D97/14/5

BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/OCIJ(PTC 35) **Party Filing:** The Defence for IENG Sary

Filed to: The Pre-Trial Chamber **Original language:** ENGLISH

Date of document: 22 January 2010

ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
Date of receipt: 22/01/2010
Time: 12:00
Case File Officer/L'agent chargé du dossier: CM Sun

CLASSIFICATION

Classification of the document suggested by the filing party: PUBLIC

Classification by OCIJ or Chamber: សាធារណៈ / Public CR

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

IENG SARY'S APPEAL AGAINST THE OCIJ'S ORDER ON THE APPLICATION AT THE ECCC OF THE FORM OF LIABILITY KNOWN AS JOINT CRIMINAL ENTERPRISE

Filed by:

The Co-Lawyers:

ANG Udom
Michael G. KARNAVAS

ឯកសារបានចំតួចម្តងត្រឹមត្រូវតាមច្បាប់ដើម
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date /Date de certification): 28/01/2010
បេឡិខ្ទុលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier: Uch Arun

Distribution to:

The Pre-Trial Chamber Judges:

PRAK Kimsan
NEY Thol
HUOT Vuthy
Katinka LAHUIS
Rowan DOWNING

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

All Defence Teams

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits, pursuant to Rules 74(3)(a), 55(10), 74(3)(b), and 21 of the ECCC Internal Rules ("Rules"), this Appeal[1] against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise ("Impugned Order").[2]

I. SYNOPSIS OF THE IMPUGNED ORDER

1. The OCIJ, after recognizing that joint criminal enterprise ("JCE") liability is *not* a form of criminal liability which exists in Cambodia,[3] reached the following conclusions:
   a. JCE is a form of "commission" under customary international law which was articulated by the ICTY *Tadić* Appeals Chamber and has 3 categories. Each category has the same *actus reus* elements but is defined according to different degrees of *mens rea*. JCE II is essentially a variation of JCE I;[4]
   b. To rely on JCE liability in legal proceedings, the principle of legality requires an assessment of whether JCE liability was applicable law at the time of the alleged facts under investigation. Two principal considerations are that criminal liability must be sufficiently foreseeable and accessible. This test of foreseeability and accessibility can be satisfied when the alleged activity was criminalized under national or international law at the particular time period;[5]
   c. The application of customary international law at the ECCC is a corollary from the finding that the ECCC holds indicia of an international court applying international law. Considering the international aspects of the ECCC and considering that the jurisprudence relied upon in articulating JCE liability pre-existed the events under investigation at the ECCC, there is a basis under international law for applying this form of liability;[6]
   d. It cannot be affirmed that international forms of liability such as JCE apply beyond the domain of international crimes. Under French law, which inspired the 1956 Penal Code, international crimes such as those falling under the jurisdiction of the ECCC constitute specific categories of crimes under autonomous legal *"regimes"* distinct from domestic

---

[1] Because of the various issues the Pre-Trial Chamber has been exposed to by the Defence, the Civil Parties, and the *Amici Curiae* in Case 001, the Defence has provided Annex A which sets out the Defence arguments previously raised concerning the applicability of JCE at the ECCC. Annex B sets out for descriptive purposes a synopsis of the law on JCE as it has developed at the *ad hoc* tribunals.
[2] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, ERN: 00411047-00411056.
[3] *Id.*, para. 22.
[4] *Id.*, paras. 13-17.
[5] *Id.*, paras. 18-20.
[6] *Id.*, para. 21.

criminal law. Pursuant to principles of interpretation of autonomous legal "*regimes*," the forms of liability for international crimes can only be applied to international crimes.[7]

e. The elements of JCE liability were foreseeable and accessible under international law in 1975 in Cambodia; the principle of legality is not violated by the application of JCE liability before the ECCC; the aspects of JCE liability were adequately pled in the Introductory Submission; and JCE liability is applicable in all three forms, though it does not apply to national crimes. The *mens rea* for JCE III is limited to the subjective acceptance of the natural and foreseeable consequences.[8]

II. SUMMARY OF ARGUMENTS

2. This Appeal will show that the OCIJ made the following errors when it determined that JCE liability is applicable at the ECCC:

a. The OCIJ erred in finding that the ECCC holds indicia of an international court. The ECCC is a domestic Cambodian court;

b. The OCIJ erred when it concluded that the ECCC could apply customary international law. The ECCC, as a domestic Cambodian court, cannot directly apply customary international law. There is no exception in Cambodia based on a theory of international crimes being subject to autonomous legal "*regimes*";

c. The OCIJ failed to undertake any independent analysis as to whether JCE liability was indeed customary international law in 1975-79. Even if the ECCC could apply customary international law, JCE liability was not part of customary international law in 1975-79;

d. The OCIJ erred in accepting that JCE liability as formulated by the *Tadić* Appeals Chamber could fall under "committing" in Article 29 of the Establishment Law; and

e. The OCIJ erred in holding that the application of JCE liability would not violate the principle of legality. Even if the ECCC could apply customary international law *and even if* JCE liability were part of customary international law in 1975-79, the principle of legality would still not allow its application at the ECCC.

III. PRELIMINARY ISSUES

A. Admissibility of the Appeal

3. This Appeal is admissible under either Rule 74(3)(a) or Rules 55(10) and 74(3)(b) of the Internal Rules. Rule 74(3)(a) states that Charged Persons may appeal against orders of the OCIJ confirming the jurisdiction of the ECCC. In the Impugned Order, the OCIJ has declared that the ECCC has jurisdiction to apply JCE as a form of liability to international

---

[7] *Id.*, para. 22.
[8] *Id.*, para. 23.

crimes. JCE liability, however, cannot be found in the Establishment Law,[9] which, pursuant to the Agreement, sets out the jurisdiction of the ECCC.[10]

4. Rules 55(10) and 74(3)(b) state that Charged Persons may appeal against the OCIJ's refusal of a request for investigative action. The Impugned Order states that IENG Sary's Motion against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise[11] was properly considered as a request for investigative action under Rule 55(10).[12]
5. Even if this Appeal were not admissible under the above mentioned Rules, it must still be admitted pursuant to Rule 21, which requires that the trial be fair and provides that every person has a right to be informed of any charges brought against him or her. The OCIJ recognized that the Charged Persons have a right to be informed of the forms of liability with which they might be charged. It stated that "[t]he issue ... raises the matter of providing due notice to the Defence on modes of liability. ... The term 'joint criminal enterprise' is not expressly mentioned in the Law or in the Agreement. ... [I]n these circumstances, the Co-Investigating Judges find it necessary to respond to the Request for the purpose of providing sufficient notice relating to a mode of liability which is not expressly articulated in the Law or the Agreement."[13]

B. Request for Oral Argument

6. Mr. IENG Sary's rights are at stake. The OCIJ's decision violates the principle of legality, thus infringing the fundamental fair trial rights afforded to him by the Cambodian Constitution and the Establishment Law. A public, oral hearing is necessary to fully and transparently address the issues raised in this Appeal. The OCIJ decision affects not only the forms of liability applied at the ECCC, but also the status of the ECCC in relation to international law. A public vetting of the applicability of JCE liability before the ECCC is warranted.

---

[9] *Id.*, paras. 21-22, and conclusion.
[10] Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea ("Agreement"), Art. 2(1).
[11] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion Against the Application at the ECCC of the Form of Liability known as Joint Criminal Enterprise, 28 July 2008, D97.
[12] Impugned Order, para. 8 "[T]he motion of IENG Sary was submitted erroneously under Internal Rule 53(1)... However, the Co-Investigating Judges decide *proprio motu* to consider this motion under the correct provision of the Internal Rules, namely Rule 55(10)."
[13] *Id.*, para. 10 (emphasis added).

IV. ARGUMENT

A. The OCIJ erred in finding that the ECCC holds indicia of an international court. The ECCC is a domestic, Cambodian court.

1. Statements by the Pre-Trial Chamber in Case 001

7. The OCIJ erred when – citing the Pre-Trial Chamber in Case 001 – it stated that "the application of international customary law before the ECCC is a corollary from the finding that the ECCC holds indicia of an international court applying international law."[14] The Pre-Trial Chamber stated, "For all practical and legal purposes, the ECCC is, and operates as, an independent entity within the Cambodian court structure..."[15] While it noted that the Office of the Co-Prosecutors ("OCP") had submitted that the ECCC was a "special internationalized tribunal,"[16] the Pre-Trial Chamber did not adopt this position.

8. When discussing the ECCC's separation from the Military Court, the Pre-Trial Chamber referred "to the decision of the Appeals Chamber of the Special Court for Sierra Leone in the case of *Taylor*, where it considered the indicia of an international court included the facts that the court is established by treaty, that it was 'an expression of the will of the international community', that it is considered 'part of the machinery of international justice' and that its jurisdiction involves trying the most serious international crimes."[17] Citing this statement, the OCIJ concluded that there were "international aspects" to the ECCC which form a "basis under international law for applying JCE..."[18]

9. The Special Court for Sierra Leone ("SCSL") differs substantially from the ECCC. International elements were effectively "grafted onto" the domestic legal system in Cambodia, unlike in Sierra Leone, where "the hybrid court exists as an institution external to the domestic system."[19] Hence, "care must be taken when lumping the various hybrid tribunals into one category. The [SCSL], 'Regulation-64 Panels' of Kosovo, Special Panel for Serious Crimes in East Timor and Cambodia's Extraordinary Chambers are each distinct in their legal bases and their particular mix of international and domestic personnel and law."[20]

---

[14] *Id.*, para. 21.
[15] *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch", 3 December 2007, para. 19 (emphasis added).
[16] "The Co-Prosecutors have submitted that this independence, which makes the ECCC a 'special internationalised tribunal', is demonstrated by a number of factors that are summarised in the Report." *Id.* (emphasis added).
[17] *Id.*, para. 20.
[18] Impugned Order, para. 21.
[19] Parinaz Kermani Mendez, *The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?*, 20 CRIM. L. F. 53, 62 (2009).
[20] *Id.*, at 63. *See also Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), IENG Sary's Submissions Pursuant to the Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues, 7 April 2008, C/22/I/26, ERN: 00177265-00177280, Annex A, which compares the ECCC to various "hybrid" tribunals.

10. In 2000, Sierra Leone's President Kabbah sought United Nations ("UN") assistance in setting up a tribunal similar to the ICTY and ICTR, established by the Security Council.[21] In fact, he also proposed that the Appeals Chamber could be shared with the ICTY/ICTR and that the judges could be international, though he did propose a co-prosecutor system with a national and an international co-prosecutor.[22]

11. The UN Security Council requested the Secretary General to negotiate an agreement with the Sierra Leonean government "to create an independent special court..."[23] Due to cost, the international community was reluctant to establish another *ad hoc* tribunal.[24] Instead, the Agreement reached provided for an "international special court" established by treaty "to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law."[25] The Secretary General explained,[26]

> [the] guarantee of developing a coherent body of law ... may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals... Article 20, paragraph 3, of the Statute accordingly provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the Yugoslav and the Rwanda Tribunals; article 14, paragraph 1, of the Statute provides that the Rules of Procedure and Evidence of the Rwanda Tribunal shall be applicable *mutatis mutandis* to the proceedings before the Special Court.

12. Those convicted by the SCSL may be imprisoned in any of the States which have concluded agreements with the ICTY or ICTR on the enforcement of sentences.[27] In determining the terms of imprisonment, the SCSL's Statute states that the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences at the ICTR and in the national courts of Sierra Leone.[28]

13. Each Trial Chamber at the SCSL consists of three judges: two appointed by the Secretary General, with particular focus on member States of the Economic Community of West African States and the Commonwealth, and one appointed by the Sierra Leonean

---

[21] Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. No. S/2000/786, 10 Aug 2000, p. 4.
[22] *Id.*, at 5.
[23] UN Security Council Resolution 1315, UN Doc. No. S/RES/1315 (2000), 14 August 2000, p. 2.
[24] Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. F. 185, 232 (2001).
[25] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone ("SCSL Agreement"), preamble (emphasis added).
[26] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. No. S/2000/915, 4 October 2000, para. 41
[27] SCSL Agreement, Art. 22(1).
[28] Statute of the Special Court for Sierra Leone ("SCSL Statute"), Art. 19(1).

government, though he or she need not be a national of Sierra Leone.[29] The Appeals Chamber is comprised of five judges, three appointed by the UN and two by Sierra Leone.[30] The Secretary General appoints an international prosecutor to lead investigations, with a Sierra Leonean deputy.[31] There is a possibility for the SCSL seat to be moved outside of Sierra Leone,[32] as was done in the Charles Taylor case.[33] The SCSL Agreement "shall be terminated by agreement of the Parties upon completion of the judicial activities of the Special Court."[34] Thus, for all intents and purposes, the SCSL is controlled by the UN.

14. In contrast, the negotiations for the establishment of the ECCC resulted in the creation of national chambers within the Cambodian court system assisted by international funding and resources. Neither the Cambodian Government nor the UN intended to establish the ECCC as an international court; nothing in the ECCC's founding documents bears this out – explicitly or implicitly.

15. During negotiations between the Cambodian government and the UN, the international community suggested the establishment of an international tribunal. This option, however, was explicitly rejected by the Cambodian government.[35] Prime Minister Samdech Akka Moha Sena Padei Techo Hun Sen insisted that the extent of the UN's participation be limited "to provid[ing] experts to assist Cambodia in drafting legislation that would provide for a special national Cambodian court to try Khmer Rouge leaders and that would provide for foreign judges and prosecutors to participate in its proceedings."[36] Thus, unquestionably, the Cambodian government and the UN negotiated and reached an agreement establishing the ECCC as a national court within the existing court structure.[37]

16. Reflecting the intent and results of the negotiations, the Agreement reads,

---

[29] *Id.*, Art. 12; SCSL Agreement, Art. 2.
[30] SCSL Statute, Art. 12; SCSL Agreement, Art. 2.
[31] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. No. S/2000/915, 4 October 2000, para. 47.
[32] SCSL Agreement, Art. 10.
[33] *See* UN Security Council Resolution 1688, UN Doc. No. S/RES/1688 (2006), 16 June 2006.
[34] SCSL Agreement, Art. 23.
[35] Report of the Secretary-General on Khmer Rouge trials, UN Doc. No. A/57/769, 31 March 2003, para. 6.
[36] *Id.*, para. 7. (emphasis added).
[37] *Id.*, para. 10. The Secretary-General stated, "In paragraph 1 of resolution 57/228, the General Assembly specifically mandated me to negotiate to conclude an agreement which would be consistent with the provisions of that resolution. It was my understanding that, to be consistent with the terms of the resolution, any agreement between the United Nations and the Government of Cambodia would have to satisfy the following conditions: (a) The agreement would have to respect and give concrete effect to the principle that the Extraordinary Chambers are to be national courts, within the existing court structure of Cambodia, established and operated with international assistance..." *See also id.*, para. 31, where he discusses the nature of the ECCC under the draft agreement: "The legal nature of the Extraordinary Chambers, like that of any legal entity, would be determined by the instrument that created them. In accordance with the draft agreement, the Extraordinary Chambers would be created by the national law of Cambodia. The Extraordinary Chambers would therefore be national Cambodian courts, established within the court structure of that country." (emphasis added).

> **WHEREAS** prior to the negotiation of the present Agreement substantial progress had been made by the Secretary-General of the United Nations ... and the Royal Government of Cambodia towards the establishment, with international assistance, of Extraordinary Chambers within the existing court structure of Cambodia
>
> ...
>
> **WHEREAS** by its resolution 57/228, the General Assembly ... requested the Secretary-General to resume negotiations, without delay, to conclude an agreement with the Government, based on previous negotiations...[38]

The Establishment Law confirms that the "Extraordinary Chambers shall be established in the existing court structure..."[39]

17. In deciding whether the Establishment Law was in accordance with the Cambodian Constitution, the Cambodian Constitutional Council's concern with the status of the ECCC is clear. It noted that "[i]n order to serve in the Extraordinary Chambers all the Cambodian and United Nations components shall be appointed by the Supreme Council of the Magistracy, which is a supreme Cambodian national institution, while the Director and Deputy Director of the Office of Administration are also to be appointed by Cambodian authorities. In this regard the United Nations only provides a list of candidates, and has no decision-making rights."[40] It further stated that "[u]tilising the existing Cambodian court system, and selecting Phnom Penh as the location for the proceedings again protect the sovereignty of the Kingdom of Cambodia."[41]
18. The ECCC and the United Nations Assistance to the Khmer Rouge Trials ("UNAKRT") websites also explain to the public that the ECCC is a national Cambodian court. The ECCC website states that "[t]he government of Cambodia insisted that, for the sake of the Cambodian people, the trial must be held in Cambodia using Cambodian staff and judges together with foreign personnel. Cambodia invited international participation due to the weakness of the Cambodian legal system and the international nature of the crimes, and to help in meeting international standards of justice."[42] The UNAKRT website states that "UNAKRT provides technical assistance to the Extraordinary Chambers in the Courts of

---

[38] Agreement, preamble.
[39] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("Establishment Law"), Article 2 new (emphasis added).
[40] Constitutional Council Decision No. 040/002/2001, 12 February 2001, p. 3 (unofficial translation, emphasis added).
[41] *Id.*, p. 4 (unofficial translation, emphasis added).
[42] *Available at* http://www.eccc.gov.kh/english/about_eccc.aspx.

Cambodia (ECCC). The ECCC is a domestic court supported with international staff, established in accordance with Cambodian law."[43]

19. Other notable differences distinguishing the SCSL as an "internationalized" court from the ECCC as a national court include:

- The international and domestic composition of the judges and prosecutors differs: Cambodia, rather than the UN, is responsible for the international appointments.
- At the ECCC, Defence Counsel must "act in accordance with the ... the Cambodian Law on the Statutes of the Bar..."[44] There is no such requirement at the SCSL.
- The Establishment Law does not state that the judges shall be guided by the ICTY/ICTR Appeals Chamber decisions *or* its rules of procedure *or* sentencing practices.
- Those convicted by the ECCC do not have the possibility of serving out their sentences in States that have concluded agreements with the ICTY or ICTR.
- There is no provision for the seat of the ECCC to move outside of Cambodia.
- The termination of the ECCC differs as well. Article 28 of the Agreement provides, "Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement."[45] The ECCC would not necessarily cease to function, should the Agreement be terminated.

2. Statements by the Trial Chamber in Case 001

20. In contrast to the Pre-Trial Chamber's statements relied upon by the OCIJ, the Trial Chamber in Case 001 stated that the ECCC is "a separately constituted, independent and internationalised court."[46] This statement was made for the purpose of establishing the ECCC's position *within* the domestic court structure and its relationship to other domestic courts.[47] The Trial Chamber did not explain the significance of this "internationalized" status, other than pointing out that the proceedings before the ECCC could not be considered a continuation of Duch's case before the Military Court. It certainly did not, because it could

---

[43] *Available at* http://www.unakrt-online.org/01_home.htm (emphasis added).
[44] Agreement, Art. 21(3).
[45] Emphasis added.
[46] *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on Request for Release, 15 June 2009, E39/5, ERN: 00338832-00338846 ("*Duch* TC Release Decision"), para. 10.
[47] This is also why the Pre-Trial Chamber, in the decision cited by the OCIJ, was discussing this matter.

not, declare that the ECCC was competent and authorized to directly apply customary international law based on this so called "internationalized" status, as the OCIJ claimed.[48]

21. The Trial Chamber only explained that the ECCC's structure differs from that of other Cambodian courts; its procedure must be in accordance with Cambodian law, as well as in compliance with international standards;[49] criteria which, in any event, are mandated by the Cambodian Constitution.[50] The Agreement provides,

> [t]he procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.[51]

While the procedure at the ECCC may possibly vary from the procedure employed in other Cambodian courts, the Agreement does not allow for the alteration of applicable substantive law. The Agreement cannot be considered as *carte blanche* authorization to introduce foreign legal concepts which have no basis in Cambodian law and/or are in contravention of the Cambodian Constitution.

22. The Trial Chamber noted that one difference between the ECCC and other Cambodian courts is that the ECCC "is composed of Cambodian and international staff and judicial officers, who have no competence to appear before or to sit in judgment over a decision by a domestic Cambodian court. Further, Cambodian judges before the ECCC have privileges and immunities additional to those possessed by other Cambodian judges."[52] Notwithstanding these differences, the Cambodian government has the ultimate discretion and authority as to who becomes a judge, co-investigating judge, or prosecutor at the ECCC: appointments are made by the Supreme Council of the Magistracy, based on nominations by the United Nations.[53]

23. If the ECCC were truly an international tribunal (or "internationalized", assuming this OCP designated moniker is of any worth), to the extent it can import laws and forms of liabilities distinct from and in contravention of the Cambodian Constitution, Criminal Code and Criminal Procedure, then how is it that its judges are not competent to deal with issues of

---

[48] Impugned Order, para. 21.
[49] *Duch* TC Release Decision, para. 11. "The structure of the ECCC is distinct from the structure of other Cambodian courts. While its procedure is in accordance with Cambodian law, the ECCC is entitled to adopt its own Internal Rules in compliance with international standards..." (emphasis added).
[50] *See* 1993 Constitution of Cambodia, as amended in 1999, Art. 31.
[51] Agreement, Art. 12(1). *See also* Establishment Law, Arts. 20 new, 23 new.
[52] *Duch* TC Release Decision, para. 11.
[53] Agreement, Arts. 3(1), 5(5), 6(5).

corruption at the ECCC? The ECCC Judges' decision to defer to the Cambodian government by declining to deal with the issue[54] suggests that they do view the ECCC as being a Cambodian court. Certainly, any of the *ad hoc* international tribunals or "internationalized" tribunals would not have deliberately opted to ignore, if not condone (a resulting perception due to inaction), the sort of corrupt practices purported to have existed at the ECCC.[55]

24. The term "internationalized" means nothing on its own as to whether the ECCC can apply customary international law, let alone ICTY and ICTR jurisprudence purporting to be customary international law. When viewed in context, the Pre-Trial Chamber and the Trial Chamber only meant to explain that, because of UN assistance, the ECCC has certain characteristics that other domestic Cambodian courts would not have and that, because of its mandate, there are no lines of authority linking the ECCC to the other courts of the Cambodian judicial system. There is nothing in the statements made by the Pre-Trial Chamber or Trial Chamber suggesting that the ECCC can act similarly to the ICTY, ICTR or the SCSL without due regard to the Cambodian legal system. The ECCC judges cannot usurp the constitutional and political authority of the duly elected executive and legislative branches of the Kingdom of Cambodia.

B. The OCIJ erred in holding that since the ECCC holds indicia of an international court, it could apply customary international law.

1. The ECCC as a domestic court cannot apply JCE liability as customary international law.

---

[54] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC20), Decision on the Charged Person's Appeal Against the Co-Investigating Judges' Order on NUON Chea's Eleventh Request for Investigative Action, 25 August 2009, D158/5/3/15, ERN: 00366747-00366761, para. 29: "The Pre-Trial Chamber further observes that this matter is before the appropriate authorities of the Kingdom of Cambodia and the United Nations."

[55] *See Case of Nuon Chea* 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Investigative Action, 27 March 2009, D158, ERN: 002294816-00294830; *Case of Nuon Chea* 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action, 3 April 2009, D158/5, ERN: 00294885-00294888; *Case of Ieng Sary* 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Motion to Join and Adopt Nuon Chea's Eleventh Request for Investigative Action, 27 March 2009, D258/2, ERN: 00294872-00294873; *Case of Nuon Chea* 002/19-09-2007-ECCC/OCIJ(PTC21), Appeal Against Order on Eleventh Request for Investigative Action, 4 May 2009, D158/5/1/1, ERN: 00323238-00323255; *Case of Ieng Sary* 002/19-09-2007-ECCC/OCIJ(PTC20), Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Request for Investigative Action Regarding Ongoing Allegation of Corruption and Request for an Expedited Oral Hearing, 4 May 2009, D158/5/3/1, ERN: 00323171-00323193; *Case of Nuon Chea* 002/19-09-2007-ECCC/OCIJ(PTC21), Decision on Appeal Against the Co-Investigating Judges' Order on the Charged Person's Eleventh Request for Investigative Action, 18 August 2009, D158/5/1/15, ERN: 00364033-00364046; *Case of Ieng Sary* 002/19-09-2007-ECCC/OCIJ(PTC20), Decision on the Charged Person's Appeal Against the Co-Investigating Judges' Order on Nuon Chea's Eleventh Request for Investigative Action, 25 August 2009, D158/5/3/15, ERN: 00366747-00366761; *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-TC, Group 1-Civil Parties' Co-Lawyers's Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, 11 May 2009, E65, ERN: 00327910-00327919; *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-TC, Decision on Group 1-Civil Parties' Co-lawyers's Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, 23 September 2009, E65/9, ERN: 00378404-00378411.

25. The OCIJ found that JCE liability does not exist in Cambodian law when it concluded that "[t]he elements of JCE which the Co-Investigating Judges find to be applicable law for the ECCC only apply with respect to international crimes and not Cambodian national crimes."[56] This was a correct legal finding.[57]

26. The OCIJ erred, however, when it found that the ECCC could apply JCE liability, as customary international law, to international crimes.[58] As argued *infra*, JCE liability is not customary international law. Even if JCE were considered customary international law, the ECCC may not apply customary international law. This is because: 1. Cambodia has not accepted that customary international law is binding and applicable domestically; and 2. Cambodian law does not allow for the application of unwritten criminal law provisions.

27. "Normally national courts do not undertake proceedings for international crimes only on the basis of international *customary* law, that is, if a crime is only provided for in that body of law."[59] According to a Max-Planck Institute comparative study concerning national prosecution for international crimes,[60] there are two prerequisites to applying customary international law in domestic courts:

> First, customary international law has to be applicable by the national courts of the respective State. The State that wants to punish somebody ... by directly applying customary international law has in general to accept customary international law as binding and applicable in the State.[61]
>
> ...
>
> Secondly, national law has to allow for applying unwritten criminal law provisions. In many countries a strict principle of legality prohibits a criminal prosecution by applying unwritten criminal law provisions.[62]

28. Cambodia adheres to a dualist system rather than a monist system, and will therefore not directly apply customary international law in the absence of specific directives in its

---

[56] Impugned Order, para. 22.
[57] For a thorough analysis on this issue, *see* Annex A, Section II C.
[58] *Id.*, para. 21.
[59] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 303 (Oxford University Press 2003).
[60] For a description of the study entitled *National Prosecution for International Crimes*, carried out by the Max-Planck Institut für ausländisches und internationales Strafrecht, Freiburg, Germany, *see* http://www.mpicc.de/ww/en/pub/forschung/forschungsarbeit/strafrecht/nationale_strafverfolgung.htm.
[61] Dr. Kreicker gives the example of Germany: "the German Constitution determines in art. 25, that customary international law is part of the German Federal Law and therefore binding for everybody." Note that Cambodia's Constitution does not contain such a provision.
[62] Discussed by Dr. Helmut Kreicker, Head of the Section "International Criminal Law" at the Max-Planck Institute for Foreign and International Criminal Law, Freiburg, Germany, in his work: *National Prosecution of Genocide from a Comparative Perspective*, 5 INT'L CRIM. L. REV. 313, 319-20 (2005) ("Kreicker"). Dr. Kreicker goes on to explain that "even in those States that [d]o not require written criminal law provisions but accept the validity of customary international law on the national level ... the model of direct application of customary international criminal law is not taken as an option. In no country under examination in the MPI-project it is an option to punish a perpetrator of genocide simply by applying customary international criminal law. In one way or another a national criminal law provision is required as a basis for national prosecution." *Id.*, at 320 (emphasis added).

Constitution, legislation or national jurisprudence which incorporate it into domestic law.[63] Neither the Constitutions that were in force at the time when the alleged crimes were committed, nor Cambodia's current Constitution, provide a procedure for the direct incorporation of customary international law into domestic law. The Cambodian National Assembly has not passed any legislation which incorporates JCE liability in the domestic legal system.

29. Cambodian law does not allow for the application of unwritten criminal law provisions.[64] Similarly, the courts of France, whose legal system the Cambodian system is modelled after,[65] have held that customary international law may not be applied directly in French courts due to the lack of written provisions in the French jurisdiction criminalizing the relevant conduct.[66] In the *Aussaresses* case,[67] for example, the *Cour de Cassation* upheld a Paris Court of Appeals decision that prosecution of General Aussaresses for crimes against humanity committed during the Algerian war was barred. It came to this decision because the penal code in force at the time did not contain provisions criminalizing crimes against humanity, although crimes against humanity were criminalized under customary international law at the time.[68] "[I]nternational customary rules cannot make up for the absence of a provision which criminalizes the acts denounced by the civil petitioner (*partie civile*) as crimes against humanity."[69]

30. A similar approach rejecting the direct application of customary international law has been followed by the Dutch Supreme Court in the *Bouterse* case,[70] which ruled against the direct application of custom as a basis for international criminal prosecutions in its national courts. In this judgment it was held that direct applicability would pose a threat to the principle of

---

[63] Adherence to either a monist or dualist system determines the mechanism that a state employs in order to give effect to its international obligations. A State that adheres to a dualist system considers international law to be separate from domestic law. *See* Annex A, Section II F (1)(a) for a discussion of the difference between dualist and monist systems. *See also Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion against the Applicability of the Crime of Genocide at the ECCC, 30 October 2009, D240, ERN: 00401925-00401940, paras. 17-20.

[64] This is due to Article 6 of the 1956 Penal Code, which provides that "No crime can be punished by the application of penalties which were not pronounced by the law before it was committed." (Unofficial translation).

[65] *See e.g.*, Impugned Order, para. 22. The OCIJ notes that the 1956 Penal code was inspired by French law.

[66] This is common in many jurisdictions. "[M]any national legal orders do not accept custom as a source of criminal law in the consideration that custom does not fulfil the requirements of specificity and foreseeability, which are essential to the legality principle and to the effectiveness of the preventive function of criminal law." Héctor Olásolo, *A Note on the Evolution of the Principle of Legality in International Criminal Law*, 18 CRIM. L. F. 301, 316-17 (2007) ("Olásolo, *Principle of Legality*").

[67] Cour de Cassation, Chambre Criminelle, 17 June 2003, *Bull. crim.* 2003 n° 122, p. 465.

[68] *See* Juliette Lelieur-Fischer, *Prosecuting the Crimes against Humanity Committed during the Algerian War: an Impossible Endeavour?*, 2 J. INT'L CRIM. JUST. 231 (2004).

[69] *Id.*, at 236, quoting the *Cour de Cassation* Judgement of 17 June 2003.

[70] *In re Bouterse*, HR, Sept. 18, 2001, NJ 559.

nullum crimen sine lege.[71] In his advisory opinion to the Amsterdam Court of Appeal, the court-appointed expert, Professor John Dugard, also states that Dutch law "appears to require a national statute which translates international law obligations into municipal law where the criminalization of human conduct is concerned."[72] Similar findings have been reached by courts of Germany,[73] Switzerland[74] and other States.[75]

31. It is improbable that customary international law could ever be directly applied to criminal law in a domestic system in the absence of a Constitutional provision or implementing legislation as it would violate the principle of *nullum crimen sine lege*.[76] Susan Lamb, a former prosecutor at the ICTY and the current Senior Judicial Coordinator at the ECCC explains that "the *nullum crimen* principle, which relies on expressed prohibitions and is based explicitly upon the value of legal certainty, sits uneasily with the very nature of customary international law, which is unwritten and frequently difficult to define with precision."[77] She also states, "The principle of legality assumes a rational, autonomous legal subject and a known or knowable law: it is frequently presumed, as a corollary, that the *nullum crimen* principle is thus compatible only with written law."[78] As Professors Fletcher and Ohlin note,

> To use custom to enhance the prospects of conviction is to violate the fundamental assumptions of modern criminal law. 'Customary law' is anathema in the criminal courts of every civilized society. The reason for legislation is to drive custom from the system and to create a regime based on rules and standards declared publicly, in advance, by a competent authority.[79]

---

[71] WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 69 (T.M.C. Asser Press 2006) ("FERDINANDUSSE").

[72] *In re Bouterse*, Amsterdam Court of Appeal, LJN: AA8427, 7 July 2000, para. 8.2.2, *citing* BERT SWART & ANDRE KLIP (EDS), INTERNATIONAL CRIMINAL LAW IN THE NETHERLANDS 27-38 (1997).

[73] The principle of legality in German law apparently excludes general direct application of international offenses altogether, whether they are contained in custom or conventions. FERDINANDUSSE, at 40.

[74] The Swiss Military Court of Appeal held in 2000 that the customary criminalization of genocide could not be applied in absence of a specific rule of reference allowing its application at the time when the alleged acts were committed. *Id.*, at 40-41.

[75] *See* Kreicker, at 320.

[76] "In the context of national legal orders, the substantive dimension of the legality principle in criminal law, and in particular its manifestations encapsulated in the *maxims nullum crimen sine lege* and *nulla poena sine lege*, includes an additional formal safeguard whereby the prohibited acts and the penalties must be pre-established by norms that can be considered "laws" in formal terms and that can be issued only by a legislative power. Therefore, the possibility of criminalising certain behaviour or establishing penalties on the basis of non-written sources of law – such as custom or the general principles of law – which offer lesser safeguards from the perspective of specificity and forseeability, is excluded." Olásolo, *Principle of Legality*, at 302 (emphasis added).

[77] Susan Lamb, Nullum Crimen, Nulla Poena Sine Lege *in International Criminal Law*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOL. 1 743 (Oxford University Press, 2002) ("Lamb").

[78] *Id.*, at 749 (emphasis added).

[79] George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 559 (2005) ("Fletcher & Ohlin, *Reclaiming Fundamental Principles*"). *See*

2. There is no exception which allows the direct application of customary international law to autonomous legal "*regimes.*"

32. The OCIJ notes that the 1956 Penal Code was inspired from French law, and that "under French law, international crimes such as those falling under the jurisdiction of the ECCC constitute specific categories of crimes under autonomous legal '*regimes*', distinct from domestic criminal law, and characterized by a coherent set of rules of procedure and substance."[80] While the Defence concurs with the OCIJ's finding that JCE cannot be applied to domestic Cambodian crimes,[81] this concept of autonomous legal regimes cannot in any way be used to justify the application of JCE to international crimes.

33. The concept of autonomous legal regimes is simply a doctrinal concept referring to certain categories of crimes in French law which may have special characteristics, such as 1) crimes against humanity, 2) acts of terrorism, 3) sexual offenses, and 4) tax and customs offenses.[82] This concept is not based on the French Constitution or upon any legal text. Furthermore, as explained by some of the Civil Parties in their Appeal against the Impugned Order, "[t]here was no specific autonomous legal regime for such crimes under Cambodian law; there is no need to devise an interpretation scheme for specific categories based on the French legal tradition."[83]

34. The concept of autonomous legal regimes does not in any way suggest that JCE liability can be applied when that form of liability does not exist in France or Cambodia. The reference to autonomous legal regimes is misleading. The sole authority cited by the OCIJ when it discusses the concept of autonomous legal regimes,[84] does not state that any legal consequence can be drawn from the fact that certain crimes are considered part of an autonomous legal regime. In fact, the text cited by the OCIJ supports the conclusion that JCE cannot be applied at the ECCC. The text discusses crimes against humanity and notes that it is unclear whether an exception to the principle of non-retroactivity found in the European Convention on Human Rights would be applied by French courts, given that they consider their Constitution to prevail over international law.[85] The *Aussaresses* case discussed above, which was decided after this book was published, makes it clear that even if crimes against

---

also p. 555-56, where it is argued that using customary international law as a means of increasing exposure to criminal liability is illegitimate under the principle of legality.

[80] Impugned Order, para. 22.

[81] *Id.*

[82] FREDERIC DESPORTES & FRANCIS LE GUNEHEC, DROIT PENAL GENERAL 117, para. 174 (2002).

[83] *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ(PTC37), Appeal Brief Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 January 2010, D97/17/1, ERN: 00428308-00428315 ("Civil Parties JCE Appeal"), para. 11.

[84] FREDERIC DESPORTES & FRANCIS LE GUNEHEC, DROIT PENAL GENERAL (2002).

[85] *Id.*, at 121-22.

humanity could be considered to fall under an autonomous legal regime, one cannot be punished for crimes against humanity without reference to domestic legislation.

35. Furthermore, reference to French law supports the conclusion that JCE cannot be applied at the ECCC in another way. As noted by McGill University in its *amicus curiae* brief, France enacted a law in 1948 which addressed the issue of individual liability in a common plan or scheme, but repealed this law in 1953. "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*."[86] If France rejected JCE liability during the time period at issue, how can French legal concepts be cited in support of its application at the ECCC?

C. The OCIJ erred in accepting that all three forms of JCE liability as formulated by the *Tadić* Appeals Chamber could be considered customary international law in 1975-79.

1. The *Tadić* Appeals Chamber wrongly determined that JCE liability existed under customary international law.

36. The OCIJ correctly noted that Article 29 of the Establishment Law does not refer to JCE liability.[87] It then stated that "JCE is a mode of liability articulated as a form of commission in the *Tadić* Appeal Judgement at the ICTY..."[88] The OCIJ's acceptance of the *Tadić* Appeals Chamber's formulation of JCE liability and its failure to give any explanation as to why it accepted this formulation is clear error. The controversy[89] surrounding the status of JCE liability in customary international law and the fact that JCE liability is not expressly provided for in the Establishment Law require that its status be examined anew. Thus, it should come as no surprise that the new international Co-Prosecutor, Andrew Cayley, in two

---

[86] *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Amicus Curiae Brief Submitted by the Centre for Human Rights and Legal Pluralism, McGill University, 27 October 2008, D99/3/25, ERN: 00234856-00234883 ("McGill Brief"), para. 27.

[87] Impugned Order, para. 13.

[88] *Id.*

[89] *See e.g.*, Ciara Damgaard, *The Joint Criminal Enterprise Doctrine: A "Monster Theory of Liability" or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?*, *in* INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES 129 (Springer, 2008) ("Damgaard"). "[T]his doctrine raises a number of grave concerns. It, arguably, inter alia is imprecise, dilutes standards of proof, undermines the principle of individual criminal responsibility in favour of collective responsibility, infringes the nullum crimen sine lege principle and infringes the right of the accused to a fair trial." Mohamed Elewa Badar, *"Just Convict Everyone!" – Joint Perpetration: From* Tadić *to* Stakić *and Back Again*, 6 INT'L CRIM. L. REV. 293, 301 (2006): "A major source of concern with regard to the applicability of JCE III in the sphere of international criminal law is that under both the objective and subjective standards, the participant is unfairly held liable for criminal conducts that he neither intended nor participated in." William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENGLAND L. REV. 1015, 1033-34: "Granted these two techniques [JCE and command responsibility] facilitate the conviction of individual villains who have apparently participated in serious violations of human rights. But they result in discounted convictions that inevitably diminish the didactic significance of the Tribunal's judgements and that compromise its historical legacy."

cases where he has been engaged as a defence counsel (*Taylor*, before the SCSL and *Gotovina et al.*,[90] before the ICTY), JCE has been robustly challenged as a legitimate form of liability. Certain Civil Parties in both Case 001 and 002 have also argued that JCE should not apply.[91]

37. The *Tadić* Appeals Chamber found that JCE liability is established in customary international law.[92] This erroneous conclusion became accepted at the ICTY and ICTR (which, incidentally, share the same Appeals Chamber) without any further independent analysis,[93] despite strong criticism, and despite the fact that the *Tadić* Appeals Chamber made its determination on the issue of JCE liability's customary status without having had the benefit of reasoned arguments from both the Prosecution and the Defence – the *Tadić* Defence did not challenge the application of JCE liability.[94] The *Tadić* Appeals Chamber engaged in an unsound examination of whether JCE liability could be considered customary international

---

[90] *See Prosecutor v. Gotovina et al.*, IT-06-90-PT, Defendant Ante Gotovina's Preliminary Motion Challenging Jurisdiction Pursuant to Rule 72(A)(i) of the Rules of Procedure and Evidence, 18 January 2007; *Prosecutor v. Čermak & Markač*, IT-03-73-PT, Mladen Markač's Preliminary Motion on the Defects in the Form of the Indictment, 9 July 2004; *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, 27 February 2009. In both of these cases, Mr. Cayley acts as co-counsel of record, for Mr. Čermak at the ICTY and Mr. Taylor at the SCSL.

[91] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Response of Co-Lawyers for the Civil Parties on Joint Criminal Enterprise, 30 December 2008, D97/3/4, ERN: 00268488-00268498; *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Response of Foreign Co-Lawyer for the Civil Parties to the *amicus curiae* briefs, 17 November 2008, D99/3/32, ERN: 00239077-00239087; *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC/TC, Transcript of Trial Proceedings - Kaing Guek Eav "Duch" Public – Redacted, 23 November 2009, E1/78.1, p. 5, l. 25 – p. 6, l. 9.

[92] For one discussion of the problems with the *Tadić* Appeals Chamber's approach to assessing the existence of customary international law, *see* Vladimir-Djuro Degan, *On the Sources of International Criminal Law*, 4(1) CHINESE J. INT'L L. 45, 77-78 (2005) ("Degan"), where Professor Degan explains that Antonio Cassese, the Presiding Judge of the *Tadić* Appeals Chamber, is "one of the champions of this 'judge-made law.'" Professor Degan is quite critical of Judge Cassese's approach to assessing the existence of customary international law. He explains some problems with Judge Cassese's approach, and finally cautions that "[i]t must be finally stressed that normative statements in judicial decisions should be considered only as emerging customary law and not as positive legal rules. They can transform into genuine customary law subsequently, if a majority of States confirm them in practice coupled with the *communis opinio juris*. However, this legislative process is generally inappropriate for criminal courts, because of a constant risk of punishing the indicted for some acts which were not criminal at the time of their commission."

[93] As Professor Olásolo notes, "After the *Tadić* case, the ICTY and ICTR Appeals Chambers have, for the most part, discussed only issues such as the specific contents of some of the elements of the three forms of joint criminal enterprise and the degree of specificity required from their pleading. However, these Appeals Chambers have never reviewed the merits of the analysis undertaken by the *Tadić* Appeal Judgment." HÉCTOR OLÁSOLO, THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPLES TO INTERNATIONAL CRIMES 49 (Hart Publishing 2009) (emphasis added).

[94] "It is a great pity that the Appeals Chamber in *Ojdanić* declined to revisit the *Tadić* finding. In *Tadić*, unlike *Ojdanić*, the defence did not challenge the existence of joint criminal enterprise liability or its presence under Article 7(1) of the Statute. Thus, the Appeals Chamber in *Tadić* did not have the benefit of arguments from both the prosecution and the defence as to the status of joint criminal enterprise under customary international law. A closer inspection of the authorities and practice cited in *Tadić* as giving rise to a customary norm of international law in relation to the third category of joint criminal enterprise, the extended form, reveals that the acceptance of such liability was limited." Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606, 615 (2004) ("Powles").

law, as it relied on 1) too few cases,[95] and 2) the treaties it relied upon do not actually provide support for JCE liability, as claimed.

a) The *Tadić* Appeals Chamber relied on too few cases.

38. Although customary international law can only be determined with reference to consistent, wide-spread State practice and *opinio juris*, to establish the first form of JCE, the *Tadić* Appeals Chamber relied upon only six cases[96] – four British, one Canadian, and one American.[97] According to some scholars, this is "perhaps the most worrying characteristic of the *Tadić* analysis."[98] As Professor Ambos notes, "*Tadić's* recourse to World War II case law is, at least in part, of 'dubious precedential value.'"[99]

39. To establish the second form of JCE, the *Tadić* Appeals Chamber relied only upon one British and one American case.[100] This is not an indication of the customary status of JCE liability – the number of cases and jurisdictions examined – not to mention the total exclusion of any case law from Civil Law jurisdictions – are far too low to establish general and consistent State practice.[101] "[T]he judgment also fails to examine the *opinio juris*, meaning the 'policies and pronouncements of states as expressions of their national commitment.'"[102]

---

[95] "The [*Tadić*] Appeals Chamber ... held the view that 'the notion of common design as a form of accomplice liability is firmly established in customary international law.' This conclusion would seem rather far-fetched. It is questionable whether one could speak of such a general principal of criminal law as being part of customary international law on the basis of so few cases." MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES, para. 274 (Intersentia, 2002). *See also id.*, para. 282, where Boot stated that "These observations may amount to the conclusion that the Appeals Chamber violated the *nullum crimen sine lege* principle in this case." *See also* Lamb, at 746, where Lamb states that "[t]he dearth of State practice to guide the *ad hoc* Tribunals has ensured that the definition of international crimes by the *ad hoc* Tribunals has had a somewhat emotive, *de lege ferenda* quality." For a more complete discussion of the cases relied upon by the *Tadić* Appeals Chamber, and their insufficiency to support JCE's status in customary international law, *see* Annex A, Section II D (1)(b).

[96] A couple of other cases are not analyzed, but are mentioned briefly in the footnotes discussing these 6 cases.

[97] *See Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), paras. 196-200.

[98] GIDEON BOAS ET AL., INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY, VOLUME I: FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 21 (Cambridge University Press, 2007) ("BOAS"). *See also* Attila 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 INT'L CRIM. L. REV. 63, 109-12 (2006) ("Bogdan").

[99] *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), *Amicus Curiae* concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 27 October 2008, D99/3/27, ERN: 00234912-00234942 ("Ambos Brief"), p. 23.

[100] *See Tadić* Appeals Judgement, para. 202. One other case is mentioned in a footnote, but even the *amicus curiae* brief submitted by McGill University notes that: "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.'" McGill Brief, para. 22.

[101] Another problem with the *Tadić* Appeals Chamber's reliance on these cases is that cases tried pursuant to Control Council Law No. 10 "cannot be deemed part of international law, since it was passed by the legislative authority over Germany (the Allied Control Council). As a result, the judgments rendered in accordance with CCL No.10 do not constitute valid international precedent, and the 'participatory principles of criminal

40. The analysis as to the third form of JCE is even more suspect and disconcerting.[103] The *Tadić* Appeals Chamber relied in large part on unpublished cases, mostly from Italy.[104] "Reliance on such 'unpublished' and 'hand-written' decisions is particularly troubling, especially considering that the Appeals Chamber was engaged in the identification and formulation of a concept it concluded to be 'firmly based in customary international law.'"[105] These cases could not be used to support a claim that customary international law embraced JCE liability in any event. Italy has adopted a unitary system whereby any person who intervenes in the commission of a crime is criminally liable as a perpetrator,[106] whereas most national criminal law systems have adopted an approach that makes a distinction between perpetrators or principals to the crime and accessories to the crime or secondary parties.[107]

---

responsibility' annunciated at these trials 'have no subsequent validity in international criminal law.'" Bogdan, at 100.

[102] *Id.*, at 110.

[103] *See* ALEXANDER ZAHAR & GÖRAN SLUITER, INTERNATIONAL CRIMINAL LAW 94 (Oxford University Press, 2008), where ICTY Legal Officer Alexander Zahar and Professor Göran Sluiter discuss the need to determine widespread and consistent State practice in order to determine customary international law and note that "Judge Cassese unearthed a multitude of minor war-related Italian cases. ... Language and cultural barriers, and the inaccessibility of material, have meant that surveys of state practice are highly selective."

[104] *See Tadić* Appeals Judgement, paras. 214-17.

[105] Bogdan, at 110-11. *See also* Shane Darcy, *Imputed Criminal Liability and the Goals of International Justice*, 20 LEIDEN J. INT'L L. 377, 384-85 (2007) ("Darcy") (emphasis added): "[T]here is some support in the postwar jurisprudence for the basic type of joint criminal enterprise liability identified by the ICTY. But for the third category, the Appeals Chamber relied on a few Italian decisions and a small number of trials before Allied military courts, mostly concerning instances of mob violence, which relied on such a doctrine. It is doubtful that the employment by a few states of this expanded form of common plan liability at that time gave it the status of customary law, particularly seeing that none of the treaties adopted in the postwar period recognized the concept. The Appeals Chamber found some limited support for the third category in domestic criminal laws, but noted, however, that the major legal systems do not all treat the notion in the same way. Critics argue that a large number of jurisdictions do not support liability for crimes outside the scope of the agreed objective for those persons who participate in a common criminal plan." *See also* Powles, at 615-16. "It is submitted that the authorities cited in *Tadić* provide only limited support for criminal liability pursuant to the third category or extended form of joint criminal enterprise. The Appeals Chamber relied, in the main, on two post-World War II cases: *Essen Lynching* and *Borkum Island*. Neither, it is submitted, provides clear and unambiguous support for liability pursuant to the extended form of joint criminal enterprise. In *Essen Lynching*, a crowd of people participated in the beating of three airmen, resulting in the airmen's deaths. It was not possible to determine who had struck the fatal blow in each case." Powles explains that in his view, *Essen Lynching* may not actually support the *Tadić* Appeals Chamber's conclusion that each accused was found guilty of murder because they were each concerned in the killing. "The prosecution in *Essen Lynching*, as the Appeals Chamber noted, specifically stated that is the accused had the *intent* to kill, then they would be guilty of murder; if they had no such intent, then they could still be convicted of manslaughter. The accused were convicted of murder, implying that the court concluded that they all indeed intended the airmen to die. Thus, there is possibly a question mark over whether the court in *Essen Lynching* actually held anyone who did not posses[s] an actual intention to kill guilty of murder. Similarly, the *Borkum Island* case cited by the Appeals Chamber lends limited support to liability for the third category or extended form of joint criminal enterprise." *Id.*

[106] Italian Penal Code, Art. 110. "Quando più persone concorrono nel medesimo reato, ciascuna di esse soggiace alla pena per questo stabilita, salve le disposizioni degli articoli seguenti."

[107] *See* ELIES VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 59 (The Hague, TMC Asser Press, 2003) ("VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS").

Furthermore, only one of the Italian cases (*D'Ottavio et al.*) cited could provide support for JCE III.[108] As Professor Ambos aptly observes,

> [T]he recognition of JCE III in customary law cannot be deduced from the Italian cases quoted by the Appeals Chamber ... since in this trial – in contrast to the trials before British and U.S. American military tribunals – no international, but exclusively the national law (Art. 116 [1] of the Italian *Codice Penale*) was applied. In addition, this case law is not uniform, since the Italian Supreme Court (*Corte Suprema di Cassazione*) has adopted two dissenting decisions.[109]

This does nothing to support the *Tadić* Appeals Chamber's claim that JCE III is firmly established in customary international law.[110]

b) The treaties the *Tadić* Appeals Chamber relied upon do not support the existence of JCE liability in customary international law.

41. In addition to relying on a small number of select cases, the *Tadić* Appeals Chamber also relied on two international treaties in support of its claim that JCE liability exists in customary international law – the ICC Statute and the International Convention for the Suppression of Terrorist Bombing ("ICSTB").[111] The language found in Article 25(3)(d)[112] of the ICC Statute was based on Article 2(3)(c)[113] of the ICSTB.[114] The *travaux*

---

[108] *See Tadić* Appeals Judgement, para. 215.
[109] Ambos Brief, p. 29.
[110] *See* Powles, at 616-17. "In *Tadić*, the Appeals Chamber noted that, in many countries, liability similar to the third category of joint criminal enterprise exists. However, the Appeals Chamber also found that in some jurisdictions, an accused is only liable for crimes arising out of a joint criminal enterprise if he shared the intent envisaged in the enterprise. Thus, if one of the participants commits a crime not envisaged in the joint criminal enterprise, he alone will incur criminal responsibility for such a crime. State practice is, therefore, not uniform on the extended form of joint criminal enterprise." *Id.*, at 615 (Emphasis added).
[111] *Tadić* Appeals Judgement, paras. 220-23.
[112] Article 25(3)(d) states: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime."
[113] Article 2(3)(c) states: "Any person also commits an offence if that person: (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned."
[114] Kai Ambos, *Article 25: Individual Criminal Responsibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 475, 483 (Otto Triffterer ed., 1999). *See also* Powles, at 617 (emphasis added). "Article 25(3)(d) [of the ICC Statute] was accepted without difficulty during negotiations in Rome, as it was based on the Terrorist Bombings Convention, which had been adopted by consensus. It was invoked as a basis of liability to avoid divisive negotiations on whether 'conspiracy' should be included as a basis of liability in the ICC Statute. To be liable for conspiracy, the accused must have intended the crime which was the subject matter of the agreement to be committed. It is submitted that if Article 25(3)(d) was intended as an alternative, compromise basis of liability to conspiracy, it may not have been the intention of the drafters to include a basis of liability that could render an accused guilty even if he did not intend the ultimate outcome of his actions pursuant to the common purpose."

préparatoires of the ICSTB do not explain why the particular wording found in Article 2 was adopted.[115] However, as explained *infra*, the ICC has rejected the JCE jurisprudence of the *ad hoc* tribunals as established by the *Tadić* Appeal Judgement and its progeny, preferring the "control over the crime" approach to distinguishing principals and accessories.[116] It is therefore "ironic," according to Professor Schabas, that the *Tadić* Appeals Chamber relied upon the ICC Statute.[117] These two treaties do not support the claim made by the *Tadić* Appeals Chamber – and embraced by subsequent ICTY/ICTR Trial Chambers – that JCE liability is established in customary international law. Furthermore, neither of these treaties was in existence in 1975-79, and they therefore cannot support an argument that JCE liability existed in customary international law during the relevant time of the alleged crimes.[118]

42. Because the *Tadić* Appeals Chamber relied on so few sources from such a small number of jurisdictions and because the two treaties it relied upon do not support the existence of JCE liability in customary international law, the ECCC must undertake an independent analysis to determine whether JCE liability exists in customary international law – assuming the ECCC determines that it even has the ability to directly apply such law.

2. JCE liability has never been a form of liability in general and consistent State use.

43. Customary international law can only be created through (a) general and consistent State practice and (b) *opinio juris*.[119] There currently is no general and consistent State practice

---

[115] *Tadić* Appeals Judgement, fn. 279.

[116] In addition to the discussion below, *see also* Damgaard, at 176, fn. 191, where Damgaard states "Article 25(3)(d) does not, in the author's view, seem to encompass JCE Category 3." In a footnote, she notes that Professors van Sliedregt and Ambos both share this view. Professor Ambos has stated that the ICC, through the two Pre-Trial Chamber decisions discussed below, has disassociated itself from the JCE. Professor Ambos remarks, "[t]he ICC chamber associates the JCE doctrine with the subjective approach in the law of co-perpetration, i.e., the determination of co-perpetration essentially by taking recourse to the intention or will of the parties. It then dismisses this approach and, therefore implicitly also the JCE doctrine." Ambos Brief, p. 7, fn. 17. Professor Olásolo, too, shares this view. *See* Héctor Olásolo, *Joint Criminal Enterprise and its Extended Form: A Theory of Co-Perpetration Giving Rise to Principal Liability, A Notion of Accessorial Liability, or a Form of Partnership in Crime?*, 20 CRIM. L. F. 263, 278 (2009) ("Olásolo, *Joint Criminal Enterprise and its Extended Form*"). *See also id.*, p. 285, where Professor Olásolo explains that policy arguments in favor of JCE III do not address concerns based on the legality and culpability principles. "Indeed, the relevance of these concerns is such, that the drafters of the ICC Statute excluded any form of criminal liability somewhat akin to the extended form of joint criminal enterprise from the realm of article 25(3)(d)."

[117] WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 212 (Cambridge University Press, 2001) ("SCHABAS, AN INTRODUCTION TO THE ICC, 1st ed.").

[118] *See Prosecutor v. Orić*, IT-03-68-A, Appeals Judgment, 3 July 2008, Partially Dissenting Opinion and Declaration of Judge Liu, para. 26, referring to the texts of the Draft Code of Crimes Against the Peace and Security of Mankind and Article 28 of the ICC Statute being adopted subsequent to the adoption of the ICTY and ICTR Statute. "[C]ustomary international law has to be assessed as of the date of the commission of the offences, the fact that ... [the ICC Statute] was adopted subsequent to these dates, further limits [its] weight and usefulness as sources of customary international law."

[119] "Customary law begins as a customary practice and then ripens into a binding rule when those who follow the rule begin to regard the practice as binding on them." Fletcher & Ohlin, *Reclaiming Fundamental Principles,*

and *opinio juris* regarding JCE liability, which would give it customary international law status, nor has there ever been.

a) Nuremberg case law does not support the existence of JCE liability

44. At Nuremburg, defendants were not classified as "perpetrators" or "accomplices," so there was nothing in the judgments defining the relationship between the physical perpetrators of murders and the accused.[120] The verdicts were quite short, with limited legal reasoning. The *Tadić* Appeals Chamber, therefore, had to infer the form of liability under which the accused were ultimately convicted based on the prosecutor's statements. It made no effort to discern whether the accused in these cases were convicted as principals or as accessories. The problem with the *Tadić* Appeals Chamber's approach stems from the common law approach that the judges followed. In failing to differentiate between different forms of participation at the level of attribution, they in essence embraced a unitary model of liability (typical for common law jurisdictions), which treats principals and accessories equally.

45. Professor Ohlin explains,

> For example, the *Tadić* court relies on cases such as *Kurt Goebell et al.* (*The Borkum Island Case*), a 1944 US military court decision. See *Tadić*, § 210-212. In that case, a US Flying Fortress aircraft was shot down over German territory and its crew was subjected to a death march. The airmen were escorted by German soldiers who encouraged civilians to beat the prisoners who were eventually shot and killed. The US prosecutor argued for a guilty verdict based on a broad theory of common criminal purpose. Although the facts of the case are directly relevant to a discussion of joint criminal enterprise, the military court issued only a simple guilty verdict and made no extensive legal findings on the issue of common criminal plans or mob beatings. Consequently, the *Tadić* court is left to quote the words of the US military prosecutor and *infer* that the judges adopted the prosecutor's reasoning. These types of cases are of negligible value for precisely this reason. Indeed, the prosecutor's discussion of the issue is internally contradictory.[121]

46. There are also examples of post World War II cases in which the extended form of JCE liability (JCE III) was clearly not employed. The fact that JCE liability was not consistently

---

at 556. It must be noted that "[i]t is notoriously difficult to establish sufficient consensus to validate a rule as customary international law." *Id. See* Annex A, Section II D for an in-depth discussion of the creation of customary international law. *See also* Bogdan, at 69.

[120] At Nuremberg, the judges declined to make a distinction between perpetrators and accomplices, or principals and aiders and abettors. "Individual responsibility was put under the heading of criminal participation. ... No distinction in parties to a crime was made, variance in role and degree was expressed in the sentence." VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS, at 27, 31.

[121] Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 75 fn. 10 (2007) ("Ohlin, *Three Conceptual Problems*") (emphasis added). *See also* McGill Brief, para. 24, discussing the *Essen Lynching* and *Borkum Island* cases: "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 findings of guilt."

applied in these cases demonstrates that it was not clearly established as customary international law. In the *Justice* case, for example, the defendant Alstoetter was found guilty of being a member of the SS, but not guilty of war crimes or crimes against humanity. The defendant Cuhorst was acquitted when it could not be shown that he had personally discriminated against Poles who were tried in his court. If these two defendants had been tried under an extended JCE theory, once it was established that they agreed to the overall criminal objectives of Hitler and the SS to discriminate against Jews and Poles, and participated in the Ministry of Justice or the Special Courts, they would have been responsible for all foreseeable crimes committed by persons in furtherance of those objectives.[122]

b) Most legal systems opt for co-perpetration rather than JCE.

47. Many States, such as Cambodia, do not apply JCE liability, but instead use a model of co-perpetration distinct from JCE.[123] Specific to Cambodia, according to Article 82 of the 1956 Penal Code, "Any person participating voluntarily, either directly or indirectly, in the commission of a crime or infraction, is liable for the same punishment as the principle perpetrator. Direct participation constitutes co-perpetration, indirect participation constitutes complicity."[124]

48. This model of co-perpetration distinguishes between principal and accessorial liability. The difference is important in Civil Law systems, such as Cambodia, "because of the distinction in some civil law systems of handing down a lower maximum sentence to a person who merely aids and abets the principal."[125] Many other States use this model of co-perpetration as well. Indeed, according to a study carried out by the Max Planck Institute at the behest of

---

[122] *United States v. Alstoetter et al.*, Trials of War Criminal before the Nuremberg Military Tribunals under Control Council Law No. 10, vol. III, p. 956, 1158, 1171 (1950). For another example of a post World War II case which was not tried under a JCE theory, *see Prosecutor v. Brđanin*, IT-99-36-A, Amicus Brief of Association of Defence Counsel – ICTY, 5 July 2005, p. 9-10.

[123] Furthermore, according to the Max-Planck study Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion, Commissioned by the United Nations – ICTY, 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 ("Max-Planck, Participation in Crime"), Introduction, p. 3, "a comparison of the rules governing participation in crime reveals a high degree of variance among the legal systems studied..." (emphasis added).

[124] Unofficial translation. The Civil Parties too have noted that "[t]hese crimes, which are international in character, are primarily and also domestic crimes, and are prosecuted as such under the relevant national law, which provides for a plurality of perpetrators (co-perpetration) and aiding and abetting (complicity)." Civil Parties JCE Appeal, para. 11 (emphasis added). *See* Annex A, Section II C for a discussion of the differences between co-perpetration and JCE.

[125] This is why, according to Damgaard, the *ad hoc* tribunals have focused on the issue of whether JCE is a form of principal or accomplice liability. Damgaard, at 194.

the ICTY Office of the Prosecutor, most States use co-perpetration rather than JCE liability.[126]

c) The ICC Statute does not codify JCE liability. Its case law has rejected the application of JCE liability.

49. As discussed below, the Pre-Trial Chamber in *Lubanga*, then presided by former ICTY President Judge Claude Jorda, "at the outset consciously departs from the ICTY's unique approach to resolving the same problem of shared responsibility" when it "rejected an explicit invitation by one of the victims' counsel to incorporate the concept of JCE into the ICC Statute's notion of 'commits such a crime ... jointly with another,'" voicing substantive reservations against accepting JCE as a form of liability.[127]

50. Article 25 of the ICC Statute deals with forms of individual criminal liability applicable at the ICC. It was drafted within the broader negotiations of the ICC Statute over a 3-year period and with 160 participating countries.[128] The main aim of the Rome Conference was to achieve the broadest possible acceptance of the ICC by mainly adopting into the Statute provisions recognized under customary international law.[129] The new court was to conform to principles and rules that would ensure the highest standards of justice and these rules were to be incorporated in the statute itself rather than being left to the uncertainty of judicial discretion.[130] Indeed, given this level of participation and the length of the drafting process, the ICC Statute is considered to codify customary international law on international

---

[126] *See* Max-Planck, Participation in Crime, Part 1: Comparative Analysis of Legal Systems, p. 16. Thus, it is unsurprising that Professor Ambos notes in his *amicus brief* in the *Duch* case,

> Against this background and the universal recognition of co-perpetration as a form of perpetration (see only Art. 25[3][a]2nd alt. ICC Statute), it is more than surprising when the [*Stakić*] Appeals Chamber states that, on the one hand. '(T)his mode of liability (...) does not have support in customary international law (...)' but, on the other, JCE liability is 'firmly established' (*Stakić* Appeals Judgement ...). [...] In any case, the co-perpetration is explicitly recognized in art. 25 (3) (a) ICC Statute, as correctly held by the ICC Pre-Trial Chamber in *Lubanga* Confirmation of Charges...

Ambos Brief, fn. 41.

[127] Thomas Weigend, *Intent, Mistake of Law and Co-perpetration in the* Lubanga *Decision on Conformation of Charges*, 6 J. Int'l Crim. Just. 471, 476-78 (2008). Interestingly, and in line with one of the Defence's primary objections on the application of JCE before the ECCC, Professor Weigend notes "It is probably not unfair to say that JCE, as developed by the ICTY, has a political mission, namely, to put into practice the 'principle' that 'all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the preparation of those violations, must be brought to justice' ... The problem, of course, is whether the (understandable) wish to bring all 'perpetrators' to justice is a sufficient basis for determining who is a 'perpetrator.' In other words, JCE, in throwing its net very broadly may have a difficulty in explaining why each fish caught deserves punishment for international wrongdoing." *Id.*, at 477 (emphasis added, footnotes omitted).

[128] John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 PACE INT'L L. REV. 361, 361 (1999).

[129] GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 402, fn. 108 (TMC Asser Press, 1st ed., 2005) ("WERLE").

[130] WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 16-17, (Cambridge University Press 3rd ed. 2007).

crimes,[131] demonstrating strong indicia of an emerging *opinio juris* of the international community.[132] This process has also been described as a *de facto* consolidation of national criminal principles on an international level.[133] Certainly, there is a general agreement[134] that the drafters of the ICC Statute would not have opted to create new law or a new form of liability in contradiction of established customary international law. As the chairman of the Rome Conference himself, Philippe Kirsch, has affirmed, "it was understood that the statute was not to create new substantive law, but only to include crimes already prohibited under international law."[135] The ICTY Trial Chamber in *Furundžija* noted that the Draft Code – which preceded the ICC Statute – "is an authoritative international instrument which may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain content or are in the process of formation, or (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world."[136] ICTY Appeals Chamber Judge Schomburg in *Gacumbitsi*, commenting on Article 25, noted that given the wide acknowledgment of co-perpetratorship and indirect perpetratorship, the ICC Statute does not create new law in this respect, but reflects existing law.[137]

51. By admission of the *Tadić* Appeals Chamber, the Statute is a "text supported by a great number of States [which] may be taken to express the legal position i.e. *opinio juris* of those States."[138] However, the JCE doctrine as established by *Tadić* was not included within the wording of Article 25. The deliberate exclusion of JCE despite the lengthy and thorough

---

[131] "Numerous treaties in the area of international criminal law expressly or incidentally codify customary law; this is true, for example, of the definitions of crimes in the ICC Statute." WERLE, at 45, marginal no. 127. "The provisions of Article 25(3)(b), second and third alternatives, of the ICC Statute reflect customary law." WERLE, at 125, marginal no. 358. *See also* SCHABAS, AN INTRODUCTION TO THE ICC, 1ST ed, at 20, fn. 62, which gives an example of the ICC Statute being cited as a guide to evolving customary international law.

[132] "The ICC Statute 'internationalises' many general principles of criminal law that are recognized in national legal systems, by providing what is increasingly being perceived as a de facto codification or consolidation of those principles on an international level. Furthermore, the content of the ICC Statute is a blend of procedural international criminal law and substantive international humanitarian law. The fact that 120 States voted in favour of the Statute at the 1998 Rome Conference can be said to provide strong evidence of an emerging *opinio juris* as to the nature and ambit of genocide, crimes against humanity and war crimes in customary international law." DOMINIC MCGOLDRICK ET AL., THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 340, (Hart Publishing, 1st ed., 2004).

[133] *Id.*

[134] "Because of the general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not to create new law, states relied heavily on accepted historical precedents in crafting the definitions in Articles 6 to 8 of the ICC Statute." Foreward by Philippe Kirsch, *in* KNUT DÖRMANN ET AL., ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT xiii (Cambridge University Press, 2002).

[135] Philippe Kirsch, John T. Holmes, *The Rome Conference on an International Criminal Court: the Negotiating Process*, 93 AM. J. INT'L L. 2, 7, fn. 10 (1999).

[136] *Prosecutor v. Furundzija*, OI -95-17/1-T, Judgement, 10 December 1998, para 227.

[137] *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006, para. 21.

[138] *Tadić* Appeals Judgement, para. 223.

drafting exercise is indicative of the fact that JCE liability cannot be considered part of customary international law. Indeed, the ICC rejected the notion of JCE liability. It explained that there are three approaches to determining whether certain conduct entails principal or accessorial liability: the objective approach, the subjective approach, and the "control over the crime" approach.[139]

52. The objective approach focuses on the realization of one or more of the objective elements of the crime. From this perspective, only those who physically carry out one or more of the objective elements of the offense can be considered principals to the crime.[140]

53. The subjective approach, according to the *Lubanga* Pre-Trial Chamber, "is the approach adopted by the jurisprudence of the ICTY through the concept of joint criminal enterprise or the common purpose doctrine."[141] This approach "moves the focus from the level of contribution to the commission of the offence as the distinguishing criterion between principals and accessories, and places it instead on the state of mind in which the contribution to the crime was made. As a result, only those who make their contribution with the shared intent to commit the offence can be considered principals to the crime, regardless of the level of their contribution to its commission."[142]

54. The control over the crime approach, the *Lubanga* Pre-Trial Chamber found, is applied in numerous legal systems.[143] "The notion underpinning this third approach is that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed."[144] This approach involves an objective element, consisting of the appropriate factual circumstances for exercising control over the crime, and a subjective element, consisting of the awareness of such circumstances.[145] According to this approach, only those who have control over the commission of the offense – and who are aware of having such control – may be principals.[146]

---

[139] *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007 ("*Lubanga*"), paras. 327-30.
[140] *Id.*, para. 328. The *Lubanga* Pre-Trial Chamber noted that it could not follow this approach because the notion of committing an offense through another person in Article 25(3)(a) of the ICC Statute cannot be reconciled with the idea of limiting the class of principals to those who physically carry out one or more of the objective elements of the offense. *Id.*, para. 333.
[141] *Id.*, para. 329.
[142] *Id.*
[143] *Id.*, para. 330.
[144] *Id.*
[145] *Id.*, para. 331.
[146] *Id.*, para. 332.

55. The *Lubanga* Pre-Trial Chamber explained that it could not follow the subjective approach taken by the ICTY because of the distinction between Article 25(3)(a) and 25(3)(d). Article 25(3)(d) moves away from the concept of co-perpetration embodied in Article 25(3)(a), and defines the concept of contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose. This would have been the basis of the concept of co-perpetration within the meaning of Article 25(3)(a) if the drafters had opted for a subjective approach to distinguishing between principals and accessories.[147] The *Lubanga* Pre-Trial Chamber further noted that the wording of Article 25(3)(d) provides for a form of residual accessory liability, making it possible to criminalize contributions which cannot be characterized as ordering, soliciting, inducing, aiding, abetting, or assisting within the meaning of Article 25(3)(b) or (c).[148]

56. The *Lubanga* Pre-Trial Chamber therefore held that the "control over the crime" approach was the correct approach to follow and distinguished collective responsibility under Article 25(3)(d) of the ICC Statute from JCE liability as formulated in the jurisprudence of the *ad hoc* tribunals.[149] Subsequently, in setting out the elements of essential contribution and mutual control over the realization of the crime, the Chamber in effect also distinguished co-perpetration within the meaning of Article 25(3)(a) and co-perpetration based on the existence of JCE I. In *Katanga*, it explained, "By adopting the final approach of control of the crime, the Chamber embraces a leading principle for distinction between principals and accessories to a crime… The control over the crime approach has been applied in a number of legal systems, and is widely recognized in legal doctrine."[150]

57. The ICC Pre-Trial Chambers have cited the ICTY *Stakić* Trial Chamber approvingly, for its discussion of the co-perpetration model.[151] Although the ICTY *Stakić* Appeals Chamber noted that co-perpetration "as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal" and instead asserted that JCE liability is firmly established in customary international law,[152] the ICC's rejection of this conclusion is clear. Professor Ambos exclaims that the *Stakić* Appeals Chamber's assertion "demonstrates such a blatant ignorance of basic principles of criminal

---

[147] *Id.*, paras. 334-35.
[148] *Id.*, paras. 336-37.
[149] The Pre-Trial Chamber explained, "Not having accepted the objective and subjective approaches for distinguishing between principals and accessories to a crime, the Chamber considers, as does the Prosecution and, unlike the jurisprudence of the *ad hoc* tribunals, that the Statute embraces the third approach, which is based on the concept of control of the crime." *Id.*, para. 338.
[150] *Prosecutor v. Katanga & Ngdujolo*, ICC-01/04-01/07, Decision on Confirmation of Charges, 30 September 2008 ("*Katanga*"), paras. 484-85.
[151] *See Lubanga*, paras. 342-43, 346; *Katanga*, paras. 509-10.
[152] *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006 ("*Stakić*, Trial Judgement"), para. 62.

law that even principled supporters of the International Criminal Tribunals, such as this writer, must rethink their support."[153] The ECCC may not simply accept the *Stakić* Appeals Chamber's conclusion without explaining why it considers the *Stakić* Trial Chamber and the ICC to be in error.

58. The internal judicial dissent towards the application of JCE liability at the ICTY and ICTR has been significant.[154] Thus, when considering these dissenting voices within the ICTY and ICTR Chambers in conjunction with other factors such as the fact that: a. the drafters of the ICC Statute did not settle on a form of collective liability like the one created by the *Tadić* Appeals Chamber, b. the ICC in *Lubanga* and *Katanga* rejected the *Tadić* JCE theory, and c. the *Tadić* Appeals Chamber erroneously relied upon, *inter alia,* the ICC Statute in support of its claim that JCE theory reflects customary international law that is grounded on and supported by UN treaties, it is beyond cavil that JCE liability as expressed by the *Tadić* Appeals Chamber and further developed through other ICTY and ICTR cases relying on *Tadić*,[155] does not express customary international law.

3. The inherent danger of JCE liability militate against the ECCC relying upon this doctrine.

59. The OCIJ declared that JCE II "is a variation of JCE I and concerns a common concerted system of ill-treatment where the accused has knowledge of the nature of the system and intends to further the common system of ill-treatment."[156] The OCIJ apparently made this determination because this is what the *Tadić* Appeals Chamber held.[157] This is another example of the danger in accepting the *Tadić* Appeals Judgment without any independent analysis. Several scholars have explained that this statement is misleading and untrue, as JCE II often equates with JCE III, rather than I.[158] JCE II therefore suffers from the same

---

[153] Ambos Brief, fn. 41.

[154] *See e.g., Stakić*, Trial Judgement, paras. 438-42; *Prosecutor v. Simić*, IT-95-9-T, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, 17 October 2003 ("*Simić*, Separate Opinion of Judge Lindholm"); *Prosecutor v. Simić*, IT-95-9-A, Dissenting Opinion of Judge Schomburg, 28 November 2006; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 2 July 2006 ("*Gacumbitsi*, Separate Opinion of Judge Schomburg").

[155] "It must be finally stated that the *opinio juris* is definitely not equivalent to simple 'legal opinions' either by judges or by legal experts in their collective works. In both cases, these 'opinions' do not amount to international custom in the meaning of Article 38(1)(b) of the ICJ Statute." Degan, at 79.

[156] Impugned Order, para. 15 (emphasis added).

[157] *See Tadić* Appeals Judgement, para. 203.

[158] "Elaborating on the relationship between the categories, the [*Tadić*] Appeals Chamber observed that the second category was actually a variant of the first one. At first sight this may appear slightly spurious, as the first category bears resemblance to the Nuremberg concept of conspiracy-complicity, while the second category is reminiscent of the membership of a criminal organization. In view of the fact that the Nuremberg Tribunal lumped both concepts together, the conflation of the categories may not be surprising after all. Both categories, however, refer to distinct factual contexts and this required a different legal assessment as well, as the ICTY was

problems as JCE III, discussed below. Professor van der Wilt further explains that a related problem with JCE II is that the "rather vague expression 'an intention to further the criminal activities or purpose of the group' arguably falls short of the requirement, stemming of the principle of legality, that the elements of the crime should be drafted as precisely as possible."[159]

60. Concerning JCE III, the OCIJ notes that the *mens rea* for JCE III applicable at the ECCC is "the subjective acceptance of the natural and foreseeable consequences of the implementation of the common plan."[160] The OCIJ does not explain how it determined this, however it observed that the *Kvočka* Appeals Chamber limited the *mens rea* to the subjective "natural and foreseeable" consequences, while the *Tadić* Appeals Chamber did not.[161] If there is no generally accepted *mens rea* for JCE III, it is difficult to understand how the OCIJ can declare this form of JCE to be established in customary international law.[162]

---

soon to discover." Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. INT'L CRIM. JUST. 91, 97 (2007) ("van der Wilt"). "In fact, the *Tadić* Appeals Chamber considered that this form of responsibility contains a 'substantially similar notion' and 'upholds' the JCE doctrine, yet this view suffers from a lack of differentiation between the categories of JCE created by this very decision." Ambos Brief, p. 14. *See also* Powles, at 609-10.

[159] van der Wilt, at 100-01.

[160] Impugned Order, p. 10.

[161] *Id.*, fn. 34. The paragraphs of the *Tadić* Appeals Chamber Judgement cited in this footnote actually refer to JCE II type cases rather than JCE III, but it does appear to be true that the *Kvočka* Appeals Chamber makes this subjective/objective distinction, while the *Tadić* Appeals Chamber does not.

[162] Professor Olásolo explains the difference between the subjective and objective approach to the *mens rea* requirement of JCE III thus: "From a subjective perspective, the extended form of joint criminal enterprise requires the defendant (i) to be aware that the commission of the foreseeable crimes is a possible consequence of the implementation of the common criminal plan, and (ii) to take the risk voluntarily by joining or continuing to participate in the enterprise. As a result, it embraces an advertent recklessness standard because the defendant need not be aware that there is a 'likelihood' or a 'substantial likelihood' (high level of risk) that the foreseeable crimes will be committed as a result of implementing the common criminal plan. He needs only to be aware that the commission of the foreseeable crimes is just a 'possible consequence' (low level of risk) of effecting the common criminal plan. Moreover, in spite of the fact that the defendant only needs to be aware of the existence of a low level of risk, he is not required to 'clearly or expressly' accept the commission of the foreseeable crimes. On the contrary, it is sufficient that he takes the risk by joining or continuing to participate in the joint criminal enterprise. This marks a critical distinction with the notion of *dolus eventualis* which, according to ICC PTC I, constitutes the lowest level of intention. Nevertheless, for some authors, the extended form of joint criminal enterprise could also be applied in situations in which the defendant is not aware that the commission of the foreseeable crimes is a possible consequence of the implementation of the common criminal plan. As long as the defendant is, objectively, in a position to foresee that possibility, it is irrelevant whether he actually foresees it." Olásolo, *Joint Criminal Enterprise and its Extended Form*, at 279-81 (2009) (emphasis added). In Olásolo's view, "the adoption of this approach would amount to introducing a negligence standard insofar as the defendant would be convicted for breaching his duty to conduct himself with due diligence in analysing the possible consequences of the implementation of the common criminal plan prior to joining it." *Id. See also* Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 561 (2008) (emphasis added): "Under [JCE III], if the prosecution shows that the defendant intended to participate in the common plan, the defendant will be liable for crimes committed by others that he did not intend, as long as those crimes were foreseeable. Some chambers have interpreted foreseeable to mean 'objectively foreseeable' meaning that the defendant could be convicted even for crimes he did not himself foresee. As commentators and defense attorneys have noted, these interpretations lower the mental state required for culpability to recklessness, or in the case of the 'objective foreseeability' test, to negligence. The Association of Defence Attorneys at the ICTY has criticized the doctrine as too broad and 'susceptible to

61. Apart from the problem of the requisite mental element, there are also other problems in relation to JCE III. For example,

> As to JCE III, it seems clear that its imputation of an act as a 'foreseeable consequence' which was not agreed upon beforehand and consequently not intended by all participants can hardly constitute a form of co-perpetration or of perpetration at all if it is required, as explained above, that the perpetrator himself fulfill all objective and subjective elements of the offence. For in JCE III, one or more of these elements are missing and only imputed to the member of the enterprise by way of *vicarious liability*..., i.e. by taking recourse to the act of another person, the actual perpetrator, transposing this act to the 'non-actor' or 'non-act' of that member. Yet, this non-act can only be considered as a form of aiding and abetting to the crime in question. This is confirmed by traditional English doctrine which has long held that participants in a common criminal purpose are principals (only) *in the second degree* (i.e. accessories) in respect of every crime committed by any of them in the execution of that purpose.[163]

62. JCE III also conflicts with the principle of culpability, "as it even holds a participant in a criminal enterprise responsible for the crimes of other participants not explicitly agreed upon beforehand, provided that they are foreseeable."[164] This notion that a participant can be liable for crimes that are merely "foreseeable" is problematic because if an objective determination of whether the crimes were sufficiently foreseeable is used, an accused may be liable for crimes he himself did not foresee. If a subjective approach is used, however, the prosecution must prove "that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him."[165] However, "[e]ither an accused knows that a certain result will occur or this result is foreseeable to him; both are logically impossible. In fact, knowledge is a standard for intent crimes (see Art. 30 ICC Statute), while foreseeability belongs to the theory of recklessness or negligence."[166]

---

overreaching and abuse.' Many national systems have also rejected such extended application of criminal liability; even in the few countries that accept liability for crimes that fall outside the scope of the common plan, such liability has often been criticized as guilt by association." *See also* Ambos Brief, p. 9-10, where Professor Ambos explains that because the *Tadić* Appeals Chamber failed to clarify the correct form of participation in a JCE, the *Kvočka* Appeals Chamber "opted for a subjective solution" and considered the difference between aiding and abetting and co-perpetration to be a subjective one.

[163] Ambos Brief, p. 13.

[164] *Id.*, at 1. *See also id.*, at 15-19; Fletcher & Ohlin, *Reclaiming Fundamental Principles*, at 550: "Our second criticism ... goes to the substance of the doctrine itself. The doctrine explicitly renders all parties of a conspiracy equally responsible for the criminal acts of the group, regardless of their individual 'role and function in the commission of the crime'. This interpretation of the doctrine clearly violates the basic principle that individuals should only be punished for personal culpability. By ignoring all relevant differences between members of a conspiracy, the doctrine erases the moral distinctions between, say, the architects of a serious crime and those whose participation was merely peripheral. To ignore these distinctions is to trample on the basic moral principles that provide the foundation for criminal liability and punishment. Individuals should only be punished relative to their individual culpability."

[165] *Prosecutor v. Kvočka et al*, IT-98-30/1-A, Judgement, 28 February 2005, para. 86.

[166] Ambos Brief, p. 17. Note that the *Tadić* Appeals Chamber could have created this confusion because Judge Cassese, author of the *Tadić* Appeals Judgment, apparently does not correctly understand the meaning of *dolus eventualis*: "Professor Cassese writes that 'recklessness' means the same thing as *dolus eventualis*, but this is not

4. If JCE is accepted as customary international law, its application must be limited to co-perpetration only, as laid out in Cambodian law.

63. Professor Ambos explains that JCE I can – and should be – equated with the Civil Law notion of "co-perpetration."[167] According to Professor Ambos, "the requirements of co-perpetration are only filled by JCE I, and only if it is construed as an objective-subjective structure, requiring, beyond the mere common purpose or will (*subjective* element), the actual performance of the act(s) by the member(s) of the enterprise (*objective element*)."[168] Professor Ambos believes that this was the intention of the *Tadić* Appeals Chamber when it called JCE I "co-perpetratorship" and invoked German and Italian cases.[169] Former ICTY Judge Per-Johan Lindholm is also of the view that JCE I can be equated with co-perpetration. He explained that "[t]he 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 long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration."[170]

64. Because co-perpetration is already a form of liability provided for in Cambodian law, there is no reason to apply JCE I as a separate form of liability.[171] A major function of the ECCC is to act as a "role model" for Cambodian courts. Thus, it would benefit Cambodian courts to see how a form of liability that is actually applied in Cambodia is interpreted, rather than importing a foreign form of liability which is not applicable in other Cambodian courts, especially given its controversial nature.

65. Furthermore, the Cambodian government has explicitly rejected JCE liability. Cambodia has enacted a new penal code which lists perpetration and co-perpetration as the forms of liability

---

correct. The term '*dolus eventualis*' is used in the Continental literature to describe the borderland of intentional killing. Recklessness focuses on the risk that the perpetrator is willing to take, but *dolus eventualis* is about the actor's attitude, regardless of the risk of harm. The punishable attitude, as defined in the German literature and case law, is one of approval and identification with the evil result. If the purpose of an armed band is to rid an area of potential military opponents and they know that some people will die as a result, their attitude is not necessarily *dolus eventualis*. Their killing is *dolus* only if they realize that specific people will die, approve and desire this result in their hearts, and decide to continue with their action. If the test were reckless killing, the emphasis would be on the gravity of the risk and the military benefits of the operation." Fletcher & Ohlin, *Reclaiming Fundamental Principles*, at 554.

[167] Ambos Brief, p. 9-13. For problems that arise if JCE I is not equated with co-perpetration, see *id.*, p. 11-13.

[168] *Id.*, at 11.

[169] *Id. See also* Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 1 J. INT'L CRIM. JUST. 1, 12 (2007), where he notes that "In fact, the *Tadić* Appeals Chamber acknowledged the identity between co-perpetration and JCE I, at least terminologically, by calling JCE I 'co-perpetratorship' and comparing it with co-perpetration as invoked in the German and Italian post-World War II cases. In substance, JCE I requires, in the words of various unanimous Appeals Chambers decisions, that the participant 'performs [objective] acts that in some way are directed to the furthering of the [subjective] common plan or purpose'. Thus, JCE I is a form of participation modelled on civil law co-perpetration and common law common purpose/design."

[170] *Simić*, Separate Opinion of Judge Lindholm, para. 2.

[171] Note that the OCIJ has accepted that JCE liability cannot be found in Cambodian law. *See* Impugned Order, para. 22.

applicable in Cambodia.[172] This penal code was passed by a vote of 99-3, following an 8 day debate.[173] This demonstrates that this was a carefully informed decision on behalf of the will of the people. Therefore, it is the will of the Cambodian government that the forms of liability applied in Cambodia must follow the perpetration / co-perpetration model and not the JCE model. The JCE model has clearly not been adopted.

D. The OCIJ erred in finding that JCE is a form of "committing." JCE cannot be considered "committing" under Article 29 of the Establishment Law and can therefore not be applied at the ECCC.

66. Even if JCE liability were found to have existed in customary international law in 1975-79 and even if its controversial drawbacks as evidenced by legal opinion and practice were to be disregarded to the detriment of the rights of the Charged Persons and the principles of fair trial and legality, JCE cannot be considered a form of "committing" in Article 29 of the Establishment law. As pointed out by former ICTY/ICTR Appeals Chamber Judge Wolfgang Schomburg, "committing" has different meanings in different legal systems.[174] In Cambodia, as discussed above, "commission" is defined as co-perpetration. The OCIJ made no attempt to explain how the various forms of JCE constructed by the *Tadić* Appeals Chamber could fit into this definition.[175]

67. The ECCC cannot simply choose to use a model that does not fit within the Civil Law system. Although JCE liability is applied at the *ad hoc* tribunals, they follow a mixed system, influenced heavily by the Common Law system, while the ECCC does not.[176]

---

[172] *See* Arts. 25-26, New Cambodian Penal Code adopted 2009 (unofficial translation).

[173] *See* Chun Sakada, *National Assembly Approves Penal Code*, VOA News, 12 October 2009, available at: http://www.voanews.com/khmer/2009-10-12-voa9.cfm?renderforprint=1.

[174] "The concept of joint criminal enterprise is not expressly included in the [ICTY] Statute and it is only one possibility to interpret 'committing' in relation to the crime under the ICTR and ICTY Statutes. In various legal systems, however, 'committing' is interpreted differently. Since Nuremberg and Tokyo, national as well as international criminal law has come to accept, in particular, co-perpetratorship and indirect perpetratorship (perpetration by means) as a form of 'committing'." *Gacumbitsi*, Separate Opinion of Judge Schomburg, para. 16 (emphasis added). For additional explanation of why JCE does not fall under the term "committing" in Article 29 of the Establishment Law, *see* Annex A, Section II B (2).

[175] As discussed in the preceding section, an assertion that JCE is simply a form of "commission" furthermore finds no support in post-World War II case law. The International Military Tribunal regarded the liability of participants in the execution of a common plan to commit crimes against humanity and war crimes as that of accessories. S. Pomorski, *Conspiracy and Criminal Organisations*, *in* G. GINSBERG & V. N. KUDRIAVTSEV (EDS.), THE NUREMBERG TRIAL AND INTERNATIONAL LAW 223 (Martinus Nijhoff Publishers, 1990). Subsequently, the domestic military tribunals interpreted common purpose liability disparately, depending on the participation models embraced by their respective national legal systems. *See e.g.*, *Otto Sandrock et al.*, Law Reports of Trials of War Criminals (UNWCC), Vol. I, London: His Majesty's Stationary Office, 1947, p. 40-43; *Frantz Holstein et al.*, UNWCC, Vol. VIII, p. 26-33. *See also* BOAS, at 141, where former ICTY Senior Legal Officer Gideon Boas explains that although other forms of liability are allegedly "inferior" to JCE, they may more accurately represent the punishable conduct of the accused, than "commission" by way of a JCE.

[176] For a discussion of the problems that arise when a form of liability which does not exist in domestic law is imported and applied, *see* Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of*

Considering that the ECCC follows a Civil Law model, it is reasonable to construe the meaning of "committed" strictly, as referring to co-perpetration only.[177]

68. The OCIJ did not explain how JCE could be considered a form of commission, but simply announced that it could because the *Tadić* Appeals Chamber had articulated it as such. Professors Olásalo and van Sliedregt have pointed out, however, that the *Tadić* Appeals Chamber was not clear as to the exact nature of JCE liability:[178] whether it (1) constituted a form of co-perpetration, (2) accessorial or derivative liability, or (3) partnership in crime or accomplice liability in a common law sense. This is because the *Tadić* Appeals Chamber simultaneously used the expressions "accomplice liability" and "co-perpetration" to refer to JCE liability.[179] Because of this lack of clarity, Professor Ambos states that the *Tadić* Appeals Judgement is "not completely clear as to whether participation in a crime by way of a JCE is encompassed by the term 'committed' in Art. 7(1) ICTY Statute."[180]

Mass Atrocity, 99 Nw. U.L. Rev. 539 (2005). "Disconnects arise when the pursuit of accountability arises through a process that is distant from or alien to local populations." *Id.*, at 602 (emphasis added).

[177] "[T]he view ... that joint criminal enterprise is akin to 'committing' a crime. ... conflicts with the ordinary meaning of 'committing' as the physical perpetration of a crime or a culpable omission contrary to the criminal law and, therefore, the general principle that penal statutes should be interpreted strictly." Darcy, at 384. Considering the plain meaning of the term "committed," it is difficult to understand how each form of JCE could be considered to fall under this term. As Powles explains, "It is easy to understand how someone guilty of participating in the first category of joint criminal enterprise could be said to have 'committed' the crime, as they, as with the person who physically perpetrates the crime, intended the crime in question to be committed. However, it is submitted that it is harder to see how someone guilty of participating in the third category of joint criminal enterprise, i.e. where the crime falls *beyond* the object of the criminal enterprise, can be said to have actually 'committed' the crime in question, where they do not possess the intention to actually commit the crime in question and may not even be aware of that crime before, during or even after the crime has actually been committed. In short, it is difficult to see how someone can be said to have 'committed' a crime that they were perhaps not even aware of, albeit that they should have been." Powles, at 611.

[178] Olásolo, *Joint Criminal Enterprise and its Extended Form*, at 273-74.

[179] *Id. See also* Damgaard, at 198, where Damgaard discusses the *Tadić* Appeals Judgement, and notes the confusion it has created surrounding the issue of whether JCE liability can be considered principal or accomplice liability. "[T]he *Tadić* Appeals Judgment, from the perspective of the categorisation of the form of liability, seemed to utilise contradictory expressions in describing the JCED [joint criminal enterprise doctrine]. For example, it states: 'However, the *commission* of one of the crimes envisaged in... the [ICTY] Statute might also occur through participation in the realisation of a common design or purpose'. This could *prima facie* be interpreted as support for the position that the JCED is a form of *principal* liability. However, later in the judgment, the Appeals Chamber states: '[i]n sum, the Appeals Chamber holds the view that the notion of common design as *a form of accomplice liability* is firmly established in customary international law and in addition is upheld, albeit implicitly in the [ICTY] Statute'. This statement, on the contrary, could be interpreted as support for the proposition that the JCED is a form of *accomplice* liability. In distinguishing between the JCED and the aiding and abetting mode of liability, the Appeals Chamber notes *inter alia* that the 'aider and abettor is *always an accessory* to a crime perpetrated by another person, the principal', thus suggesting by implication that a JCE perpetrator is not always an accessory and therefore is sometimes a principal perpetrator. It also noted 'to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard *the role as co-perpetrators* of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, *to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility*'. This statement too seems to support the proposition that the JCED is a principal liability. These *prima facie* contradictory statements have been a source of much discord before the ICTY. The jurisprudence of the ICTY provides support for both camps."

[180] Ambos Brief, p. 21.

69. According to Professor Ambos, JCE III (and JCE II in situations where it can be equated with JCE III) cannot be considered to fall within "committed" under Article 7(1) of the ICTY Statute and could only structurally fall within "otherwise aided and abetted."[181] Professor Ambos in his *amicus* brief notes that JCE III,

> may only be subsumed under the 'otherwise aided and abetted' formula if one construes the 'otherwise' as including any complicity in the collective criminal commission. Aiding and abetting, however, as understood in Article 7(1) ICTY Statute and also Article 25(3)(c) ICC Statute differs in its *mens rea* from JCE II and III; it requires, on the one hand, knowledge or intent within the meaning of Article 30 ICC Statute and, on the other, an act 'for the purpose of facilitating the commission of such a crime'. Thus, the only form of participation comparable with JCE II or III is that of collective responsibility as laid forth in Article 25(3)(d) ICC Statute.[182]

Collective responsibility under Article 25(3)(d) of the ICC Statute, however, has been distinguished from JCE liability as formulated in the jurisprudence of the *ad hoc* tribunals by the two recent ICC Pre-Trial Chamber decisions (*Lubanga* and *Katanga*) discussed in the preceding section.

70. JCE II and III can thus not be considered to fall under "committed" in Article 29 of the Establishment Law. JCE I could be considered to fall under "committed" if it is construed as a form of Civil Law co-perpetration.[183] As there is already a form of liability recognized in Cambodian law as "co-perpetration," there is no reason to confuse matters by referring to this form of liability as JCE I.

71. If JCE cannot be considered "committing" for purposes of Article 29, it cannot be applied at the ECCC. This differs from the situation at the ICTY, where the *Ojdanić* Appeals Chamber noted that "on its face, the list in Article 7(1) appears to be non-exhaustive in nature as the use of the phrase '*or otherwise* aided and abetted' suggests."[184] This would allow room to consider JCE liability as falling within the ICTY Statute even if it were not considered to be a form of commission. Unlike Article 7(1) of the ICTY Statute, however, the express wording of Article 29 makes a clear separation between "committed" and "aided and abetted." It states that a person who "planned, instigated, ordered, aided and abetted, or committed the

---

[181] *Id.*, at 13-14.
[182] *Id.*, at 14.
[183] *Id.*, at 1-2. As a summary, Ambos states: "If one construes JCE I as containing objective and subjective elements, in the sense of the functional control concept, it can be considered as a form of co-perpetration within the meaning of Art. 25 (3) (a) alt. 2 ICC Statute and, as such, as a *form of commission* pursuant to Art. 7 (1) ICTY/Art. 6 (1) ICTR Statutes."
[184] *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 ("*Ojdanić* JCE Decision"), para. 19. The Appeals Chamber then stated, however, that it did not need to consider whether outside those forms of liability expressly mentioned in the Statute, other forms of liability could come within Article 7(1), because it was satisfied that JCE comes within the terms of the Statute.

crimes"[185] may be liable. Any ambiguity with regard to Article 29 – should such an ambiguity be deemed to exist – must be resolved in accordance with the principle of *in dubio pro reo* as provided by Article 38 of the Cambodian Constitution: in favor of the accused. Recourse to Article 1 of the Establishment Law, referring to the purpose of bringing senior leaders to trial, cannot alter the meaning of Article 29 espoused above.[186]

E. The OCIJ erred in holding that the application of JCE liability would not violate the principle of legality. Even if JCE liability were part of customary international law in 1975-79, the principle of legality does not allow its application at the ECCC.

1. The OCIJ erred in the test it applied to determine whether the principle of legality allows for the application of JCE liability at the ECCC. JCE liability must have been part of Cambodian law in 1975-79 to satisfy the principle of legality.

72. The OCIJ erred when it concluded that application of JCE liability would not violate the principle of legality because elements of JCE liability "were foreseeable and accessible under international law in 1975 in Cambodia..."[187] The OCIJ used the wrong test when making this determination. The OCIJ concluded that the principle of legality could be satisfied if JCE liability existed in international law by referring to Article 33 new of the Establishment Law, which "sets out the principle of legality by referring to the provisions of Article 15 of the 1966 International Convention on Civil and Political Rights (ICCPR)."[188] However, the ECCC is a national Cambodian court and "[o]ne has to distinguish between the prerequisites of the principle of legality as it is defined on the international level and the principle of legality of national legal orders. ... [M]any national legal systems – for example the German Constitution (art. 103(2)) – require compliance with a stricter principle of legality."[189] This issue arose in the *Aussaresses* case discussed *supra*. The appellant in that case argued that the existence of a rule of customary international law at the time the acts were committed would satisfy the principle of legality. This argument was rejected.[190]

73. Article 6 of the 1956 Penal Code states that "Criminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law

---

[185] Emphasis added.
[186] For a critical explanation of the *Tadić* Appeals Chamber's flawed reasoning, *see* Ohlin, *Three Conceptual Problems*, at 72. Referring to the *Tadić* Appeal's Chambers' construction of the ICTY Statute, the court found JCE liability as part of its object and purpose. Professor Ohlin explains that this argument is circular as it works backwards from the position that defendants must be punished, which leaves the question of individual responsibility unanswered and contradicts basic criminal law theory.
[187] Impugned Order, para. 23 (emphasis added).
[188] *Id.*, para. 19.
[189] Kreicker, at 320 (emphasis added).
[190] *See* Lelieur-Fischer, at 232-36.

before it was committed."[191] The 1956 Penal Code thus requires compliance with a stricter principle of legality: JCE liability must have been established in Cambodian law at the relevant time in order for the principle not to be violated.[192]

2. The OCIJ erred in determining that JCE liability was sufficiently foreseeable and accessible in 1975-79. JCE liability is not sufficiently well defined to have been foreseeable and accessible at the relevant time.

74. The OCIJ noted that the principle of legality requires two key considerations: whether the criminal liability in question was sufficiently foreseeable and whether it was sufficiently accessible at the relevant time.[193] The OCIJ failed, however, to explore the meaning and requirements of these two key considerations.[194] Rather than engaging in any analysis as to whether JCE liability was actually foreseeable and accessible at the relevant time, the OCIJ simply pronounced that "[c]onsidering the international aspects of the ECCC and considering that the jurisprudence relied upon in articulating JCE pre-existed the events under investigation at the ECCC, the Co-Investigating Judges find that there is a basis under international law for applying JCE..."[195]

75. The requirement that criminal liability be sufficiently foreseeable and accessible at the time the alleged criminal acts are committed has been clearly explained by the ICTY *Vasiljević* Trial Chamber.

> Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity *under customary international law* for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible. When making that assessment, the Trial Chamber takes into account the specificity of international law, in particular that of customary international law. The requirement of sufficient clarity of the definition of a criminal offence is in fact part of the *nullum crimen sine lege* requirement, and it must be assessed in that

---

[191] Unofficial translation from French.
[192] For a more extensive discussion, *see* Annex A, Section II A (1).
[193] Impugned Order, para. 19. As noted by Professor Ambos, however, compliance with the requirements of foreseeability and accessibility alone do not suffice, because liability must also be provided for by the applicable law. Ambos Brief, p. 21. As discussed above, JCE, in each of its forms, cannot be said to fall under the term "committed" in Article 29 of the Establishment Law.
[194] Impugned Order, para. 20. The OCIJ simply stated that "[t]his test of foreseeability and accessibility can be satisfied when the alleged activity was criminalized under national law or under international law at the particular time period. Judicial decisions and international instruments will be of guidance in assessing the foreseeability and accessibility of criminal norms, as is the nature and gravity of the alleged acts themselves." The meaning of the notions of foreseeability and accessibility is important, however, because "an analysis of the way in which the Appeals Chamber [in the *Ojdanić* JCE Decision] understands the content of the notions of foreseeability and accessibility – which in the Chamber's opinion is intimately related to the idea of specificity – shows that these notions have been defined by the Appeals Chamber in a more generic and less strict way than what is usual in many national legal orders." Olásolo, *Principle of Legality*, at 317 (emphasis added).
[195] Impugned Order, para. 21 (emphasis added).

> context. If customary international law does not provide for a sufficiently precise definition of a crime listed in the Statute, the Trial Chamber would have no choice but to refrain from exercising its jurisdiction over it, regardless of the fact that the crime is listed as a punishable offence in the Statute. This is so because, to borrow the language of a US military tribunal in Nuremberg, anything contained in the statute of the court in excess of existing customary international law would be a utilisation of power and not of law.[196]

76. The Trial Chamber further explained that "[f]rom the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility."[197]

77. JCE liability, even if it could be considered part of customary international law at the relevant time, is certainly not defined with sufficient clarity for liability *via* a JCE to be foreseeable to the Charged Persons. This is evident from the many disagreements surrounding its elements, such as whether or not JCE II can be equated with JCE I,[198] whether the *mens rea* for JCE III is based on a subjective or objective determination,[199] whether it is possible to aid and abet a JCE,[200] whether contribution to the common plan of the JCE must be substantial,[201] etc.

78. In the *Ojdanić* JCE Decision cited by the OCIJ, the Appeals Chamber assessed whether criminal liability would have been foreseeable to Ojdanić. In support of its conclusion that Ojdanić could incur criminal liability on the basis of his participation in a JCE, the Appeals Chamber noted that Article 26 of the Criminal Code of the Socialist Federal Republic of Yugoslavia contained a provision "strikingly similar" to JCE liability.[202] Thus, JCE liability's existence in domestic legislation was considered when assessing foreseeability and

---

[196] *Prosecutor v. Vasiljević*, IT-98-32-T, Judgment, 29 November 2002, paras. 201-02 (emphasis added).
[197] *Id.*, para. 193 (emphasis added). *See also Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, Interlocutory Appeal on Joint Challenge to Jurisdiction, 27 November 2002, para. 15. "It is well-established under international criminal law that the principle of legality requires that the crime charged be set out in a law that is accessible and that it be foreseeable that the conduct in question may be criminally sanctioned at the time when the crime was allegedly committed."
[198] *See* discussion *supra*.
[199] *See* discussion *supra*.
[200] *See* Ambos Brief, p. 10.
[201] *See id.*, at 5-6, fn 10.
[202] *Ojdanić* JCE Decision, para. 40.

accessibility.[203] JCE liability does not exist in Cambodian law. It is highly unlikely that any accused would be aware that he could be held liable under a form of liability that did not exist in his country. *If* JCE liability were part of customary international law and *if* it could be assumed that an accused were actually aware of this, he could also be assumed to be aware that his country does not directly apply customary international law to crimes within its jurisdiction.

79. It has been explained that "[t]he long-range value of the ICC is that it will teach countries of the world how to do justice as they seek to apply repressive measures in name of social protection. If the ICC deviates from the principles of due process and legality, it will become a teacher that will bring great harm to the world. The ICC must not only conform to the rules of fair trial; it must also exceed conventional practices of the nation states and set a model for the world of how a criminal court should function."[204] The Defence submits that this statement is equally applicable to the ECCC, in terms of the ECCC's stated goal of acting as a role model for the courts of Cambodia.[205] The ECCC must not violate the principle of legality by applying a form of liability that did not exist in Cambodian law in 1975-79 and does not exist in Cambodian law today.

---

[203] *Id.*, para. 43. The Appeals Chamber did note, however, that "In the present case, and even if such a domestic provision had not existed, there is a long and consistent stream of judicial decisions, international instruments and domestic legislation which would have given him reasonable notice that, if infringed, that standard could entail his criminal responsibility." *Id.* However, "[a] number of countries do not recognize the JCED as a mode of liability, or only do so in limited circumstances. Does that mean that nationals of those states can successfully argue that the JCED was not sufficiently foreseeable nor accessible to them, so they cannot be convicted on that basis, whereas nationals of England, the USA and Yugoslavia whose national laws do recognise some form of the JCED cannot expect the same success when employing an identical argument? ... [C]an it really be said that the JCE mode of liability for core international crimes is 'sufficiently foreseeable' and that the law providing for the same is 'sufficiently accessible'? In the author's view, it is doubtful. Of course, the JCED has a higher profile today than it had before the *Tadić* Appeals Judgment. However, the negotiations in relation to Article 25(3)(d) of the ICC Statute indicate that even among the legal experts and high-positioned diplomats, the JCED is still a contentious issue. In addition, there seems to be an inherent unfairness in expecting an individual – in particular an uneducated and perhaps illiterate rebel – to comprehend the JCED, when many seasoned international criminal lawyers are still unclear as to its scope. Such expectation of knowledge of potential liability as a result of the JCED mode of liability arguably reflects an ivory tower view." Damgaard, at 240. *See also* p. 241 for a further discussion of this author's view that the application of JCE violates the principle of *nullum crimen sine lege*.

[204] Fletcher & Ohlin, *Reclaiming Fundamental Principles*, at 540. "Born from the ashes of 20th-century atrocity, international criminal law emerged as a response to impunity for the greatest crimes that had escaped the reach of the law. As such, it is a nascent legal enterprise. But one cannot defend its shortcomings by asserting that adherence to these principles would be too difficult. We assert that international criminal law, insofar as it aspires to be not just international law, but criminal law as well, must remain faithful to some basic principles of fairness and legality. The rationale for this assertion is that these basic principles are morally required in any true system of criminal law, regardless of its structure and irrespective of whether it is constituted at the municipal or international level. The demands of fairness are constitutive of the rule of law itself, and insofar as international criminal law seeks to extend the rule of law to atrocity and crimes against humanity, it too must remain faithful to the demands of fairness. Furthermore, there is no reason to believe that a more rigorous criminal law at the international level will not be successful in achieving justice and ending impunity for atrocity." *Id.*, at 541.

[205] *See* Introduction to the ECCC, *available at* http://www.eccc.gov.kh/english/about_eccc.aspx.

V. CONCLUSION AND RELIEF REQUESTED

80. The ECCC is a domestic Cambodian court. As such, it cannot directly apply customary international law. JCE liability cannot be considered a form of "committing" for the purposes of Article 29 of the Establishment Law and JCE liability was not part of customary international law in 1975-79. Even if it were determined that the ECCC could directly apply customary international law and that JCE could be considered a form of commission under customary international law, application of JCE liability would still violate the principle of legality. JCE was not a form of liability recognized in Cambodian law between 1975-79. JCE liability would not have been sufficiently foreseeable or accessible at the time.

81. The *Tadić* Appeals Chambers' embrace of JCE liability despite all evidence that it was not established customary international law gives the clear impression that the *Tadić* Appeals Chamber was grasping at whatever evidence it could find in order to reach a particular result – to be able to hold individuals criminally liable when they are far removed from the commission of a crime.[206]

82. The ECCC must not blindly follow the flawed analysis of the *Tadić* Appeals Chamber.[207] To do so violates the principles of legality and culpability, tending toward guilt by association.[208]

---

[206] "One cannot discount the idea that the tribunals are relying on these modes of imputed liability in order to ensure the conviction of indicted individuals and thus, in their view, the automatic fulfilment of the numerous broader objectives ascribed to international trials. Needless to say, it would be unacceptable for such trials to be used as a means to the end of achieving the ancillary goals, in disregard of the primary objective of holding individuals accountable in accordance with established principles of criminal liability and fair trial." Darcy, at 403 (emphasis added).

[207] *See* Ohlin, *Three Conceptual Problems*, at 69 for an argument that JCE, as constructed by the *Tadić* Appeals Chamber, should not, due to three major problems, form precedent when the International Criminal Court interprets its Statute and offers its own analysis of JCE. This argument is equally applicable to the ECCC, as it determines whether to apply JCE, since it is not bound by ICTY jurisprudence.

[208] "The way in which the doctrine is employed makes it hard to avoid the impression that there is some sort of equation of collective criminal action or group crime with collective criminal responsibility. It is difficult not to view joint criminal enterprise liability as being a nuanced form of guilt by association." Darcy, at 386. "The doctrine resembles the law of conspiracy and the membership or organizational liability applied in Nuremberg. The similarity is most obvious in JCE III since in this case a participant in a JCE can even be responsible for crimes of other participants not explicitly agreed upon beforehand if they are merely foreseeable. Thus, his liability is essentially based on his membership in the group pursuing the JCE." Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 1 J. INT'L CRIM. JUST. 1, 10 (2007). "Essentially an accused can be determined guilty of, for example, murder or even genocide, even though he never had the requisite intent to commit such crimes and even though they were committed outside the JCE and by persons that he, perhaps, had no control over. His guilt is arguably based on the principle of collective responsibility. He is being punished for a crime that he did not personally perpetrate and with respect to which he never had the requisite intent to commit; he is being punished for his *association* with the perpetrators of the crime. This is a worrying development in the law. As noted by Patricia McGowan Wald, a former judge at the ICTY '... the criminal enterprise doctrine must have outer limits if the notion of individual criminal guilt is to be maintained, rather than replaced by notions of collective guilt which was, after all, the very evil the Tribunals were set up to avoid.'" Damgaard, at 238. "[T]here is nothing in the concept or theory of joint participation ensuring ... limitation. That is a virtual invitation to guilt by association, where the defendant is many steps removed from its most malicious actors, as in a loosely knit network spread over many countries--such as al-Qaeda. Joint participation is potentially so broad a notion that it requires enormous self-restraint by prosecutors to ever be defensible, in practice." Mark J. Osiel, *Modes of Participation in Mass Atrocity*, 38 CORNELL INT'L L.J. 793,

The principle of legality and the right to a fair trial are cornerstones of international criminal law[209] which prohibit the expansion of any theory of criminal liability for the purpose of circumventing a lack of evidence on the specific role played by those individuals somehow involved in the planning, preparation and execution of large scale or widespread campaigns of criminality.

83. The OCIJ cited the *Tadić* Appeal Judgement for the proposition that "International crimes … typically concern persons who bear the most responsibility yet may have operated far from the physical perpetration of the criminal acts. International criminal law addresses this through modes of liability such as command responsibility or JCE."[210] The fact that international crimes tend to be collective in nature and involve persons removed from the physical perpetration is not a reason to apply JCE liability, when the other forms of liability specifically enumerated in Article 29 and already part of Cambodian law are available.[211] "Instead of moulding legal concepts to fit reality, one might better realize that the JCE doctrine is simply not always the appropriate instrument to tackle state bureaucracies and large organizations that engage in international crimes."[212] Cambodia's new criminal code reflects the will of the duly elected National Assembly: it confirmed co-perpetration's place in Cambodia's legal system, rather than adopting some judicially-created concept based on the Common Law.

84. In conclusion, the Pre-Trial Chamber should keep in mind the role and function of the ECCC, as a Cambodian court established within the domestic legal system.

> [J]udgments which leave room for doubt about the guilt of a particular individual undermine the validity of their message and may serve to add fuel to the fire of those who seek to advance their own version of history. In the presence of competing narratives of the causes and conduct of a recent conflict, such judgments may in turn hinder the realization of the objectives of maintaining peace and reconciliation. Intended in such a context to be a tool for imparting justice and promoting the healing of wartime wounds, law and legal mechanisms may in fact, paradoxically, inflame an already tense situation. The principles of

---

799-800 (2005) (emphasis added). *See also* van der Wilt, at 97, where Professor van der Wilt states that the Nuremberg Tribunals lost sight of the principle of individual guilt and that the outcome of Nuremberg was therefore not satisfactory.

[209] R. CRYER ET AL., INTERNATIONAL CRIMINAL LAW AND PROCEDURE 301 (Cambridge University Press, 2007).

[210] Impugned Order, para. 22.

[211] In addition, the assertion made by the OCIJ to the effect that JCE liability in international law developed as a means to address the need for accountability of those most responsible for the crimes committed, (Impugned Order, para. 22) is inaccurate. In the *Tadić* Appeal Judgement, JCE liability was envisaged as applicable to group crimes at the execution level only, involving members operating in proximity to one another. *See* Elies van Sliedregt, *System Criminality at the ICTY*, *in* A. NOLLKAEMPER & H. G. VAN DER WILT, SYSTEM CRIMINALITY IN INTERNATIONAL LAW 196 (Cambridge University Press, 2009).

[212] van der Wilt, at 93.

criminal liability to be applied by international courts[213] should have a solid foundation in domestic legal systems in order to increase the likelihood that the judgments of those tribunals will be accepted by the local population. The lack of continuity between domestic and international criminal law can have 'a corrosive potential impact on the public support for international criminal justice'.[214]

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

a. DECLARE that the current appeal is admissible under Rule 74(3)(a), Rules 55(10) and 74(3)(b), or Rule 21;

b. GRANT a public oral hearing on this matter; and

c. REVERSE the Impugned Order's holding that JCE liability is applicable to international crimes over which the ECCC has jurisdiction.

Respectfully submitted,

AVOCAT ATTORNEY AT LAW KINGDOM OF CAMBODIA

ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **22nd** day of **January, 2010**

[213] Of course, the ECCC, as a domestic court, situated within the domestic legal system of Cambodia has an even stronger obligation to ensure that the law it applies has a solid foundation within the domestic system.
[214] Darcy, at 400-01.