JOINT CRIMINAL ENTERPRISE AT THE ECCC

A critical analysis of two divergent commentaries on the Pre-Trial Chamber's Decision against the application of JCE

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Introduction

The ECCC[1] is an extraordinary chamber established within the existing court structure of Cambodia.[2] It was established pursuant to an Agreement between the Royal Government of Cambodia and the United Nations, formed after the Cambodian government requested the United Nations' assistance in organizing a process for the Khmer Rouge trials.[3] The Establishment Law was enacted by the Cambodian government in 2001 and amended in

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[1] "ECCC" is an abbreviation for the Extraordinary Chambers in the Courts of Cambodia.

[2] 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. *See* Report of the Secretary-General on Khmer Rouge Trials, UN Doc. No. A/57/769, 31 March 2003, para. 6. Prime Minister 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." *Id.*, para. 7. Reflecting the intent and results of the negotiations, the preamble to the 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") reads:

> **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
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> …
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> **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…

The 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") confirms that the "Extraordinary Chambers shall be established in the existing court structure…" *See* Establishment Law, Article 2 new. The United Nations Assistance to the Khmer Rouge Trials ("UNAKRT") website states that "UNAKRT provides technical assistance to the Extraordinary Chambers in the Courts of Cambodia (ECCC). The ECCC is a domestic court supported with international staff, established in accordance with Cambodian law." *Available at* http://www.unakrt-online.org/01_home.htm (emphasis added).

[3] *See* Chronology of Establishment of ECCC, available on the ECCC website: http://www.eccc.gov.kh/english/backgroundECCC.aspx.

2004. It sets out the subject matter and the temporal and personal jurisdiction of the ECCC,[4] as well as the applicable substantive and procedural law.[5] The form of liability known as joint criminal enterprise ("JCE")[6] as articulated by the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY") is not expressly included in the Establishment Law.

JCE was first formulated as a distinct form of criminal liability by the *Tadić* Appeals Chamber.[7] It is applied to a group of people who have carried out crimes collectively. The *Tadić* Appeals Chamber held that participation in a common plan is implicitly recognized as a form of "committing" under Article 7(1) of the ICTY Statute.[8] It reached this conclusion by determining that the object and purpose of the ICTY Statute allowed the extension of the Tribunal's jurisdiction to all persons who have in any way participated in the crimes within the Tribunal's jurisdiction.[9] The *Tadić* Appeals Chamber, moreover, held that the notion of common plan liability has been firmly established in customary international law.[10] The ICTY Appeals Chamber has identified three forms of JCE, the elements of which are the following:

a. The basic form (JCE I) ascribes individual criminal liability when "all co-defendants, acting pursuant to a common design, possess the same criminal intention … even if each co-perpetrator carries out a different role within it."[11]
b. The systemic form (JCE II) ascribes individual criminal liability when "the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan."[12]
c. The extended form (JCE III) ascribes individual criminal liability in situations "involving a common purpose to commit a crime where one of the perpetrators

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[4] *See*, *e.g.*, Establishment Law, Arts. 1, 2 new, 38, 39, 40.
[5] *See*, *e.g., id.*, Arts. 3 new, 4, 5, 6, 7, 8, 14 new, 17 new, 20 new, 23 new, 29 new, 33 new, 35 new, 36 new.
[6] JCE as a liability concept has been variously and interchangeably labeled at the ICTY as "common criminal plan," "common criminal purpose," "common design or purpose," "common criminal design," "common purpose," "common design," or "common concerted design." The common purpose has been more generally described to form part of a "criminal enterprise," a "common enterprise," and a "joint criminal enterprise." *See Prosecutor v. Brđanin & Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 24.
[7] *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), paras. 185-234.
[8] *Id.*, para. 220. Article 7(1) of the ICTY Statute provides that "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."
[9] *Id*, paras. 189-90.
[10] *Id*., para. 220.
[11] *Id.*, para. 196.
[12] *Id.*, para. 202.

commits an act which, while outside the common plan, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose."[13]

JCE has been the most controversial form of liability applied at the *ad hoc* international tribunals. Since its inception, it has come under severe criticism, particularly because it has been viewed as judge-made and not reflective of customary international law.[14] However, despite countless challenges over the years in various courts and international tribunals, it was not until 20 May 2010, when the Pre-Trial Chamber ("PTC") of the ECCC in a landmark decision[15] unequivocally held that JCE III is not reflective of customary international law. This Decision, the culmination of nearly 2 years of robust litigation,[16] overturned in part the Office of Co-Investigating Judge's ("OCIJ") Order on the application of JCE at the ECCC.[17]

As soon as the PTC Decision was published, it was met with criticism. On 3 June 2010, David Scheffer and Anthony Dinh published an article claiming the PTC's legal reasoning in rejecting the applicability of JCE III was flawed and inconsistent with the stated mission of the ECCC,[18] while former ICTY and International Criminal Tribunal for Rwanda ("ICTR") Judge Wolfgang Schomburg published an article proclaiming that

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[13] *Prosecutor v. Vasiljević,* IT-98-32-A, Judgement, 25 February 2004, para. 99. *See also Tadić* Appeal Judgement, para. 204.

[14] *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."

[15] *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ (PTC35), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), D97/14/15, ERN: 0048652-00486589 ("PTC Decision").

[16] A list of the Ieng Sary Defence filings concerning JCE and summaries of these filings are available on the Ieng Sary Defence website: http://sites.google.com/site/iengsarydefence/Home.

[17] *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 ("OCIJ Order").

[18] David Scheffer & Anthony Dinh, *The Pre-Trial Chamber's Significant Decision on Joint Criminal Enterprise for Individual Responsibility*, CAMBODIA TRIBUNAL MONITOR, 3 June 2010, p. 1, *available at* http://www.cambodiatribunal.org/images/CTM/ctm%20scheffer%20dinh%20jce%20commentary%203%20june%202010.pdf ("Scheffer and Dinh").

the PTC Decision was a good start in that it found JCE III not to be supported by customary international law. However, Judge Schomburg believed the PTC Decision lacked sufficient clarity – particularly with respect to JCE I and II.[19] Despite this criticism, the PTC Decision provides the most thorough judicial analysis to date of the jurisprudence the *Tadić* Appeals Chamber relied on to proclaim that JCE was beyond doubt recognized as customary international law and thus applicable before the ICTY.[20]

The aim of this article is to assess these commentaries. It is argued that Scheffer and Dinh's analysis is lacking, resulting in unfounded conclusions. Judge Schomburg's analysis, which focuses on the existence of forms of liability available for circumstances where collective responsibility is warranted, has traction and merits consideration. While the PTC's decision is far from perfect[21] – especially when considering the arguments advanced by the Ieng Sary Defence as briefly addressed in this article – its holding that JCE III is not reflective of customary international law and is thus inapplicable before the ECCC (since it was also not part of Cambodian law at the relevant time) is a wise and courageous decision.

Summary of the OCIJ Order and PTC Decision

On 28 July 2008, the Ieng Sary Defence filed a jurisdictional challenge before the OCIJ on the application of JCE at the ECCC. The basis of the challenge was that JCE is inapplicable before the ECCC because: (1) it is not specified in the Establishment Law; (2) it is not part of Cambodian law; (3) it is not recognized in customary international law and even if it were today, it was not customary international law in 1975-79, nor is customary international law directly applicable in Cambodian courts; and (4) it is not recognized by an international convention enforceable at the ECCC. Therefore applying JCE at the ECCC would violate the principle of *nullum crimen sine lege*.[22] On 8 December 2009, the OCIJ issued an Order holding that JCE in all its forms is applicable at the ECCC. After recognizing that JCE is *not* a form of criminal liability which exists in Cambodia,[23] the OCIJ concluded that JCE is a form of "commission" under customary

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[19] Wolfgang Schomburg, *Jurisprudence on JCE – Revisiting a Never Ending Story*, CAMBODIA TRIBUNAL MONITOR, 3 June 2010, *available at* http://blog.cambodiatribunal.org/2010/06/jurisprudence-on-jcerevisiting-never.html ("Schomburg").

[20] As to the applicability of customary international law at the ICTY, *see* Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 34 (emphasis in original): "In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the [ICTY] should apply rules of international humanitarian law which are beyond doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."

[21] *See infra* p. 24-31 for a discussion of the faults in the PTC's reasoning.

[22] *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, ERN: 00208225-002082240.

[23] OCIJ Order, para. 22.

international law.[24] The OCIJ found that 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.[25] 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, it held that there is a basis under international law to apply this form of liability.[26] The OCIJ found that JCE could not be applied to domestic crimes as it could not affirm that international forms of liability such as JCE apply beyond the domain of international crimes.[27]

The OCIJ Order was appealed by the Ieng Sary Defence team, two other Defence teams, and some of the Civil Parties. Following these appeals, the PTC issued its Decision. It found that JCE was a unique concept which combines features of different legal systems; that although JCE I and II resemble accountability in Civil Law systems, participation in a JCE differs from co-perpetration in Cambodian law. It reasoned that JCE embraces situations in which the accused may be more remote from the perpetration of the *actus reus* of the crime.[28] In determining whether JCE fell within the jurisdiction of the ECCC, the PTC applied a test set out at the ICTY.[29] It found that the preconditions which must exist for a form of liability to be applicable are:

> (i) it must be provided for in the [ECCC Law], explicitly or implicitly;
> (ii) it must have existed under customary international law at the relevant time;
> (iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way;
> (iv) such person must have been able to foresee that he could be held liable for his actions if apprehended.

Without providing any explanation, the PTC found that it was not convinced that a stricter test should be applied at the ECCC.[30] With regard to accessibility, the PTC stated that accessibility may be found where a law existed at the relevant time only in customary international law; the law need not have been recognized in domestic law.[31] With regard to foreseeability, the PTC stated that "a charged person must be able to

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[24] *Id.*, para. 13.
[25] *Id.*, para. 21.
[26] *Id*.
[27] *Id.*, paras. 22-23.
[28] PTC Decision, paras. 40-41.
[29] *Id.*, para. 43, *quoting 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. 21.
[30] *Id.*, para. 44.
[31] *Id.*, para. 45.

appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision."[32]

The PTC found that it is immaterial whether the ECCC is a domestic or international court because this does not impact on a finding that JCE is applicable, due to the clear terms of Article 1 and 2 of the Establishment Law.[33] It found that Article 2 of the Establishment Law leads to the conclusion that the ECCC may apply international forms of liability which were recognized in customary international law at the time,[34] contrary to the Ieng Sary Defence position on this point.[35] It found that JCE could be considered a form of "commission" under Article 29 of the Establishment Law even though Article 29 does not explicitly mention JCE.[36]

The PTC then turned to an examination of whether JCE existed in customary international law in 1975-79. It noted that the *Tadić* Appeals Judgement was the first decision of an international tribunal to trace the existence and evolution of JCE in customary international law.[37]

The PTC first considered JCE I and II together. It considered the sources relied upon by the *Tadić* Appeals Chamber in finding the existence of JCE I and II in customary international law, but stated that it would not limit its inquiry to these sources.[38] It considered that the doctrine of common plan found in the London Charter of the International Military Tribunal ("London Charter") and Control Council Law No. 10

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[32] *Id.*
[33] *Id.*, para. 47. Article 1 of the Establishment Law states:

> The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

Article 2 new of the Establishment Law states:

> Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.
> Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as 'Suspects'.

[34] PTC Decision, para. 48.
[35] *See infra* p. 25-27.
[36] PTC Decision, para. 49.
[37] *Id.*, para. 54.
[38] *Id.*, paras. 56-57.

support the existence of JCE in customary international law.[39] The PTC considered the eight cases relied upon by the *Tadić* Appeals Chamber as well as two additional post-World War II cases which it considered provided support for the existence of JCE I and II in customary international law.[40] It found that:

> In light of the London Charter, Control Council Law No. 10, international cases and authoritative pronouncements, the Pre-Trial Chamber has no doubt that JCE I and JCE II were recognized forms of responsibility in customary international law in the time relevant for Case 002. This is the situation irrespective of whether it was appropriate for *Tadić* to rely on the [International Criminal Court ("ICC")] draft Statute and on the International Convention for the Suppression of Terrorist Bombing.[41]

The PTC concluded that JCE I and II would have been sufficiently accessible and foreseeable to the Charged Persons in 1975-79, based on its earlier finding that these forms of liability have an underpinning in the Cambodian law concept of co-perpetration.[42]

The PTC then turned to an examination of the authority relied upon by the *Tadić* Appeals Chamber for the existence of JCE III.[43] It found that the London Charter and Control Council Law No. 10 do not provide support for the existence of JCE III and that the additional instruments relied upon by the *Tadić* Appeals Chamber (the draft ICC Statute and the International Convention on the Suppression of Terrorist Bombing) cannot support the existence of JCE III in customary international law in 1975-79 as these instruments post-date that time period.[44] It found that although the facts of the two cases relied upon by the *Tadić* Appeals Chamber (*Essen Lynching* and *Borkum Island*) could be relevant to JCE III, the lack of reasoned judgements in these cases precludes certainty as to the form of liability applied. The PTC could not infer that JCE III had been applied in either of these cases.[45] It noted that the *Tadić* Appeals Chamber had relied upon some Italian cases, but did not find that national jurisprudence could be a proper precedent for this international form of liability.[46]

The PTC considered whether general principles of law could be considered in determining customary international law, but ultimately decided that it did not need to consider general principles as evidence of customary international law, because it was not

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[39] *Id.*, paras. 57-58.
[40] *Id.*, paras. 62-69.
[41] *Id.*, para. 69.
[42] *Id.*, para. 72. The PTC uses the term "co-authorship" here, but it appears that this term is used interchangeably with co-perpetration. *See id.*, para. 41.
[43] *Id.*, para. 77.
[44] *Id.*, para. 78.
[45] *Id.*, paras. 79-81.
[46] *Id.*, para. 82.

satisfied that such liability would have been foreseeable to the Charged Persons in 1975-79.[47] This is because it could identify no Cambodian law applicable at the relevant time which would have put the Charged Persons on notice that such an extended form of liability was punishable.[48]

The Scheffer and Dinh commentary to the PTC Decision

Although Scheffer and Dinh hailed the PTC Decision as a comprehensive and long overdue analysis of the jurisprudential bases for JCE, they were quick to criticize its conclusion that JCE III is inapplicable at the ECCC. Scheffer and Dinh acknowledge that the PTC Decision:

> provided the most comprehensive review of the history and jurisprudential bases for JCE since the *Tadić* appeals decision… [It] includes a detailed examination of the post-World War II statutes establishing the first international criminal tribunals, the case law of the tribunals acting pursuant to these statutes, the work of the United Nations' International Law Commission which represents the practice of the international community, and the legal practices in Cambodia and relevant states in 1975.[49]

The authors argue, however, that the PTC erred in its interpretation of JCE III.[50] Specifically, they argue that the PTC erred in failing to consider the Tokyo Charter of the International Military Tribunal for the Far East ("IMTFE")[51] and erred because it "did not discuss the *Borkum Island and Essen Lynching* [sic] cases… [although] [t]he facts and judgments in *Borkum* and *Essen* produce the inescapable inference that the defendants were convicted of crimes of which they did not have specific intent but that nonetheless resulted from their actions in a common criminal plan."[52] They doubt whether this jurisprudence "involves significantly more inference than the other post-World War II jurisprudence that led the PTC to find 'without a doubt' that JCE 1 and JCE 2 were customary law… Hence, the PTC's attempt to distinguish the JCE 1 and JCE 2 jurisprudence from the JCE 3 jurisprudence is dubious at best."[53] They also observe that "[t]he PTC did not reject JCE 3 outright in the manner that the Pre-Trial Chamber in the ICC did."[54]

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[47] *Id.*, paras. 84-87.
[48] *Id.*, para. 88.
[49] Scheffer and Dinh, at 3.
[50] *Id.*
[51] Charter of the International Military Tribunal for the Far East, approved 26 April 1946, TIAS No. 1589 ("Tokyo Charter").
[52] Scheffer and Dinh, at 4-5.
[53] *Id.*, at 5.
[54] *Id.*, at 4.

Scheffer and Dinh believe that all forms of JCE must be applied at the ECCC as "it is only through employing a doctrine such as JCE that the court is able to effectuate the object and purposes of the ECCC."[55] They see the object and purpose of the ECCC as two-fold: "1) To bring to trial senior leaders of Democratic Kampuchea and those most responsible for the commission of crimes in Cambodia in the period 1975-79; and 2) To hold individuals individually responsible for the commission of any crimes to which they contributed."[56] They believe that "[w]ithout JCE, the court cannot fully prosecute individuals for the degree of culpability that their actions entailed."[57] The authors contend that:

> The public statements of officials of the Cambodian government as well as the debates in the Cambodian National Assembly express the drafters' view that the senior leaders and those with influence in the organization are culpable for any violations committed. Thus, in order to fully prosecute suspects for the culpability envisioned by the drafters, the court must be able to hold responsible those who perpetrated crimes via a common criminal enterprise. None of the modes of liability listed in the ECCC Law are capable of fully expressing the culpability that this form of commission entails. In contrast, the culpability contemplated in the ECCC Law correlates with the perpetration of crimes under the doctrine of JCE.[58]

Next, Scheffer and Dinh observe that there has been "near uniform acceptance in the *ad hoc* tribunals that [JCE] is indeed customary law."[59] Yet they argue that rejecting settled ICTY jurisprudence concerning the applicability of JCE III was actually the path of least political resistance for the PTC. They base this argument on the fact that there has been a

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[55] *Id.*, at 6.

[56] *Id.* To support this proposition, Scheffer and Dinh rely upon a purposive interpretation of the Agreement and Establishment Law, arguing that Art. 29 of the Establishment Law must be interpreted in light of the purpose expressed in Article 1 of the Agreement and Article 2 new of the Establishment Law. Article 1 of the Agreement states:

> The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation.

See supra note 33 for the text of Article 2 new of the Establishment Law.

[57] Scheffer and Dinh, at 6.

[58] *Id.* Scheffer and Dinh also argue that as the ECCC has the power to bring to trial all suspects who committed the crimes enumerated in Article 3-8 of the Establishment Law, the court must consider the different forms of perpetration through which the crimes in Cambodia may have been committed. *Id.*

[59] *Id.*, at 2.

"recent and highly vocal trend opposing the doctrine of JCE."[60] They argue that due to this opposition, the PTC may not have wished to be seen "applying dubious law."[61]

The authors conclude by arguing that the PTC Decision is ambiguous in its effect, stating that it is "a decision of first impression for all significant purposes"[62] that "only applies to the pre-trial phase," and "does not bind the Trial Chamber."[63] They advise the Trial Chamber to "consider the reasons above when they inevitably face the question of whether or how to apply the doctrine of JCE,"[64] urging it to find that it is appropriate to apply all three forms of JCE because "[t]he ECCC needs as many tools as is legally available to make sure that those most culpable are held accountable."[65]

How Scheffer and Dinh got it wrong

While Scheffer and Dinh acknowledge that the PTC Decision is "the most comprehensive review of the history and jurisprudential bases for JCE since the *Tadić* appeals decision," they also criticize it for overlooking the Tokyo Charter and relevant post-World War II jurisprudence.[66]

Materiality of the Tokyo Charter

Scheffer and Dinh argue that "the PTC failed to consider the Tokyo Charter … which provides specific and unambiguous textual support for JCE III."[67] A comparison of the Tokyo Charter and the London Charter highlights the fallacy in Scheffer and Dinh's argument. Article 5 of the Tokyo Charter states in pertinent part:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all the acts performed by any person in execution of such plan.

Article 6 of the London Charter states in pertinent part:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution of the common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

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[60] *Id.*
[61] *Id.*
[62] *Id.*, at 7.
[63] *Id.*
[64] *Id.*
[65] *Id.*, at 8.
[66] *Id.*, at 2, 4.
[67] *Id.*, at 4.

Clearly the relevant language of the Tokyo and London Charters is almost identical.[68] The PTC considered the London Charter and found it provided "undeniable support of the basic and systemic forms (JCE I & II) of JCE liability."[69] Due to the lack of any substantive difference between the Tokyo Charter and London Charter, it seems disingenuous to suggest that the PTC has "failed to consider a relevant source of international criminal law."[70]

Further, there is no evidence of JCE III in the Majority Judgement at the IMTFE.[71] It is plainly erroneous for Scheffer and Dinh to assert that "the Tokyo Charter provides specific and unambiguous support for JCE 3 liability in international criminal prosecutions."[72] In any event, the Tokyo Charter is not declaratory of customary international law. Unlike the London Agreement, which established the International Military Tribunal at Nuremberg,[73] the Tokyo Charter was not signed by the governments of the Allied powers; it was essentially an American undertaking.[74]

Post World War II Jurisprudence

Scheffer and Dinh erroneously claim that post World War II jurisprudence, Scheffer and Dinh are wrong in their assertion that "the PTC did not discuss the *Borkum Island and*

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[68] This is recognized by one of the co-authors of the Scheffer and Dinh article, Anthony Dinh. "Article 6 of the London Charter of the International Military Tribunal and article 5 of the Charter of the International Military Tribunal for the Far East provide in identical [sic] wording…" Anthony Dinh, *Joint Criminal Enterprise at the ECCC: The Challenge of Individual Criminal Responsibility for Crimes Committed under the Khmer Rouge*, CAMBODIA TRIBUNAL, 18 June 2010 ("Dinh"), p. 9, *available at* http://cambodiatribunal.org/images/CTM/ctm%20adinh-international%20criminal%20law-jce.pdf.

[69] PTC Decision, para. 58.

[70] Scheffer and Dinh, at 4.

[71] Neil Boister, *The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal – The Measure of the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 425, 437 (2010).

[72] Scheffer and Dinh, at 4.

[73] Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945 ("London Agreement"), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47fdfb34d.

[74] *See* VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA fn. 42 (Transnational Publishers Inc., 1st ed. 1995) (internal citations omitted): "There are several reasons why the Tokyo Charter and Judgment are generally considered to be less authoritative than the Nuremberg Charter and Tribunal. Unlike the Nuremberg Charter, which was the product of extensive multilateral negotiations, the Tokyo Charter was promulgated by General Douglas MacArthur, the Supreme Allied Commander for Japan following the war, in the form of an executive order without prior approval of the other allied nations. In contrast to Nuremberg, where the judges and prosecutors were selected by four different countries, the prosecutor and judges at Tokyo were personally selected by General MacArthur. In his dissenting opinion, the French Judge at Tokyo expressed the view that 'so many principles of justice were violated during the trial that the Court's judgment certainly would be nullified on legal grounds in most civilized countries.'"

Essen Lynching [sic] cases."[75] The PTC did in fact discuss these cases,[76] and specifically rejected the "inescapable inference that the defendants were convicted of crimes of which they did not have specific intent but that nonetheless resulted from their actions in a common criminal plan" claimed by Scheffer and Dinh.[77]

Specifically in relation to the *Borkum Island* case, the PTC found that "in light of the fact that the Prosecution pleaded that all accused shared the intent that the airmen be killed, the court may as well have been satisfied that these six individuals possessed such intent rather than having merely foreseen this possible outcome."[78] In relation to *Essen Lynching*, it found that "there is no indication in the case that the Prosecutor even explicitly relied on the concept of common design and this case alone would not warrant a finding that JCE III exists in customary international law."[79] The PTC Decision is correct. The principle of *nullum crimen sine lege* requires the law at the time of an alleged offense to be certain.[80] Neither *Essen Lynching* nor *Borkum Island* provide certainty that JCE III existed in customary international law in 1975-79.[81] Professor Ambos explains the lack of certainty surrounding JCE III:

> [Although] JCE I and II have a basis in the post World War II case law, this is not the case with regard to JCE III. From the case law referred to by the *Tadić* Appeals Chamber, only the *Essen Lynching* case contains elements of the '*common purpose*' or '*common design*' doctrines insofar as the killings were attributed to all the accused on this basis (on their being concerned in the killing of the three unidentified British prisoners of war). Yet, it is not – inter alia because of the absence of conclusions by a Judge Advocate – clear whether the tribunal convicted the three accused

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[75] Scheffer and Dinh, at 4.
[76] PTC Decision, paras. 75, 79-81.
[77] Scheffer and Dinh, at 5.
[78] PTC Decision, para. 80.
[79] *Id.*, para. 81.
[80] *See Prosecutor v. Stakić*, IT-97-24-T, Decision Rule 98*bis* Motion for Judgment of Acquittal, 31 October 2002, para. 131, where *nullum crimen sine lege certa*, a branch of the *nullum crimen sine lege* principle, is described as a "fundamental criminal law principle." *See also Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), *Amicus Brief* for Pre-Trial Chamber on Joint Criminal Enterprise from Professor Kai Ambos 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. 20, n. 83.
[81] This is apparently recognized by Dinh, who observes that "the common purpose doctrine of the post-World War II tribunals remained a nebulous concept and an incomplete attempt to hold individuals responsible for the international crimes," Dinh, at 7; "these cases provided sparsely reasoned judgments," Dinh, at 15; "[t]he post-WWII decisions regarding this form of the common purpose doctrine [JCE III] are famously devoid of legal reasoning," Dinh, at 23. Dinh also observes that "all of the accused [in *Essen Lynching* and *Borkum Island*] were physically present during the commission of the crime and none of the accused were charged with participation in a larger plan outside of the immediate mob action. Such situations are not likely to capture the wide and complex situations which contemporary cases exhibit. The situations before the contemporary *ad hoc* tribunals regarding nation-wide and transnational JCEs support this contention." Dinh, at 15-16.

> on the basis of a shared intent with regard to the killing of the accused (i.e., pursuant to JCE I) or – as submitted by the *Tadić* Appeals Chamber – on the basis of the foreseeability doctrine, i.e. that it was foreseeable (objectively or subjectively) for all accused that the prisoners would be killed. In a similar vein, the *Borkum Island Case*, another case of mob violence, constitutes – on the basis of the case made by the Prosecution – proof of recourse to JCE I rather than JCE III. The Prosecution described the accused in this case as 'cogs in the wheel of common design,' each wheel on its own indispensable for the commission of the crime ('the wheel of wholesale murder could not turn without all the cogs.') Accordingly every person accused who 'played his part in mob violence which led to the unlawful killing of the seven American flyers' had to be convicted of murder. Consequently, the Appeals Chamber itself concedes that this case could also be considered as a case of JCE I.[82]

Even if it were unequivocal that *Essen Lynching* and *Borkum Island* did employ JCE III liability, its use in these cases would not be enough to demonstrate the widespread and consistent State practice necessary to be declarative of customary international law. Cases such as these, 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 [Control Council Law No. 10] do not constitute valid international precedent, and the 'participatory principles of criminal responsibility' annunciated at these trials 'have no subsequent validity in international criminal law.'"[83]

Flawed analysis of the object and purpose of the Agreement and Establishment Law

Scheffer and Dinh contend that the ECCC's "goal to prosecute only senior leaders of Democratic Kampuchea and those most responsible points logically to JCE as applicable to prosecutions before the ECCC."[84] This argument is misplaced. To cite public policy considerations (such as the object and purpose of the ECCC) as justification for the introduction of a form of criminal liability that did not exist in either Cambodian or customary international law during the relevant period is inappropriate and unsound.[85]

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[82] Ambos Brief, at 28-29.

[83] 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, 100 (2006).

[84] Scheffer and Dinh, at 6.

[85] "[P]ublic policy: it is a very unruly horse and once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when all other points fail." Burrough J. in *Richardson v. Mellish* (1824) 1 Bing 229 at 252. *See also Magor & St. Mellons Rural District Council v. Newport Corporation*, (1951) 2 All ER 839: 1952 AC 189; Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense,* 11 LEWIS & CLARK L. REV. 185 (2007); Ambos Brief, at 22.

The Civil Law system – and especially the French model upon which Cambodia's legal system is largely based – requires that all forms of liability must be expressly included in written law if they are to be applied.[86] Despite this requirement, as Scheffer and Dinh admit, "[t]he drafters, who included co-author David Scheffer, did not expressly consider JCE in particular. There was no effort to articulate JCE in either the ECCC Law or the Agreement."[87] It is unfathomable that David Scheffer, who at the relevant time was the United States Ambassador at Large for War Crimes Issues,[88] was not aware of JCE and of the Civil Law requirement that all forms of liability must be expressly included in written law, particularly given the controversy surrounding the legitimacy of JCE. If the drafters of the Establishment Law intended to legislate JCE as an applicable form of liability at the ECCC, they should have expressly included it in the Establishment Law.

In fact, in its Decision, the PTC did legislate, in part, when it found that had the drafters of the Establishment Law intended to limit the "commission" envisaged in Article 29 to persons who physically and directly carry out the *actus reus* of the crime(s), they would have made such a restriction explicit.[89] It made this finding by reasoning that Article 29 mirrors Article 6 of the ICTR Statute and Article 7 of the ICTY Statute and since "the *ad hoc* tribunals have consistently held that they regarded participation in a JCE as a form of 'commission,'" it was of the view that this is "consistent and precedential case law."[90] Creative as this reasoning may be, it is circular.[91]

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[86] *See* French law on *nullum crimen sine lege scripta*, Crim. 8 Sep. 1809, S 1809-11.1.107. *See also* JOHN BELL ET AL., Principles of French Law 204. This approach is also followed in Germany. *See Streletz, Kessler & Krenz v. Germany* (German Border Guard Case), European Court of Human Rights, Applications Nos. 34044/96, 35532/97 and 44801/98, para. 22. Indeed this is the approach of the Pre-Trial Chamber in assessing the scope of rights to appeal orders by the OCIJ set out in the ECCC's Internal Rules. *See Case of IENG Sary*, 002/19-09-2007, Decision on IENG Sary's Appeal Against Letter Concerning the Request for Information Concerning Legal Officer David Boyle, 28 August 2008, A162/III/6, ERN: 00221204-00221208, para. 17. *Cf. Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010 ("*Duch* Trial Judgement"), para. 30, holding that the ECCC may rely on customary and conventional international law. It is submitted that this finding is misconceived, due both to its failure to consider *nullum crimen sine lege scripta*, and further for the reasons explained *infra* at p. 25-27.

[87] Scheffer and Dinh, at 6.

[88] *See* David Scheffer's Biography, *available at* http://www.law.northwestern.edu/faculty/profiles/DavidScheffer/. "Scheffer was previously the U.S. Ambassador at Large for War Crimes Issues (1997-2001) and led the U.S. delegation in U.N. talks establishing the International Criminal Court. During his ambassadorship, he negotiated and coordinated U.S. support for the establishment and operation of international and hybrid criminal tribunals and U.S. responses to atrocities anywhere in the world. Scheffer also headed the Atrocities Prevention Inter-Agency Working Group. During the first term of the Clinton Administration, he served as senior adviser and counsel to the U.S. Representative to the United Nations, Dr. Madeleine Albright, and served from 1993 through 1996 on the Deputies Committee of the National Security Council."

[89] PTC Decision, para. 49.

[90] *Id*.

[91] Note that, unfortunately, the ECCC's Trial Chamber has made a similar mistake. In justifying its finding that Article 29 new encompasses JCE because the jurisprudence of the ICTY, the ICTR and SCSL has held

At the time the Establishment Law was negotiated and drafted, "consistent and precedential case law" that supports the existence of JCE simply did not exist. The *ad hoc* tribunals did not consistently hold that JCE was a form of commission until after the period in which Article 29 of the Establishment Law was enacted. [92]

Scheffer and Dinh rely on certain statements made by Deputy Prime Minister His Excellency Sok An to support their proposition that the drafters intended the inclusion of JCE.[93] However, it bears emphasis that several of these statements were made either outside the National Assembly, or were made after the conclusion of the Establishment Law and the Agreement.[94] As explained below, such statements cannot be considered a supplementary means of statutory interpretation or *travaux préparatoires*. It is also barely credible that HE Sok An would intend to endorse JCE, which will cast a wide shadow of liability and spread stain on a variety of distinguished members of Cambodian society and others, such as the King-Father Norodom Sihanouk and his wife, Monique,[95]

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that JCE is encompassed by the language of their respective Statutes, the Trial Chamber fails to undertake any critical analysis of whether these Tribunals were correct to construe JCE as a form of "committing" in the first place, and also whether such an interpretation is appropriate in the context of the ECCC. *Duch* Trial Judgement, para. 511.

[92] Article 29 of the 2004 Establishment Law does not differ materially from Article 29 of the 2001 Establishment Law. The 2001 Establishment Law was adopted by the National Assembly on 2 January 2001 and was promulgated on 10 August 2001. It appears that there were only two decisions or judgements at the *ad hoc* tribunals which referred to JCE in the period between the *Tadić* Appeal Judgement and the date the Establishment Law was promulgated. Due to the timing of these decisions, and the fact that there were no amendments to Article 29 between the time it was adopted and when it was promulgated, it seems impossible that these decisions could have been considered by the Establishment Law's drafters as consistent, precedential case law. *See Prosecutor v. Brđanin & Talić*, IT-99-36-PT, Decision on Form of further Amended Indictment and Prosecution Application to Amend, 26 June 2001; *Prosecutor v. Krstić*, IT-98-33-T, Judgement, 2 August 2001.

[93] Scheffer and Dinh, at 6. H.E. Sok An is Deputy Prime Minister of Cambodia and Chairman of the Royal Government of Cambodia Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders.

[94] *See* Scheffer and Dinh, at fns. 12, 14, 15, *citing* Statements of Sok An, Deputy Prime Minister and Chairman of the Task Force on the Khmer Rouge Trials, and the debates of the National Assembly *available at* http://www.cambodia.gov.kh/krt/english/index.htm. *See* HE Sok An, Never Again! Statement on the 60th Anniversary of the Liberation of Auschwitz and the Other Nazi Extermination Camps, 27 January 2005; HE Sok An, Message to the Pledging Conference for the Extraordinary Chambers, United Nations Secretariat, New York, 28 March 2005; HE Sok An, Statement on the Entry into Force of the Agreement between Cambodia and the United Nations on the Khmer Rouge Trials, 29 April 2005; HE Sok An, Opening Remarks at the Meeting of the Group of Interested States, ASEAN and Other Countries on the Cambodian Share of the Budget for the Extraordinary Chambers, 30 May 2005; HE Sok An, Remarks at the Reception following the Swearing in of National and International Judicial Officers for the Extraordinary Chambers in the Courts of Cambodia, 3 July 2005.

[95] After King Sihanouk was deposed by Lon Nol in a military coup in 1970, he formed the Front d'Union National Khmer and the Gouvernement Royal d'Union National Khmer, including ministers who were old Sihanoukists, as well as communists in the interior such as Khieu Samphan, Ieng Sary, Hou Yuon and Hu Nim to oppose Lon Nol. He also called on Cambodians to fight against the Khmer Republic of Lon Nol. *See* James Gerrand, The Last God King: Sihanouk of Cambodia (Documentary, 1998): "Before the coup of 1970, Cambodia's communist rebels had just a few hundred hardcore members. Now, Sihanouk's name would be used to enlist thousands of unwitting peasants, teachers, students and intellectuals to the Khmer

Prime Minister Hun Sen,[96] Heng Samrin,[97] Keat Chhon,[98] Chea Sim,[99] Hor Nam Hong,[100] Ouk Bun Chhoeun,[101] General Pol Saroeun,[102] General Tea Banh,[103] Thiounn Mum,[104] Thiounn Prasith,[105] Thiounn Thioeun,[106] and Laurence Picq.[107]

Recourse to supplementary means of interpretation is only appropriate when there is a lack of clarity, or if relying on the text alone would produce a manifestly absurd result.[108]

Rouge side." In 1973, Sihanouk and his wife Monique clandestinely traveled down the Ho Chi Minh trail with Ieng Sary to visit Cambodia, going as far as Banteay Srei and Angkor Wat. Among those who received them in Cambodia were Khieu Samphan, Hu Nim and Son Sen. Pol Pot was also present. After the Democratic Kampuchea victory in April 1975, Sihanouk returned to Phnom Penh in early September 1975, and after a few weeks went to New York where he spoke supportively of the new government at the UN. He then returned to Cambodia and held the title of "Chief of State" until April 1976.

[96] It appears that Hun Sen joined the revolution around 1970, in answer to Sihanouk's call for people to fight against Lon Nol. He became a low-ranking army officer. By 1977, he appears to have become a regimental commander responsible for the border between Region 21 and Vietnam. *See* BEN KIERNAN, GENOCIDE AND RESISTANCE IN SOUTHEAST ASIA: DOCUMENTATION, DENIAL, AND JUSTICE IN CAMBODIA AND EAST TIMOR 38 (Transaction Publishers 2008). *See also* BEN KIERNAN, THE POL POT REGIME 210, 266, 370-71, 375 (Silkworm Books 1997) ("KIERNAN, POL POT REGIME").

[97] Heng Samrin appears to have been second in command of one of the divisions which took Phnom Penh in April 1975. He apparently remained loyal to Democratic Kampuchea until deciding to flee to Vietnam in 1978. By then he was in command of much larger forces, and claims to have been active in a revolt against Pol Pot in early 1978. There is some evidence that his troops were among those who committed atrocities against Vietnamese civilians in the 1977 cross-border warfare. *See* KIERNAN, POL POT REGIME, at 31-35, 65-67, 95, 206, n. 97.

[98] Keat Chhon is presently the Minister for Economy and Finance. He was in Sihanouk's pre-war government, in Peking during at least part of 1970-75 and a member of the Foreign Ministry during the time of Democratic Kampuchea. *See* CAMBODIA DAILY, July 1-2, 2000, at 8-13.

[99] Chea Sim was chief of a District in the Southeast (Region 20, Prey Veng Province) during Democratic Kampuchea. *See* KIERNAN, POL POT REGIME, at 56-58, 372, 397, 441-42, 455.

[100] Hor Nam Hong is presently the Minister of Foreign Affairs. He had been a pre-1975 diplomat and was called back in 1975. *See* Statement of Hor Nam Hong in *Phnom Penh Post*, April 8-21, 2005. *See also* CAMBODIA DAILY, July 1-2, 2000, at 1, 8-13.

[101] Ouk Bun Chhoeun was a former Minister of Justice in the People's Republic of Kampuchea. *See* KIERNAN, POL POT REGIME, at 62, 265-67, 396, 440-41.

[102] General Pol Saroeun was a member of the Democratic Kampuchea military forces. *Id*., at 395-96, 398-99, 440.

[103] General Tea Banh is presently Minister of Defence. *Id.*, at 69-78.

[104] Thiounn Mum was an early communist intellectual. His official position from 1975-79 remains unclear, but some reports say he was Minister of Energy. *Id.*, at 10, 147, 327.

[105] Thiounn Prasith was a member of the Foreign Ministry who often traveled abroad with Ieng Sary and with Sihanouk. After 1979, he became the Democratic Kampuchea representative at the UN in New York until 1991. *Id.*, at 10, 327-28, 444-49.

[106] Thiounn Thioeun was a medical doctor and head of a hospital in prewar Phnom Penh. He was Minister of Health during Democratic Kampuchea. *Id.*, at 327.

[107] Laurence Picq is the author of AU DELA DU CIEL: CINQ ANS CHEZ LES KHMER ROUGES. Although her book is presented as an exposé of Democratic Kampuchea horrors, she, by her own description, worked enthusiastically for Democratic Kampuchea within Ieng Sary's Foreign Ministry, and did not try to leave Democratic Kampuchea in 1979, but remained with the Khmer Rouge on the Thai border until sometime in the early '80s.

[108] The Vienna Convention on the Law of Treaties ("VCLT") may be considered when interpreting the Agreement. *See* Agreement, Article 2(2)**.** Article 32 of the VCLT provides that:

Article 29 of the Establishment Law is clear and its application would not produce an absurd result. Any suspect who "planned, instigated, ordered, aided and abetted, or committed" a crime within the ECCC's jurisdiction shall be individually responsible for it.[109] In Cambodian law, "commission" equates with "direct participation," and "direct participation" constitutes "co-perpetration."[110] JCE cannot be assimilated into co-perpetration. The Cambodian law of co-perpetration differs from that of JCE, as recognized by the PTC. The PTC explained that "[w]hile both require the shared intent by participants that the crime be committed, participation in a JCE, even if it has to be significant, would appear to embrace situations where the accused may be more remote from the actual perpetration of the *actus reus* of the crime than the direct participation

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> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (*a*) leaves the meaning ambiguous or obscure; or
> (*b*) leads to a result which is manifestly absurd or unreasonable.

The Establishment Law is to be interpreted using "existing procedures" to the extent that there is no uncertainty regarding their interpretation or application and there is not a question regarding their consistency with international standards. *See* Establishment Law, Arts. 23 new, 33 new. In this regard, *see* 2009 Cambodian Penal Code, Article 5: "In criminal matters, the law shall be strictly construed. A judge may neither extend its scope of application nor interpret it by analogy", *cited in Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187, ERN: 00573246-00573266, para. 44. Cambodian procedures are also analogous with those employed in the French legal system. In France, the method of statutory interpretation can be summarized as the following:

> 1. When a text is clear, it should be applied and not interpreted, unless an absurd result would follow.
> 2. When a text is ambiguous or obscure, courts look for the will of the legislature. For that, a judge first examines the text itself with care, and considers commentaries written about the text. This is not limited to the provision to be applied but includes the chapter or the entire law. Often a provision is obscure only if separated from its context.
> 3. If this study is insufficient, courts often go to the *travaux préparatoires* to discover the legislature's thinking. The *Cour de cassation* agrees with this process, but also states that the *travaux préparatoires* never bind the court. René David, who calls this process the historical method of interpretation, cites its frequent use by the courts.
> 4. When a text does not directly provide the solution for a dispute, judges need at least to start from a text to situate the rule that they will design. French judicial decisions almost always invoke a text, and it is exceptional for a court not to refer to a legal text. However, sometimes courts invoke general principles of law.
> 5. If the legislative history is confused, or the law is too old, the judge will look at other considerations and use what the scholarly writers call the teleological interpretation method. This approach is mostly used by the highest courts, the *Cour de cassation* and the *Conseil d'État*, rather than the lower courts.

Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT'L L 195, 201-02 (2003).

[109] Establishment Law, Art. 29.

[110] *See* 1956 Penal Code, Art. 82.

required under domestic law."[111] The PTC also noted that it could not identify any provision in Cambodian law which equates to JCE III.[112] A plain reading of Article 29 in its legislative context, applying Cambodian law which the ECCC is obliged to follow,[113] shows that "commission" cannot include JCE.[114]

As the meaning of Article 29 is clear, there is no need to turn to considerations of public policy, and the ECCC, in fact, may not do so. "[P]olicy considerations are inapposite as a basis for a theory of individual criminal responsibility."[115] Legislatures may create forms of liability based on public policy reasons. Judges may not create law by legislating from the Bench; they must simply apply the law faithfully as it is handed to them by the legislators entrusted with drafting and adopting laws.

Even if recourse to the object and purpose of the Agreement and the Establishment Law is made, the object and purpose do not support the application of JCE, but actually

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[111] PTC Decision, para. 41. Note that this passage of the PTC Decision was cited with approval by the ECCC Trial Chamber. *See Duch* Trial Judgement, para. 510.

[112] *Id.*, para. 87.

[113] *See* Agreement, Art. 12(1). *See also* Establishment Law, Art. 2 new; ECCC Internal Rules, Rev. 5 (9 February 2010), Preamble.

[114] Note that the PTC erred in stating that Article 29 of the Establishment Law mirrors Article 6 of the ICTR Statute and Article 7 of the ICTY Statute. Article 29 of the Establishment Law may be distinguished from the ICTY Statute, where the *Ojdanić* Appeals Chamber noted that "on its face, the list in Article 7(1) [of the ICTY Statute] appears to be non-exhaustive in nature as the use of the phrase 'or otherwise aided and abetted' suggests." *Ojdanić JCE Decision*, para. 19. 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 crimes" may be liable. Note also that "the 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." Shane Darcy, *Imputed Criminal Liability and the Goals of International Justice*, 20 LEIDEN J. INT'L L. 384 (2007).

[115] *See Prosecutor v. Brđanin* IT-99-36-A, Judgement, 3 April 2007, para. 421 (emphasis added). *See also* Thomas Weigend, *Intent, Mistake of Law and Co-perpetration in the Lubanga Decision on Confirmation of Charges*, 6 J. INT'L CRIM. JUST. 471, 476-78 (2008): "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. *See also* 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. 285 (2009) ("Olásolo*, Joint Criminal Enterprise and its Extended Form*"), 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)." *See infra* p. 29-31 for further analysis of the approach taken at the ICC.

mandate against it. The applicable rules of statutory interpretation stipulate that their object and purpose must be examined as a whole.[116] Scheffer and Dinh's approach, by which they decipher the object and purpose of the Agreement and Establishment Law by reference to individual provisions (for example Article 1 of the Agreement and Article 2 of the Establishment Law), is incorrect. To the extent that the object and purpose is to "bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes … committed during the period from 17 April 1975 to 6 January 1979," there must be consistency with the Establishment Law's object of establishing a Cambodian court that is obliged to apply Cambodian law.[117] Furthermore, the Agreement was formed in order to regulate the cooperation between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during 1975-79.[118] The purpose of the Establishment Law is simply to put into practice exactly how this would be done. As noted, JCE has no basis in Cambodian law.

Even the two-fold object and purpose formulated by Scheffer and Dinh does not mandate the application of JCE. They state that the object and purpose is: "1) To bring to trial senior leaders of Democratic Kampuchea and those most responsible for the commission of crimes in Cambodia in the period 1975-79; and 2) To hold individuals individually responsible for the commission of any crimes to which they contributed."[119]

Applicable Cambodian forms of liability (for example ordering, instigating, aiding and abetting, and committing)[120] are sufficient to fulfill the purpose of bringing senior leaders and those most responsible to justice and holding them responsible for any crimes to which they contributed. Applying these forms of liability also respects the object of establishing a Cambodian court that is obliged to apply Cambodian law. Above all, their application does not violate the principle of legality by importing foreign legal concepts that are not included in Cambodian law. JCE, on the other hand, is not capable of fully expressing the culpability of those accused of jointly committing criminal acts, be they

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[116] Article 31 of the VCLT obliges courts to interpret a treaty in light of "its" object and purpose, namely the object and purpose of the entire treaty. In relation to the position under French law regarding interpretation of the Establishment Law. *See supra* note 107.

[117] *See* Establishment Law, Art. 2 new. *See also* ECCC Internal Rules, Rev. 5 (9 February 2010), Preamble.

[118] *See* Agreement, Arts. 1, 12(1). Note also that the full title of the Agreement is: "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". *Cf.* the object and purpose of the ICTY, as evidenced by Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 34 (emphasis in original): "In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."

[119] Scheffer and Dinh, at 6.

[120] *See* 1956 Penal Code, Arts. 82-84.

senior leaders or otherwise. It "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."[121]

Finally, Scheffer and Dinh misguidedly argue that "the complexity of the criminal operations and the Khmer Rouge's obsessive efforts to mask the chain of command exemplify the problem that the command responsibility [sic] is inadequate as a means for expressing the appropriate culpability involved in atrocity crimes."[122] Because command responsibility in their view is inadequate, they would have JCE apply. This logic cannot be supported. If the Khmer Rouge masked its chain of command, this is not a reason to apply JCE if it has no basis in law. If the evidence does not exist to support a conviction through an applicable form of liability,[123] new forms of liability cannot be simply invented and applied because it is too difficult to prove those which are applicable.[124] As has been aptly observed:

> It is the law – not the evidence – that creates the critical linkage between the conduct of the accused and the crimes of others … In traditional legal orders, the criminal law might be compared to a measuring cup and the facts of a particular case to liquid that can be poured in that container. The measuring cup is marked with a line which, if reached on the evidence, would coincide with the attribution of criminal responsibility to the accused: by putting the facts of the case in the cup you will see if there is enough evidence to render the accused criminally responsible.[125]

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[121] George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 550 (2005) ("Fletcher & Ohlin, *Reclaiming Fundamental Principles*"). For a critical discussion of the *Tadić* Appeal's Chambers' flawed reasoning in applying JCE pursuant to a purposive interpretation of the ICTY Statute, *see also* Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 72 (2007). Referring to the *Tadić* Appeal Chambers' construction of the ICTY Statute, where the tribunal 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.

[122] Scheffer and Dinh, at fn. 16.

[123] Note, however, that the Ieng Sary Defence does not consider command responsibility to be an applicable form of liability, as it too, lacked basis in Cambodian law in 1975-79.

[124] This was recognized by the drafters of the ICC Statute. As Professor Héctor Olásolo has noted, "policy arguments do not address any of the above-mentioned 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). This is the result of requiring under this provision that the relevant contribution be carried out, at the very least, 'in the knowledge of the intention of the group to commit the crime'." Olásolo, *Joint Criminal Enterprise and its Extended Form*, at 285.

[125] Dr. Guénaël Mettraux, *"Joint Criminal Enterprise" Has Grown Another Tentacle!*, 18 November 2009, INTERNATIONAL CRIMINAL LAW BUREAU, 18 November 2009, *available at* http://www.internationallawbureau.com/blog/?p=944.

The "path of least political resistance"

Scheffer and Dinh observe that a commentator once asserted that the "path of least political resistance" would be for the PTC to adopt JCE.[126] The authors reject this conclusion, noting the "the recent and highly vocal trend opposing the doctrine of JCE."[127] They argue:

> The debate on JCE has become a referendum on the legitimacy of the laws being applied at the ad hoc tribunals. The issue is fought tooth and nail even at the ICTY and the other tribunals where the doctrine seems firmly established. Considering that the ECCC has been dogged by criticism of corruption and bias since the court's inauguration, the perception that the court is applying dubious law would only compound the ECCC's political problems. Hence, the recent trend against JCE actually indicates that the path of least resistance would be for the PTC not to apply the doctrine of JCE.[128]

Scheffer and Dinh's conclusion is not only unwarranted but is an attempt to discredit the PTC Decision by claiming that it was politically motivated, rather than grounded in an analysis of JCE under customary international law. The PTC Decision is a wise and courageous decision. It has nothing to do with politics, but is a much needed precedent by which the principle of legality has closed the door on the relentless creep of collective responsibility in international criminal justice.

It is true that there has been a "recent and highly vocal trend opposing the doctrine of JCE." This "trend," however, does not demonstrate that the PTC took the path of least resistance – quite the opposite, in fact. Despite numerous dissenting opinions on the applicability of JCE at the ICTY, ICTR, and Special Court for Sierra Leone ("SCSL"), Chambers at each of these tribunals have routinely held, albeit erroneously, that JCE is applicable. After JCE was first articulated at the ICTY, its applicability was not even revisited by Chambers at the ICTR or SCSL, despite the fact that their respective Statutes, like the ICTY Statute, did not expressly provide for this form of liability. The path of least resistance would have been for the PTC to blindly follow in the footsteps of the *ad hoc* tribunals. It chose not to do so.

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[126] Scheffer and Dinh, at 2, *citing* John Ciorciari, *Joint Criminal Enterprise and the Khmer Rouge Prosecutions*, CAMBODIA TRIBUNAL MONITOR, December 2008, *available at* http://cambodiatribunal.org/commentary.html.
[127] *Id.*
[128] *Id.*

The Schomburg commentary to the PTC Decision

In his analysis of the PTC Decision, Judge Schomburg comments that the "result [of the PTC Decision] is more than welcome after years of dangerous confusion."[129] He remarks, however, that "regretfully the decision takes it as a given from the outset that in International Criminal Law there is such a label called JCE."[130] In this context, he asks why "was it that the alleged necessity of creating a new doctrine was not discussed in general [in the PTC Decision] … in order to harmonize the jurisprudence on modes of liability with the one elaborated in great detail by the ICC?"[131] In declaring JCE I and JCE II applicable in relation to international crimes, "the court omits to scrutinize the necessity to give … recognized forms of liability under international criminal law and in particular universal state practice new labels."[132] He adds:

> [T]he doctrine of JCE in its entirety is an unnecessary and even dangerous attempt to describe a mode of liability not foreseen in the Statutes of today's international tribunals, in particular not in the Statutes of ICTY and ICTR, however invented and applied by the Appeal Chamber of both Tribunals. This artefact still has all the potential of violating in part the fundamental right not to be punished without law (*nullum crimen, nulla poena, sine lege*).[133]

Judge Schomburg's article sets out "to show in particular the third category of JCE has no basis in the Statutes of ICTY and ICTR [sic]."[134] JCE I and JCE II are not "discussed in greater detail as these categories by and large overlap with traditional definitions of the word committing."[135] The article traces how the jurisprudence of JCE at the ICTY and ICTR has developed from *Tadić* to *Seromba*,[136] and more particularly how a deep concern has developed regarding the validity of JCE from the *Stakić* Trial Judgement (where Judge Schomburg was Presiding Judge)[137] through to the ICC's rejection of JCE in *Lubanga*[138] and *Katanga*.[139] The thread running through these opinions is that for a

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[129] Schomburg, at 1.
[130] *Id.*
[131] *Id.*, at 27. *See infra* p. 29-31 for further analysis of the approach taken at the ICC.
[132] Schomburg, at 1.
[133] *Id.*, at 2 (emphasis added).
[134] *Id.*, at 3.
[135] *Id*, at 4.
[136] *Id.*, at 4-12.
[137] Here, the Trial Chamber noted that "co-perpetration" is "closer to what most legal systems understand as 'committing' and avoids the misleading impression that a new crime not foreseen in the Statute of the Tribunal has been introduced through the back door." *Prosecutor v. Stakić*, IT-97-24-T, 31 July 2003, para. 441 ("*Stakić* Trial Judgement").
[138] *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, ("*Lubanga* Confirmation of Charges Decision").
[139] *Prosecutor v. Katanga & Ngdujolo*, ICC-01/04-01/07, Decision on Confirmation of Charges, 30 September 2008 ("*Katanga* Confirmation of Charges Decision"). Judge Schomburg traces the judicial

perpetrator to be convicted of an international crime as a primary offender, he must be in control of the act to the extent he "can ruin the whole plan if he does not carry out his part" (i.e. an objective criterion).[140] JCE, on the other hand, "is based primarily on the common state of mind of the perpetrators" (i.e. a subjective criterion).[141] In addition, co-perpetration "is closer to what most legal systems understand as 'committing' and avoids the misleading impression that a new crime… has been introduced through the back door."[142]

Judge Schomburg found the experience of the SCSL instructive. Judge Schomburg notes that there, JCE III "has found its realization at least in part in the final conviction" of Gbao.[143] Gbao was found liable for all crimes which were the natural and foreseeable consequence of putting into effect the common purpose of gaining and exercising political power and control over Sierra Leone, in particular its diamond mining areas.[144] In her Partially Dissenting and Concurring Opinion, Justice Shireen Avis Fisher criticized the Majority of the Appeals Chamber for upholding a form of pleading that alleged a non-criminal objective, pursued by criminal means which Gbao *did not intend* but which he merely *contemplated*:

> The Majority reasons that it was sufficient for the Trial Chamber to conclude that Gbao was a "participant" in the JCE… Therefore, according to the Majority's reasoning, it matters not whether Gbao intended the crimes … [G]iven that he was 'a member of the JCE,' he was liable for the commission of 'the crimes … which were within the Common

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discomfort with JCE from the *Stakić* Trial Judgement, through Judge Per-Johan Lindholm's Separate and Partly Dissenting Opinion in the *Simić* Trial Judgement: "I disassociate myself from the concept or doctrine of joint criminal enterprise" (Schomburg, *citing Prosecutor v. Simić*, IT-95-9-T, Judgement - Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm ("*Simić* Trial Judgement"), 17 October 2003, paras. 2, 5), the *Seromba* Appeal Judgement (*id.*, *citing Prosecutor v. Seromba*, ICTR-2001-66-A, Judgement, 12 March 2008, paras. 171-72 and Dissenting Opinion of Judge Liu, paras. 8-9), Judge Schomburg's own dissent in the *Simić* Appeal Judgement: "As an international criminal court, it is incumbent upon this Tribunal not to turn a blind eye to these developments in modern criminal law … by accepting internationally recognized legal interpretations and theories such as the notion of co-perpetration." (*id.*, *citing Prosecutor v. Simić*, IT-95-9-A, Judgement – Dissenting Opinion of Judge Schomburg, 28 November 2006 ("*Simić* Schomburg Opinion"), paras. 3, 11-14, 17, 20), the *Martić* Appeal Judgement: "The Statute does not penalize individual criminal responsibility through JCE" (*id.*, *citing Prosecutor v. Martić*, IT-95-11-A, Judgement – Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, 8 October 2008 ("*Martić* Schomburg Opinion"), paras. 2, 5-9), through to the ICC's rejection of JCE (*id.*, *citing Lubanga* Confirmation of Charges Decision, para. 235 *et seq*., and *Katanga* Confirmation of Charges Decision). *See infra* p. 29-31 for further analysis of the approach taken at the ICC.

[140] *Id.*, *citing Simić* Trial Judgement, para. 62. *See infra* p. 30-31 for further discussion of the "control over the crime" approach to individual criminal responsibility.

[141] Schomburg, at fn. 78.

[142] *Id.*, *citing Stakić* Trial Judgement, para. 441. *See also Simić* Schomburg Opinion, paras. 12-14, 17; *Martić* Schomburg Opinion, paras. 2, 7.

[143] *Id.*, at 28.

[144] *Id.*, *citing Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgement, 26 October 2009, para. 485.

> Criminal Purpose,' so long as it was 'reasonably foreseeable that some of the members of the JCE or persons under their control, would commit crimes.'[145]

Justice Fisher noted that whether Gbao "was a 'participant' is only significant if it means that he shared the common criminal intent of the JCE, that is, the Common Criminal Purpose. The Trial Chamber's findings, unquestioned, and indeed quoted by the Majority, state unequivocally that he did not."[146] She found that Gbao was "convicted of committing crimes which he did not intend, to which he did not significantly contribute, and which were not a reasonably foreseeable consequence of the crimes he did intend."[147]

Using the Gbao conviction, Judge Schomburg drew some lessons which fittingly the PTC, at least in part, seemed to have been mindful of:

> [t]he lesson to be learned is that judges should never yield to the temptation to act as kind of legislator and when only developing the law with legitimate 'judicial creativity' they must act with the highest degree of scrutiny always envisaging: what can be in a worst case scenario the result, how can an exaggerated interpretation or application be avoided when a doctrine is no longer subject to own control.[148]

Judge Schomburg concludes by emphasizing that we "should be grateful to the authors" of the PTC Decision, which "allows for the necessary harmonisation of international criminal law, here the applicable modes of liability."[149] But, "two wishes remain: (a) [t]hat the other benches of the ECCC uphold the rejection of JCE[; and] (b) [t]hat it will be expressly said that a sound interpretation of 'committing' needs no other labeling (aka JCE)."[150]

The Author's take on the PTC Decision

At the ECCC, the Ieng Sary Defence team consistently argued that JCE has no basis in customary international law,[151] and that co-perpetration is an applicable form of liability for collective responsibility.[152] Indeed, like Judge Schomburg,[153] the Ieng Sary Defence

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[145] *Id.*, *citing Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgement – Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher ("*Sesay* Fisher Opinion"), 26 October 2009, para. 17.
[146] *Id.*, *citing Sesay* Fisher Opinion, para. 18.
[147] *Id.*, *citing Sesay* Fisher Opinion, para. 45.
[148] *Id.*, at 28.
[149] *Id.*
[150] *Id.*, at 29.
[151] *See*, *e.g.*, the list of Defence filings concerning JCE and summaries of these filings available on the Ieng Sary Defence website: http://sites.google.com/site/iengsarydefence/Home.
[152] *See*, *e.g.*, *Case of IENG Sary*, 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, 22 January 2010, D97/14/5, ERN: 00429213 – 00429253 ("JCE Appeal"), paras. 47-58, 63-65. *See also infra* p. 28.
[153] *See* Schomburg, *citing Simić* Schomburg Opinion, para. 14.

team has relied upon research conducted by the Max Planck Institute to show that most States use co-perpetration rather than JCE liability.[154] JCE is an unnecessary attempt to describe a form of liability that is not foreseen in the language of the Statutes of the *ad hoc* tribunals, nor for that matter in the ECCC's Establishment Law. There was no lacuna of liability necessitating the invention of JCE to express the culpability involved in atrocity crimes. Nor did recognized forms of liability such as "co-perpetration" require relabeling. The SCSL experience serves as a stark warning to Benches adjudicating on the applicability of JCE. For all of these reasons, Judge Schomburg's contribution to the analysis of the PTC Decision is to be welcomed.

Customary international law is not directly applicable in Cambodia

From the outset, the PTC made a fundamental error in its Decision by failing to consider fully whether customary international law is directly applicable in Cambodia. As recognized by the PTC, JCE does not exist in Cambodian law in any of its forms, although JCE I and II may share certain similarities with the Cambodian concept of co-perpetration.[155] The only basis to apply JCE would therefore be through customary international law.[156] Hence, it was necessary to consider whether the ECCC, as a domestic Cambodian court, may apply customary international law.

The PTC did not explicitly state that it considered the Establishment Law to be the implementing legislation necessary to apply customary international law in the Cambodian legal system. Its finding that the terms of Articles 1 and 2 new of the Establishment Law lead to the conclusion that the ECCC may apply international forms of liability which were recognized in customary international law at the time[157] indicates, however, that it considers the Establishment Law to be the necessary implementing legislation.

The Establishment Law cannot be employed to implement customary international law. First, the fact that the Establishment Law refers to international custom does not mean that the ECCC has the jurisdiction to apply customary international law directly. Domestic courts generally require implementing legislation before they may apply customary international law. This is because direct application would violate the

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[154] *See* JCE Appeal, para. 48, *citing* 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"), Part 1: Comparative Analysis of Legal Systems, p. 16.
[155] *See* PTC Decision, paras. 40-41, 87.
[156] This is recognized by the ECCC Trial Chamber. *See Duch* Trial Judgement, para. 510.
[157] PTC Decision, para. 48.

principle of *nullum crimen sine lege*.[158] 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."[159] She adds that "it is frequently presumed … that the *nullum crimen* principle is thus compatible only with written law."[160] 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.[161]

Second, JCE is a form of liability and not an international crime.[162] It is not possible to violate a form of liability. The references in Article 1 and Article 2 new to "violations of international custom" do not oblige the ECCC to apply forms of liability based in customary international law.

Third, and most importantly, implementing legislation may only incorporate customary international law as it existed at that date, for crimes committed after its entry into force. The Establishment Law may therefore only incorporate customary international law in 2001 for crimes committed after that date. It may not retroactively incorporate customary international law from 1975 and apply it to crimes that were allegedly committed at that time. In finding that the Establishment Law did so, the PTC Decision unfortunately violates the principle of *nullum crimen sine lege.*

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[158] "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." Héctor Olásolo, *A Note on the Evolution of the Principle of Legality in International Criminal Law*, 18 CRIM. L. F. 302.

[159] 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).

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

[161] Fletcher & Ohlin, *Reclaiming Fundamental Principles*, at 559. *See also id.*, at 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.

[162] *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005, para. 91, *citing Ojdanić* JCE Decision, para. 20. *See also Prosecutor v. Brđanin*, IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, para. 5.

The Cambodian Penal Code in force from 1975-79 was the 1956 Penal Code. The ECCC recognizes this.[163] Article 6 of the 1956 Cambodian Penal Code, sets out the fundamental principle of *nullum crimen sine lege*:

> Criminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law before it was committed.[164]

As noted above, the PTC followed ICTY jurisprudence concerning the preconditions which must be met before a form of liability may fall within a tribunal's jurisdiction.[165] However, the stricter test of legality contained in the 1956 Cambodian Penal Code should have been applied because 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."[166] This issue arose in the French *Aussaresses* case. 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.[167] As Article 6 of the 1956 Cambodian Penal Code 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.

JCE is not part of customary international law

The PTC also erred in reaching the conclusion that JCE I and II were part of customary international law in 1975-79.[168] Scheffer and Dinh note that the *Tadić* Appeals Chamber did not rely upon any more cases to support its finding that JCE III has a basis in customary international law than were relied on to support a finding that JCE II has such a basis.[169] Consequently, "it is dubious whether the jurisprudence above [i.e. *Borkum Island* and *Essen Lynching*] involves significantly more inference than the other post-World War II jurisprudence that led the PTC to find 'without a doubt' that JCE 1 and

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[163] *See Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Information about the 1956 Penal Code of Cambodia and Request Authentication of an Authoritative Code, 17 August 2009, E91/5, ERN: 00365471-00365472.
[164] Unofficial translation.
[165] *See supra* p. 5.
[166] Helmut Kreicker, *National Prosecution of Genocide from a Comparative Perspective*, 5 INT'L CRIM. L. REV. 313, 320 (2005).
[167] *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).
[168] Unfortunately, the ECCC Trial Chamber in *Duch* also made the same mistake. *See Duch* Trial Judgement, para. 512.
[169] Scheffer and Dinh, at 5.

JCE 2 were customary law."[170] This logic inverts the proper conclusion that must be drawn from the *Tadić* Appeals Chamber's reliance on a handful of cases to establish JCE: there is simply not enough evidence of State practice or *opinio juris* to transmute any one of the three forms of JCE into a form of individual criminal liability under customary international law.[171]

Many States, such as Cambodia, do not apply JCE liability, but instead use a model of co-perpetration distinct from JCE.[172] In 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 principal perpetrator. Direct participation constitutes co-perpetration, indirect participation constitutes complicity."[173] 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."[174] Many other States use this model of co-perpetration as well. Also as noted above according to the Max Planck Institute, most States use co-perpetration rather than JCE liability.[175]

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[170] *Id*.

[171] "[W]hen determining the state of customary international law in relation to the existence of a crime or a form of individual responsibility, a court shall assess existence of 'common, consistent and concordant' state practice, or *opinio juris*, meaning that what States do and say represents the law. A wealth of state practice does not usually carry with it a presumption that *opinio juris* exists…" PTC Decision, para. 53, *citing Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Merits, 1974 ICJ Rep. 3, at 50; 1946 Statute of the International Court of Justice, Art. 38(1); *North Sea Continental Shelf (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)*, Merits, 20 February 1969, ICJ Rep. 3, para. 77. *See also* Dinh, at 35: Dinh's proposition that the "distinction between international law of states and the international criminal prosecution of individuals … limits the applicability of the *opinio juris* requirement on issues such as the applicability of JCE … because no situation would arise that would require a state to declare that it considers itself bound under the doctrine of JCE" is misconceived and ignores the process of negotiation and ratification of the ICC Statute by which precisely such a situation did arise, and which led to the deliberate rejection of JCE in contemporary *opinio juris.* Furthermore, it appears that the *Tadić* Appeals Chamber erred in its analysis of the *Einsatzgruppen* case, which it found supported the existence of JCE I. Professor Kevin Jon Heller recently discovered that the *Tadić* Appeals Chamber quoted the Prosecution's closing argument as if it were the tribunal's judgement. Heller referred to this as "an egregious error." Kevin Jon Heller, *An Egregious Error in Tadić*, OPINIO JURIS, 8 July 2010, *available at* http://opiniojuris.org/2010/07/08/an-egregious-error-in-tadic/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29.

[172] Furthermore, according to 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).

[173] Unofficial translation.

[174] 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.

[175] *See* Max-Planck, Participation in Crime, Part 1: Comparative Analysis of Legal Systems, p. 16. *See also supra* p. 24-25. Thus, it is unsurprising that Professor Ambos notes in his *amicus brief* in the *Duch* case:

The text of the ICC Statute and the way it has been interpreted is also relevant when considering whether JCE has a basis in customary international law. By admission of the *Tadić* Appeals Chamber, the ICC 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."[176] However, the JCE doctrine as created in *Tadić* was not included within the wording of Article 25 of the ICC Statute.

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.[177] The main aim of the Rome Conference was to achieve the broadest possible acceptance of the ICC by adopting into the Statute provisions recognized under customary international law.[178] 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.[179] 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 crimes.[180] This process has also been described as a *de facto* consolidation of national criminal principles on an international level.[181] Certainly, there is a general agreement[182] that the drafters of the ICC Statute would not have opted

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> 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.

[176] *Tadić* Appeal Judgement, para. 223.

[177] 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).

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

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

[180] "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.

[181] *See* DOMINIC MCGOLDRICK ET AL., THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 340, (Hart Publishing, 1st ed., 2004).

[182] "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*

to create new law or a new form of liability contradicting 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."[183] The deliberate exclusion of JCE despite the lengthy and thorough drafting exercise is indicative of the fact that JCE liability cannot be considered part of customary international law.

Furthermore, when asked to apply JCE despite the wording of the ICC Statute, the Pre-Trial Chamber in *Lubanga*, then presided by former ICTY President Judge Claude Jorda, "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.[184] The *Lubanga* Pre-Trial Chamber 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.[185]

KNUT DÖRMANN ET AL., ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT xiii (Cambridge University Press, 2002).

[183] 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). Judge Schomburg, commenting on Article 25 in *Gacumbitsi*, 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. *See 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.

[184] 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).

[185] *Lubanga* Confirmation of Charges Decision, paras. 327-30. 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. *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. The subjective approach "is the approach adopted by the jurisprudence of the ICTY through the concept of joint criminal enterprise or the common purpose doctrine." *Id.*, para. 329. 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." *Id.* 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) of the ICC Statute. 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. *Id.*, paras. 334-35. 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). *Id.*, paras. 336-37.

The control over the crime approach is applied in numerous legal systems.[186] "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."[187] 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.[188] 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.[189]

The *Lubanga* Pre-Trial Chamber 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.[190] 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. The Pre-Trial Chamber in *Katanga* followed the *Lubanga* jurisprudence. 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."[191]

The fact that most legal systems do not apply JCE, coupled with the fact that the ICC Statute – a consolidation of customary international law at the time it was drafted – did not provide for it (and two ICC Pre-Trial Chambers rejected its application) demonstrate that this form of liability cannot be considered customary international law today, let alone in 1975-79.

Conclusion

The PTC Decision is a significant stepping stone by which the ECCC, serving as a model court for Cambodia,[192] departs from erroneous jurisprudence that violates the principle of

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[186] *Id.*, para. 330.
[187] *Id.*
[188] *Id.*, para. 331.
[189] *Id.*, para. 332.
[190] The *Lubanga* 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.
[191] *Katanga* Confirmation of Charges Decision, paras. 484-85.
[192] According to the ECCC website:

legality. The PTC has undertaken the most comprehensive judicial analysis of the jurisprudential bases for JCE since the notion was first articulated by the *Tadić* Appeals Chamber. The *Duch* Trial Chamber implicitly recognized this when it cited the PTC Decision to support its conclusion that JCE I and II were part of customary international law in 1975-79.[193] The *Duch* Trial Chamber declined to consider the customary status of JCE III, or to apply it.[194] There is no reason why the Trial Chamber in Case 002 should not follow the PTC in respect of JCE III and further develop its own analysis and the analysis of the PTC by rejecting JCE I and JCE II in favor of co-perpetration, a form of liability for collective responsibility that does not violate the principle of legality,[195] and which does not have the potential of leading to a system that imputes guilt by association.[196]

> The 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. An agreement with the UN was ultimately reached in June 2003 detailing how the international community will assist and participate in the Extraordinary Chambers. This special new court was created by the government and the UN but it will be independent of them. It is a Cambodian court with international participation that will apply international standards. It will provide a new role model for court operations in Cambodia.

Available at http://www.eccc.gov.kh/english/about_eccc.aspx (emphasis added).

[193] *See Duch* Trial Judgement, fn. 907.

[194] *Id.*, para. 513. This is because the Co-Prosecutors had only sought to apply JCE III in the alternative.

[195] The Trial Chamber acknowledges that co-perpetration existed as a form of liability applicable in Cambodia during the period of 1975-79. See *Duch* Trial Judgement, para. 510.

[196] *Prosecutor v. Martić*, IT-95-11-A, Judgement, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, 8 October 2008, para. 7.