives meaning to a comprehensive program."[24] This reform effectively reduced the importance of the objective character of

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[21] Frédéric Desportes & Francis Le Gunehec, *Droit pénal general*, 14th ed. (Paris: Economica, 2007) at 481. This was consistent with the presumption under Art. II(1)(d) of Control Council Law No 10 applied in Germany after the Second World War.

[22] Philippe Merle, *Les présomptions légales en droit pénal* (Paris: Librairie Générale de Droit et de Jurisprudence, 1970).

[23] Codice penale, [C.p.] (It.) [unofficial translation].

[24] Cass., sez. I, 28 gennaio 1991 – 2 aprile 1991, n. 354, CP 92, 2368 [unofficial translation].

responsibility (understood as a chronological and thematic link among the crimes committed) and accentuated the psychological and subjective character of the criminal intent as part of a larger design.[25]

30. Article 110, on the other hand, focuses on the issue of personal responsibility and establishes the concurrency of people in the same crime. Jurisprudence previous to the relevant time established that the formula in art. 110 "encompasses all forms and grades of criminal participation, in which the actions resulting from the cooperation of a plurality of subject must be considered as one."[26] When read together these articles evidence –as far as Italian criminal doctrine is relevant- that during the period of 1975-1979 a person could be liable for any form of participation in a collective effort which consists in performing one or more acts, constituting one or more crimes, within the framework of a common criminal design.

31. The *Indian Penal Code 1860* imposes individual liability for unlawful acts committed by several persons in furtherance of a common plan.[27] Section 34 of the original *Code* states: "When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if it were done by him alone."[28] This provision was amended, prior to 1975, to include more explicit references to the fact that such action must be in furtherance of the common intention. It now reads: "When a criminal act is done by several persons in furtherance of the common intention of all,

[25] Ibid.
[26] Cass., sez. I, 4 dicembre 1972 – 24 marzo 1973, n. 2325, GP 73, II 341; CPMA 74, 756 [unofficial translation].
[27] Walter Morgan and A.G. MacPherson, *Indian Penal Code*, (XLV, 1860) (London: G.C. Hay & Co. 1861).
[28] *Ibid.*

each of such persons is liable for that act in the same manner as if it were done by him alone."[29]

32. Canada similarly imposes liability for participation in common plan and its legislation provides particularly strong support for the existence of JCE prior to 1975. S. 61(2) of the 1893 *Criminal Code* states:

> If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

33. This provision was revised as s. 21(2) in 1970, and Canadian courts have imposed common plan liability under the *Criminal Code*.[30] In *R. v. Trinneer*, the accused participated in a common plan to commit robbery with a co-perpetrator resulting in the victim's murder.[31] Although the accused's participation was limited to sitting in the victim's car, he was aware that his co-perpetrator was carrying a hunting knife when the latter robbed and murdered the victim outside the car. The accused however, had knowledge that his co-perpetrator was carrying a hunting knife prior to perpetrating the robbery and murder. The Court determined that the accused's conviction of non-capital murder under s.21(2) of the *Criminal Code* was proper given the accused's knowledge of the existence of the hunting knife and that the stabbing was a probable consequence of

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[29] *Matiullah Sheikh v. The State of West Bengal*, 1964 S.C.R. (6) 978.

[30] s.21(2) of the *Criminal Code*, R.S.C. 1970, c. C-34, as follows: Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[31] [1970] S.C.R. 638.

carrying out the robbery. [32]

34. In its landmark ruling in the *Tadic* case, the ICTY relied on a U.S. Supreme Court case from 1946, which is widely regarded as initiating a form of common-enterprise criminal liability within the U.S. The *Tadic* Court refers primarily to a doctrine arising from a 1946 U.S. Supreme Court case, *Pinkerton v. U.S.* – clearly predating the relevant time period of 1975-1979.[33] The *Tadic* Court correctly notes that the notion of criminal liability arising from a common plan or scheme is not formalized in U.S. federal statutory provisions, although it is addressed on the state level.[34] The *Pinkerton* case involved two brothers who were charged with a number of tax-related offenses, including one count each of conspiracy. Pinkerton was charged both with conspiracy to commit tax evasion with his brother and with specific tax evasion offenses that his brother had committed, including some that were committed when he was in jail. The Supreme Court ruled that it was not necessary to prove that Pinkerton had directly participated in the underlying offenses, but, rather, that it was adequate to prove that the crimes were a reasonably foreseeable consequence of the unlawful agreement for Pinkerton to have direct criminal liability for the underlying offense.[35] As a result, Pinkerton could be held

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[32] *Ibid.(* In Canada this notion has also been questioned. As discussed *infra*, the Supreme Court of Canada later placed constitutional restrictions on the degree of liability that can be imposed on individuals for crimes committed by others in furtherance of a common plan where these acts constitute specific-intent crimes such as attempted murder); see *R. v. Logan*, [1990] 2 S.C.R. 731.

[33] *Pinkerton v. U.S.*, 328 U.S. 640 (1946) [*Pinkerton*].

[34] *Tadic, supra* note 2 at para. 224, fn. 289 (citing Maine (17 Maine Criminal Code § 57 (1997), Minnesota (Minnesota Statutes § 609.05 (1998)), Iowa (Iowa Code § 703.2 (1997)), Kansas (Kansas Statutes § 21-3205 (19997)), Wisconsin (Wisconsin Statutes § 939.05 (West 1995)). At least two of those statutes – those from Minnesota and from Wisconsin – were in effect at least as of 1972. Wayne R. LaFave & Austin W. Scott Jr., *Criminal Law* (Minnesota: West Publishing, 1972) at 514, n. 8 [LaFave & Scott]; the Minnesota statute includes one who conspires with another to commit a crime, while the Wisconsin statute involves one who "is a party to a conspiracy with another to commit" the crime, *Ibid.*

[35] *Pinkerton, supra* note 33 at 641-642; see also LaFave &Scott, *supra* note 34 at 513 (explaining the standard in U.S. law of substantive charges for a crime not committed by a defendant, but arising as a foreseeable outcome of an unlawful scheme).

criminally liable for the actual underlying offense committed by his brother.[36] After this ruling, what has come to be known as the *Pinkerton* rule has been used to find one defendant criminally liable for the substantive offense committed by another.[37]

35. Based on its general liability for foreseeable crimes even outside the scope of the specific enterprise, *Pinkerton* liability appears to resemble the third form of JCE. As of the time period relevant to the ECCC, however, and certainly later, as of the time of the *Tadic* decision, the *Pinkerton* rule was being criticized, and it appears to be a questionable basis for suggesting that U.S. law as of that time supports this mode of liability, at least in relation to the third form of JCE.[38] LaFave & Scott, writing in the 1970s, explained that those drafting the highly influential Model Penal Code in the U.S. had noted "'law would lose all sense of just proportion' if one might, by virtue of his one crime of conspiracy, be 'held accountable for thousands of offenses that he did not influence at all.'"[39] LaFave & Scott further point out that the *Pinkerton* rule "never gained broad acceptance," adding that opposition to it was growing as of the early 1970s.[40] Primarily because of its broad reach in terms of assigning liability, LaFave & Scott noted that the *Pinkerton* rule was rejected by the drafters of the Model Penal Code and was not incorporated into the federal criminal code.[41]

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[36] *Pinkerton*, *supra* note 33 at 642.
[37] LaFave &Scott, *supra* note 34 at 513.
[38] *Ibid.*
[39] *Ibid.* (citing Model Penal Code § 2.04, Comment (Tent. Draft No. 1, 1953)).
[40] *Ibid.* at 515.
[41] *Ibid.* (citing 1 National Comm'n on Reform of Federal Criminal Laws, Working Papers 155-57 (1970). National Comm'n on Reform of Federal Criminal Laws, Final Report – Proposed New Federal Criminal Code § 401 (1971)); See Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, (2005) 93 Cal. L. Rev. 75 at 140 (noting that some criticisms of *Pinkerton* liability point to the fact that it allows for criminal liability for crimes that were not intended, but are only foreseeable, causing a basic unfairness) [Marston & Martinez].

36. Another possibly analogous doctrine in U.S. law might arise from the common law "felony murder rule." This rule has to do with the foreseeability of crimes arising out of a criminal common plan. The doctrine, which was well developed long before the 1970s, allows a defendant to be "held accountable for a crime because it was a natural and probable consequence of the crime which that person intended to aid or encourage."[42] This rule has long been criticized, and was under considerable criticism in the 1970s, as allowing liability for a crime that requires a different *mens rea* than the crime originally contemplated.[43] The felony-murder rule had been limited to a killing committed while the conspirator has been actively engaged in the commission of another serious felony crime.[44] It is notable, however, that, while this rule has a long history in the common law, it has since been repealed in a large number of states, and repudiation of this notion was taking place as of the time of the offenses before the ECCC.[45]

37. British courts similarly emphasised the issue of foreseeability when determining whether individual liability for criminal acts committed during a joint enterprise would apply. In *R. v. Smith (Wesley)*, the accused participated with three other individuals with the common purpose of causing damage to a bar.[46] The accused's actual participation was limited to throwing bricks at the establishment yet he was aware that one of his co-perpetrators was carrying a knife. The latter used the knife to kill the bartender inside the bar. The accused was convicted of manslaughter on the theory that the killing was within the scope of the common design to attack the bar and was a

[42] LaFave & Scott, *supra* note 34 at 515-516.
[43] See *ibid.*
[44] *Ibid.*
[45] *Ibid.*; see also *Commonwealth ex rel. Smith v. Myers*, 261 A.2d 550 (Pa. 1970); *State v. Branson*, 487 N.W.2d 880 (Minn. 1992).
[46] [1963] 3 All E.R. 597

foreseeable consequence of this act.

b. Developments in Cambodian Law

38. The criminal law in force during the relevant time period was the 1956 *Code pénal et lois pénales*, published by the Ministry of Justice of the Kingdom of Cambodia.[47] No sources reliably and comprehensively update this law through 1975, and no available case law appears to elaborate it.[48]

39. There is no explicit legal basis for joint criminal enterprise (JCE) in the 1956 Cambodian Penal Code. Some sections within the Cambodian Penal Code do address issues related to a common plan. The title on co-perpetration (art. 82), for example, states that "any person, who willfully participates in the commission of any crimes or offences, either directly or indirectly, shall be punished with the same punishment applicable to the principal perpetrator."[49] This notion of common plan is suggested in arts. 83 to 87, which establishes indirect participation and complicity as requiring underlying acts that are the result of instigation, explanation, provision of means, or aiding or abetting.[50]

3. **Further legal developments and critiques.**

40. While national jurisdictions continued to develop the notion of criminal liability based on a common plan after World War II, it was sanctioned in contemporary international criminal law in the ICTY's *Tadic* decision. Subsequent international criminal tribunal decisions have further refined this mode of liability.

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[47] *Code pénal et lois pénales*, published by the Ministry of Justice of the Kingdom of Cambodia [*Code pénal* Cambodia].
[48] Group of Experts for Cambodia, *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, UN GAOR, 53th Sess., UN Doc.S/1999/231 & A/53/850 (1999).
[49] *Code pénal, supra* note 47 at art. 82.
[50] *Ibid.*, art. 83-87.

41. Since its introduction in the *Tadic* Appeal Judgement, the doctrine of joint criminal enterprise has attracted considerable criticism from scholars[51] and defendants before international criminal tribunals. Disagreements about the application of the doctrine have also been manifest in the case-law of various international criminal tribunals.[52] The controversies surrounding the doctrine of joint criminal enterprise have centered on the uncertainty regarding its legal elements, on the principle of *nullum crimen sine lege* and on defendant's rights.

42. While the Appeals Chamber outlines all three forms of JCE in *Tadic*, the facts in *Tadic* only fit the mode of participation's third and most controversial form. Thus, the fact that the principle of a joint criminal enterprise has often been identified with this least direct form of JCE can in part be attributed to its having been employed first. Had the ICTY dealt with cases of JCE 1 or JCE 2 earlier and thereby developed a foundation for JCE 3, the concept might have a more nuanced and less broadly structured. Instead, JCE now faces significant criticism.[53]

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[51] See, e.g., Alexander Zahar & Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: OUP, 2007) at 221-257; Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lee and Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen: Intersentia, 2002) at 288-304; Jens David Ohlin, "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise," (2007) 5 J. Int'l Crim. J. 69; Kai Ambos, "Joint Criminal Enterprise and Command Responsibility" (2007) 5 J. Int'l Crim. J. 159; Elies van Sliedregt, "Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide" (2007) 5 J. Int'l Crim. J. 184.

[52] See, *e.g.*, *Prosecutor v. Brđanin*, IT-99-36-A, Judgment on Appeal - Partly Dissenting Opinion of Judge Shahabuddeen (3 April 2007) (ICTY); *Prosecutor v. Martic*, IT-95-11-A, Judgment on Appeal - Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martic (8 October 2008) (ICTY); compare also the different approaches of the Trial Chamber and the Appeals Chamber in *Prosecutor v. Stakic*, IT-97-24, Trial Judgment (31 July 2003) at paras. 431-442; *Prosecutor v. Stakic*, Case No. IT-97-24-A, Appeal Judgement (22 March 2006) at paras. 58-63.

[53] In a recent article, Antonio Cassese refers to the three forms of liability as 1:"liability for a common intentional purpose", 2: "liability for participation in an institutionalized common criminal plan" and 3: "incidental criminal liability based on foresight and voluntary assumption of risk." Drawing from later jurisprudence, Cassese suggests clarifications to, and limitations on, JCE as it was originally developed in Tadic: Antonio Cassese, "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise" (2007) 5 J. Int'l Crim. J. 109.

43. Criticism of JCE exists even within the ICTY's jurisprudence. For instance, though later overturned on appeal, Judge Lindholm was critical in his opinion in *Simić*:

> 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, in my opinion, have any substance of its own. It is nothing more than a new label affixed to a since well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration.... If something else than participation as co-perpetrator is intended to be covered by the concept of joint criminal enterprise, there seems to arise a conflict between the concept and the word 'committed' in Article 7(1) of the Statute.[54]

44. Machteld Boot's criticisms of JCE 3 are representative of one doctrinal perspective. He describes how the Appeals Chamber resorted to customary international law in attempting to identify the *mens rea* and *actus reus* of collective criminality under Art. 7(1) of the ICTY's Statute.[55] Boot has no problem with the Chamber's derivation of JCE 1 and 2 but discusses the controversy surrounding JCE 3 at length. He describes the Appeals Chamber's conclusion that "the notion of common design as a form of accomplice liability is firmly established in customary international as "rather far-fetched".[56] Boot finds that a) it is based on too few cases; b) that the domestic cases the Appeals Chamber cites were not sufficiently uniform; and c) such domestic law as did support the new form of liability did not "incorporate customary international humanitarian law" as the UN Secretary-General's report on the ICTY statute

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[54] *Prosecutor v. Simić et al.*, IT-95-9-T, Trial Judgment - Separate and Partly Opinion of Judge Per-Johan Lindholm (17 October 2003) at para. 2.

[55] Machteld Boot, *Genocide, crimes against humanity, war crimes : nullum crimen sine lege and the subject matter jurisdiction of the international criminal court* (Antwerpen: Intersentia, 2002) at 272; referring to *Statute of the International Criminal Tribunal for the Former Yugoslavia*, at art. 7, online: ICTY <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf>.

[56] Boot, *supra* note 55 at 274.

recommended.[57] Further, the two treaties that the Appeals Chamber relied on (the *International Convention for the Suppression of Terrorist Bombing* and the *Rome Statute*) both entered into force after *Tadic*.

45. A recurring criticism of joint criminal enterprise is that it "lacks clear definitions meticulously determining the scope of individual criminal responsibility."[58] To be sure, the elements of joint criminal enterprise set out in the *Tadic* Appeal Judgement contained a number of ambiguities relating to the nature of the common plan or purpose agreed to and the relationship between this common plan or purpose and the crimes perpetrated pursuant to it.

46. As the Appeals Chamber of the ICTY itself has acknowledged, such ambiguities raise a number of concerns in terms of fundamental fairness:

> The Statute does not provide for criminal liability other than for those forms of participation stated therein, expressly or implicitly. In particular, it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law.[59]

47. In a number of recent cases, most notably *Brdjanin* and *Martic*, the ICTY Appeals Chamber has sought to respond to both of these concerns and to clarify the elements of joint criminal enterprise. With the exception of Judge Schomburg, a majority current of opinion appears to have emerged in the ICTY Appeals Chamber as to how joint criminal enterprise should be deployed as a mode of liability.[60]

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[57] *Ibid.* at 36.

[58] *Prosecutor v. Limaj et al.*, IT-03-66-A, Judgment on Appeal - Partially Dissenting and Separate Opinion and Declaration of Judge Schomburg (27 September 2007) (ICTY) para. 10.

[59] *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Appeal Judgement (3 July 2002) at para. 34.

[60] See *Martic, supra* note 52 at paras. 168-173 (where the Appeals Chamber seeks to build a clear line of authority from *Stakic* and *Brdnin*).

48. Many defendants and commentators have argued that JCE amounts to mere "guilt by association." Indeed, the doctrine raises numerous issues about the proper scope of liability and the rights of defendants. We will examine in turn concerns over the *mens rea* standard, over the scope of the criminal enterprise. And over the participation requirement.

Concerns over the *Mens Rea* Standard

49. The lower standard of *mens rea* in JCE 3 is controversial because defendants are held liable for having specific intent to perpetrate the crime in question, when they may only have been reckless. In other words, applying 'extended' JCE to specific-intent crimes lowers the *mens rea* standard in a way that conflicts with the additional mental requirements particular to those crimes. JCE tests the elasticity of intent as an essential element of criminal responsibility for the worst crimes. As a result, 'extended' JCE makes it easier to convict secondary participants than perpetrators. On this basis, several domestic criminal systems including Germany, the Netherlands, and Switzerland reject 'extended' JCE as a mode of participation. Even in jurisdictions where it is accepted such as Canada, the U.S., and the United Kingdom, the doctrine is highly criticized.[61]

50. Ever since the ICTY Appeal Chamber's ruling in *Brdjanin,* that 'extended' JCE is applicable to specific-intent crimes like genocide,[62] the issue has remained highly controversial.[63] The Appeals Chamber ruling in *Brdjanin* that the Trial Chamber erred in finding that 'extended' JCE did not apply to genocide lowered the *mens rea* standard for

[61] *Marston &* Martinez, *supra* note 41at 32.
[62] *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Interlocutory Appeal (19 March 2004) (ICTY); *Prosecutor v. Milosevic,* IT-02-54-T, Decision on Motion for Judgment of Acquittal (16 June 2004) (ICTY); *Prosecutor v. Karemera, Ngirumpatse, Nzirorera, Rwamakuba*, ICTR-98-44-T, Trial Decision (11 May 2004) at para. 46.
[63] *Prosecutor v. Kvočka et al.*, IT-98-30/1, Decision on the Preliminary Motions by the Defence Challenging Jurisdiction in Relation to Joint Criminal Enterprise (2 November 2001) at para. 288.

genocide from "shared intent to destroy a group" to "natural and foreseeable" destruction of a group.[64]

51. Critics of the *Brdjanin* decision argue that the most salient feature of genocide, like other specific-intent crimes, is its "elevated *mens rea.*" To eliminate this criterion approximates "guilt by association" and violates the additional intent requirements provided for in the international tribunals' statutes. Advocates argue that the additional requirements for genocide are "in addition to" rather than "in preclusion of" the individual responsibility requirements, and thus 'extended' JCE is no different than any other mode of participation in genocide.[65] The Appeals Chamber ruling in *Krstic*, that a conviction of genocide based on JCE requires "unequivocal" proof of specific genocidal intent, suggests that this area of JCE remains unsettled.[66] Indeed, commentators have interpreted the *Krstic* Appeal judgment as indicating "some concern with vicarious criminal liability within the context of genocidal joint criminal enterprise."[67]

Concerns over the Scope of the Criminal Enterprise

52. With the exception of JCE 2, in which the scope is restricted to the camp setting, there is substantial prosecutorial discretion in how to define the scope of a criminal enterprise.[68] This discretion is controversial because the more broadly an enterprise is defined, the more likely a particular act will fall within its scope. Some international criminal law scholars fear that "prosecutorial discretion, not individual action, appears to be the only meaningful limit on the extent of wrongdoing attributable

[64] *Brđanin*, Decision on Interlocutory Appeal, *supra* note 62.
[65] *Karemera*, *supra* note 62 at para. 46.
[66] *Prosecution v. Krstić*, IT-98-33-A, Appeal Judgement (19 April 2004) (ICTY) at para. 134.
[67] Mark A. Drumbl, "ICTY Appeals Chamber Delivers Two Major Judgments: *Blaskic* and *Krstic*" *ASIL Insights* (August 2004), online: ASIL <www.asil.org/insights/insigh143.htm>.
[68] *Marston* & Martinez, *supra* note 41.

to an individual defendant in JCE."[69] However, the use of prosecutorial discretion in defining scope finds "ample support" in U.S. domestic criminal law.[70] Some domestic criminal law systems have attempted to deal with this ambiguity by imposing restrictions on scope, requiring that the prosecution demonstrate that the enterprise have a "continuity of both structure and personality" rather than simply a "common or shared purpose which animates those associated with it."[71]

53. The scope of what constitutes a criminal enterprise was addressed extensively in the IMT judgments. The tribunal held that a group or organization which shared common planning, frequent conferences between staff officers and field commanders and overall coordination was not sufficient to constitute a criminal enterprise. The criminal purpose and objectives of the enterprise had to be apparent so that the individuals who were a party to the alleged enterprise must have had knowledge, or would have been presumed to have had knowledge of the purpose behind the enterprise.

54. The IMT held that the common plan or conspiracy "must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action."[72] Article 9 of the *Nuremberg Charter* gave the Tribunal the authority to declare that a group or organization was a criminal organization. The effect of the declaration of criminality by the Tribunal essentially lessened the burden of proof of the Prosecution.

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[69] *Ibid.*
[70] *Ibid.* at 64.
[71] *United States v. Bledsoe,* 674 F. 2d 647 (C.A. Mo. 1982).
[72] *France et al. v. Goering et al.,* (1946) 22 IMT 411; 41 A.J.I.L. 172.

55. In effect, mere membership in a criminal organization in a leadership capacity was sufficient to bring a person in front of the Tribunal. However, the Tribunal emphasized that standards of justice still applied. While membership in a criminal organization created grounds for indictment and lessened the burden of proof on the prosecution, membership alone was insufficient to convict an individual. The accused maintained the right to prove that they had no knowledge of the criminal purposes or acts of the organization or that they were forced into membership with no choice.[73]

56. Following their pronouncement on the reach of a declaration of criminality, the Tribunal found that, in Nazi Germany, the General Staff and High Command and the Reich Cabinet were not in fact criminal enterprises – though individuals within these groups could be found guilty of criminal acts; the Gestapo and the SS, on the other hand, were found to be criminal organizations as the primary objectives of these groups involved criminal activities.[74]

[73] *Ibid.* at 500; Quincy Wright, "International Law and Guilt By Association" (1949) 43 A.J.I.L.746 at 754; H. Donnedieu de Vabrez, "Le proces de Nuremberg devant les principes modernes du droit pénal international" (1947) 70 Rec. des Cours 483 at 543-58.
[74] *France et al., supra* note 72 at 500.

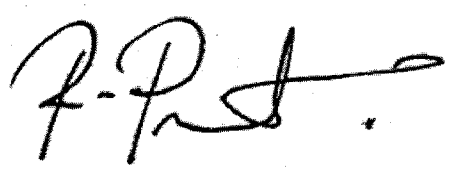
Concerns over the Participation Requirement

57. The threshold for 'participation' in a JCE is also not settled. While *Kvocka* established that the defendant's act must be "in some way…directed to the furthering of the common plan or purpose," it is unclear whether a "*de minimis* contribution to a JCE suffice(s) to place an individual within the criminal enterprise."[75] Although the ICTY Trial Chamber introduced the threshold of "substantial" participation, the Appeals Chamber has yet to endorse this definition.[76] Some doctrinal writers support adoption of the Trial Chamber standard.[77] This issue is most troublesome when applied to the conduct of lower-ranking officials for whom a minor role might translate into criminal responsibility for an elaborate JCE.[78]

[75] Kvočka, *supra* note 63 at para. 289; *Marston &* Martinez, *supra* note 41.
[76] *Marston &* Martinez, *supra* note 41 at 59; Kvočka, *supra* note 63 at 309, 311; *Simić*, supra note 54 at para. 159.
[77] *Marston &* Martinez, *supra* note 41 at 3.
[78] *Ibid.* at 60.

V. CONCLUSION

In light of the preceding analysis, the *amicus* finds that the doctrine of joint criminal enterprise was recognized under international criminal law during the relevant period (1975-1979). As such, it can be applied by the ECCC in the instant case without contravening the principle of *nullum crimen sine lege*. The Court should bear in mind that that same principle directs that the accused benefit from any legal development posterior to the impugned act making JCE more favourable to the accused. This is an issue to be examined at the trial rather than the pre-trial stage, and for that reason it was not developed here.



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