ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance



សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

**Case File/Dossier No. 002/19-09-2007/ECCC/TC**

**Before:** **Judge NIL Nonn, President**
**Judge Silvia CARTWRIGHT**
**Judge YA Sokhan**
**Judge Jean-Marc LAVERGNE**
**Judge THOU Mony**

**Date:** **12 September 2011**
**Original language(s):** **Khmer/English/French**
**Classification:** **PUBLIC**

# DECISION ON THE APPLICABILITY OF JOINT CRIMINAL ENTERPRISE

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Andrew CAYLEY

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# 1. INTRODUCTION

1. At the Initial Hearing in Case 002, the Trial Chamber heard oral argument in relation to all matters that it considered to be preliminary objections within the scope of Internal Rule 89. The Chamber also indicated that early clarification of a number of other legal issues raised by the parties may nonetheless assist in the fair and expeditious conduct of the trial.[1]

2. On 17 June 2011, the Office of the Co-Prosecutors filed a motion requesting the Trial Chamber to consider JCE III (the so-called extended form of joint criminal enterprise ("JCE")) as an alternative mode of liability in Case 002.[2] The Civil Party Lead Co-Lawyers filed a brief in support of the Co-Prosecutors Motion.[3] All Defence teams have opposed this motion, on grounds of its admissibility and merits.[4] The Co-Prosecutors filed a reply on 11 August 2011.[5]

3. The Chamber is additionally seised of a motion by the IENG Sary Defence of 24 February 2011 requesting that portions of the Closing Order be struck out due to defects.[6] The Co-Prosecutors responded to this motion on 16 March 2011.[7] The Chamber in this decision rules also on this motion insofar as it pertains to the applicability of JCE.[8]

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1 T., 27 June 2011, pp. 12-118; T., 28 June 2011, pp. 14-115; T., 29 June 2011, pp. 3-113.

2 Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, E100, 17 June 2011 ("Co-Prosecutor's Motion").

3 Brief in Support of the Co-Prosecutors' Request for the Trial Chamber to Consider Joint Criminal Enterprise III as an Alternative Mode of Liability, E100/4, 22 July 2011.

4 Defence Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, E100/1, 22 July 2011 ("IENG Thirith Response"); Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, E100/5, 22 July 2011 ("NUON Chea Response"); *Réponse à la demande des co-procureurs relative à la troisième catègorie d'éntreprise criminelle commune*, E100/3, 22 July 2011 ("KHIEU Samphan Response"); IENG Sary's Response to the Co-Prosecutor's Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability and Request for an Oral Hearing, E100/2, 22 July 2011 ("IENG Sary Response").

5 Co-Prosecutors' Consolidated Reply to Defence Responses to Co-Prosecutor's Requests to Recharacterise Charges in the Indictment and to Exclude the Nexus Requirement for an Armed Conflict to Prove Crimes Against Humanity, E95/6, 11 August 2011, paras. 93-97.

6 "IENG Sary's Motion to Strike Portions of the Closing Order due to Defects", E58, 24 February 2011, paras. 3-6 ("IENG Sary Motion to Strike"). In their preliminary objections, the Accused IENG Sary, KHIEU Samphan and IENG Thirith made related submissions (Summary of IENG Sary's Rule 89 Preliminary Objections, E51/4, 25 February 2011, para. 24(d), Preliminary Objections Concerning Jurisdiction, E46, 14 February 2011, para. 18 ("KHIEU Samphan Preliminary Objections") and IENG Thirith Defence's Preliminary Objections, E44, 14 February 2011, paras. 33-38 ("IENG Thirith Preliminary Objections") (collectively, "the Defence Motions"). The Co-Prosecutors and Civil Parties responded to all Defence Preliminary Objections on 21 March 2011 and 7 March 2011, respectively (Civil Parties' Joint Response to Defence Rule 89 Preliminary Objections, E51/5/4, 7 March 2011, paras. 42-51 and Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, E51/5/3/1, 21 March 2011, paras. 22-26).

7 "Co-Prosecutor's Response to IENG Sary's Motion to Strike Portions of the Closing Order due to Defects", E58/1, 16 March 2011, paras. 1-7, 18-19 ("Co-Prosecutor's Response to IENG Sary Motion to Strike").

8 *See further* Trial Chamber Response to various Motions following Trial Management Meeting, E74, 8 [illegible]

## 2. PROCEDURAL HISTORY

4. On 8 December 2009, the Co-Investigating Judges issued an order holding JCE to be applicable in all of its forms before the ECCC.[9] On 18 and 22 January 2010, three Defence teams appealed this order to the Pre-Trial Chamber.[10] On 19 February 2010, the Co-Prosecutors filed a joint response to the Defence Motions, addressing the applicability of JCE in all of its forms, including JCE III.[11]

5. On 20 May 2010, the Pre-Trial Chamber rejected the Co-Prosecutors' reasoning in part, ruling that JCE III did not form part of customary international law between 1975 and 1979, but upholding the applicability of JCE I and II.[12] The Closing Order in Case 002 consequently did not include JCE III as a form of responsibility against any of the Accused but did allege responsibility in relation to all Accused pursuant to JCE I and II.[13]

6. The Co-Prosecutors did not appeal the exclusion of JCE III from the Closing Order pursuant to Internal Rules 67(5) and 74. In its motion before this Chamber, the Co-Prosecutors ask the Trial Chamber instead to re-characterize the facts in the Indictment in the verdict, where appropriate, as crimes committed pursuant to JCE III (rather than JCE I or II).[14]

7. The IENG Sary Defence challenge the inclusion of JCE in the Closing Order, in particular, its identification of the elements required for participation in a common criminal plan, and its treatment of the specific intent requirement for genocide.[15]

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April 2011 ("[t]he Chamber is seized of various Motions concerning alleged deficiencies in the Indictment or in the Investigation, [... including requests that] parts of the Indictment should be struck out [....]. It is clear from the Rules that the Chamber is bound by the scope of the Indictment. [....] Should any ambiguity in the Indictment arise at trial, the Chamber will, on a case-by-case basis state its interpretation of the scope of the Indictment and will consider itself bound by this interpretation").

[9] Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, D97/13, Office of Co-Investigating Judges, 8 December 2009.

[10] *Appel contre l'ordonnance sur l'application devant les CETC de la responsabilité dite <<Entreprise criminelle commune>>*, D97/16/1, 18 January 2010; IENG Thirith Defence Appeal Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise of 8 December 2009, D/97/15/1, 18 January 2010; 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, D97/14/5, 22 January 2010.

[11] Co-Prosecutors' Joint Response to IENG Sary, IENG Thirith and KHIEU Samphan's Appeals on Joint Criminal Enterprise, 19 February 2010, D97/16/5.

[12] Decision on the Appeals Against the Co-Investigative Judges Order On Joint Criminal Enterprise, Pre-Trial Chamber, D97/15/9, 20 May 2010, paras. 69, 77, 88 ("PTC JCE Decision").

[13] Closing Order, D427, 15 September 2010 (as amended by the Pre-Trial Chamber's Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, D427/3/15, 15 February 2011 and Decision on IENG Sary's Appeal Against the Closing Order, D427/1/30, 11 April 2011)("Amended Closing Order").

[14] Co-Prosecutor's Motion, para. 1.

[15] IENG Sary Motion to Strike, paras. 20-28.

# 3. SUBMISSIONS

## 3.1. The Defence Motions

8. The IENG Sary Defence submits that the Closing Order failed to apply the correct *mens rea* concerning IENG Sary's participation in a common criminal plan.[16] The Closing Order alleges he participated in a non-criminal common plan that merely resulted in the commission of crimes. Such an allegation, if proven, does not support a *prima facie* case of JCE I. In addition, he submits that JCE as applied to the crime of genocide requires proof of a specific intent (*i.e.* intent to destroy, in whole or in part, a national, ethnical, racial or religious group).[17] As the Closing Order simply alleges the members of the JCE were aware of the perpetrators' genocidal intent but not that IENG Sary shared this genocidal intent, all reference to genocide must consequently be stricken from it.[18]

9. Although conceding that JCE I was unambiguously part of Cambodian law between 1975 and 1979, the IENG Thirith Defence submits that JCE II is ambiguous and uncertain and therefore inapplicable before the ECCC.[19]

10. The Co-Prosecutors submit IENG Sary misconstrues the Closing Order and that the facts included in the Closing Order support an inference that IENG Sary shared the intent to perpetrate crimes through a joint criminal enterprise.[20] They submit that JCE in all its forms was considered a criminal mode of liability within customary international law at the time relevant to Case 002.[21]

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16 IENG Sary Motion to Strike, para. 20.
17 IENG Sary Motion to Strike, paras. 21-24.
18 IENG Sary Motion to Strike, paras. 26-28..
19 IENG Thirith Preliminary Objections, paras. 36-37 (noting that the 1956 Cambodian Penal Code included co-perpetration and complicity, which nonetheless 'largely coincide with joint criminal enterprise in its basic and second forms'); *see also* KHIEU Samphan Preliminary Objections, para. 18 (adopting IENG Sary's earlier submissions before the Pre-Trial Chamber by reference).
20 Co-Prosecutors' Response to IENG Sary's Motion to Strike, paras. 32-36.
21 Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, E51/5/3/1, 21 March 2011, paras. 23-26 (incorporating by reference prior submissions).

## 3.2. The Co-Prosecutor's Motion

### *3.2.1. Admissibility*

11. All Defence teams contend that the Co-Prosecutor's Motion is inadmissible because it constitutes a jurisdictional challenge pursuant to Rule 89 and the deadline for the filing of preliminary objections has long since passed.[22]

12. The Co-Prosecutors argue that their motion is instead admissible pursuant to Rule 98(2).[23] This Rule permits the Trial Chamber to change the legal characterization of a crime as set out in the Indictment. They consider re-characterization to be consistent with the fair trial rights of the Accused because the Accused have been appraised of the Co-Prosecutors' intent to seek re-characterisation, and as the applicability of JCE III was extensively litigated at the pre-trial stage.[24] The Co-Prosecutors also note that the Trial Chamber granted a similar motion in Case 001.[25]

### *3.2.2. Merits*

13. In their motion, the Co-Prosecutors urge the Trial Chamber to adopt the approach taken by the ICTY Appeals Chamber in *Prosecutor v. Tadić* concerning the applicability of JCE III.[26] In this regard, the Co-Prosecutors place particular reliance on two cases cited by the *Tadić* Appeal Judgement: the *Essen Lynching Case* from the British Military Court for the Trial of War Criminals, and the *Borkum Island Case* from the American Military Tribunal at Dachau.[27] They also argue, in the alternative, that JCE III constitutes a general principle of law and is applicable on this basis.[28]

14. Three Defence teams counter that the authorities relied upon by the *Tadić* Appeal Judgement do not support the existence of JCE III as a form of responsibility in customary

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[22] IENG Thirith Response, paras. 3, 7-10; NUON Chea Response, para. 3; KHIEU Samphan Response, para. 26; IENG Sary Response, para. 4; *see also* IENG Sary's Request for an Expedited Decision as to Whether the OCP May Raise Requests for Re-characterization at this Stage in the Proceedings, E103, 24 June 2011.
[23] Co-Prosecutor's Motion, para. 8.
[24] Co-Prosecutor's Motion, paras. 9-11.
[25] Co-Prosecutor's Motion, para. 8 *citing* 001/18-07-2007-ECCC/TC, Judgement, E188, 26 July 2010 ("*Duch* Judgement"), paras. 496, 516.
[26] Co-Prosecutors' Motion, paras. 20-21; *Prosecutor v. Tadić,* Judgement, ICTY Appeals Chamber (Case No. IT-94-1-A), 15 July 1999 ("*Tadić* Appeal Judgement").
[27] Co-Prosecutor's Motion, paras. 24-28.
[28] Co-Prosecutor's Motion, paras. 29-30.

international law between 1975-1979.[29] Two Defence teams also argue that JCE III is not a general principle of law.[30] The IENG Sary Defence further notes that the *Tadić* Appeal Judgement itself stated that domestic sources could not be relied on as irrefutable evidence that JCE III constituted a general principle of law.[31]

# 4. DELIBERATIONS

## 4.1. Introduction

15. Joint criminal enterprise was first set out by the ICTY Appeals Chamber in the *Tadić* Appeal Judgement in 1999. The ICTY Appeals Chamber has held that participation in a joint criminal enterprise constitutes a mode of liability in the form of commission.[32] Both the ECCC Pre-Trial and Trial Chambers have similarly found participation in a joint criminal enterprise to amount to commission within the scope of Article 29 (new) of the ECCC law.[33] The three categories of JCE articulated in the *Tadić* Appeal Judgement comprise:

- The basic category or JCE I, involving cases where all participants act pursuant to a common purpose and share the same criminal intent[34];
- The systemic category or JCE II, referring to instances of systemic ill-treatment in organized institutions, such as concentration camps[35]; and
- The extended form or JCE III, entailing liability of the members of the group for acts that occur as a natural and foreseeable consequence of carrying out the common purpose of the group.[36] To be found liable under this extended form of JCE, it must be shown than an Accused intended to participate in and further criminal activity of a group, and to contribute to its joint criminal enterprise. It must also be shown that it was foreseeable that a crime outside the scope of this agreement might be perpetrated by one or other members of the group and that the Accused willingly took the risk that this would occur.[37]

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[29] IENG Thirith Response, Para. 19; NUON Chea Response, para. 8; IENG Sary Response, paras. 9-17. The KHIEU Samphan Defence relies exclusively on its arguments regarding the inadmissibility of the Co-Prosecutor's Motion.
[30] IENG Thirith Response, para. 20; IENG Sary Response, paras. 19-21.
[31] IENG Sary Response, para 19.
[32] *Tadić* Appeal Judgement, para. 190.
[33] PTC JCE Decision, para. 49; *Duch* Judgement, para. 511.
[34] *Tadić* Appeal Judgement, paras. 196-201.
[35] *Tadić* Appeal Judgement, paras. 202-203.
[36] *Tadić* Appeal Judgement, para. 204.
[37] *Tadić* Appeal Judgement, para. 228.

## 4.2. Required specificity of the Indictment in relation to Joint Criminal Enterprise

### *4.2.1. Applicable law*

16. The Chamber notes that where crimes of specific intent are concerned, proof is required that the Accused possessed not only the intent to commit the underlying crime but also the special intent required by these offences.[38] In order to convict for genocide committed as part of a JCE, it follows that proof is required that the Accused possessed the intent to destroy in whole or in part a protected group.[39] Proof of genocidal intent may, however, be established on the basis of circumstantial evidence where it is the only reasonable conclusion in the circumstances of a case.[40]

17. The Trial Chamber further notes that joint criminal enterprise is a form of responsibility and not a crime in itself. In this regard, it is sufficient to show that the Accused participated in some way in the JCE, and that this participation either amounts to or involves the commission of a crime.[41] The case law of other international tribunals has consistently found that the common plan forming part of the joint criminal enterprise need not be criminal in nature so long as crimes are contemplated as a means of bringing the common plan to fruition.[42] On appeal before the Special Court for Sierra Leone ("SCSL") in *Brima et. al.,* the Defence argued that the indictment was defective because the common plan alleged by the Prosecution was not a crime under international law.[43] Noting several cases from the ICTY and the Rome Statute, the SCSL Appeals Chamber held that the common plan, design or purpose of a joint criminal enterprise must either have as its objective a crime or contemplate crimes as the means of achieving its objective.[44] It concluded that "[a]lthough the objective of gaining and exercising political power and control over the territory of Sierra Leone may not

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[38] *Prosecutor v. Simba,* ICTR Trial Chamber (Case No. ICTR-01-76-T), 13 December 2005 ("*Simba* Trial Judgement"), para. 388; *Prosecutor v. Munyakazi,* ICTR Trial Chamber (Case No. ICTR-97-36A-T) 5 July 2010, ("*Munyakazi* Trial Judgement"), para. 439; *Prosecutor v. Kvočka et. al.,* Judgement, ICTY Trial Chamber (Case No. IT-98-30/1-T), 2 November 2001, para. 288; *Prosecutor v. Kvočka et. al.,* Judgement, ICTY Appeals Chamber (Case No. IT-98-30/1-A), 28 February 2005 ("*Kvočka* Appeal Judgement"), paras. 240-45; *Prosecutor v. Krnojelac,* Judgement, ICTY Appeals Chamber (Case No. IT-97-25-A), 17 September 2003, para. 111.

[39] *Simba* Trial Judgement, paras. 415-419; *Munyakazi* Trial Judgement, paras. 500-501.

[40] *Simba* Trial Judgement, paras. 415-419; *Munyakazi* Trial Judgement, paras. 500-501.

[41] *Tadic* Appeal Judgement, para. 227; *Kvočka* Appeal Judgement, para. 46; *Prosecutor v.Krnojelac,* Judgement, ICTY Appeals Chamber (IT-97-25-A), 17 September 2003, para. 31. *See also, Prosecutor v. Ntakirutimana*, Judgement, ICTR Appeals Chamber (Cases Nos. ICTR-96-10-A and ICTR-96-17-A), December 13, 2004, para. 466.

[42] *Prosecutor v. Brima et. al.,* Judgement, SCSL Appeals Chamber (Case No. SCSL-04-16-A), 22 February 2008, *("Brima* Appeal Judgement"), para.80;

[43] *Brima* Appeal Judgement, para. 71; *Kvočka* Appeal Judgement, para. 46.

[44] *Brima* Appeal Judgement, paras. 77-80.

be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute."[45] The ICTY Appeals Chamber in *Kvočka* similarly noted that the foundation of the Prosecution case regarding joint criminal enterprise was the alleged common purpose of "the creation of a Serbian State within the former Yugoslavia."[46] Therefore, the common plan, design or purpose of a joint criminal enterprise must either have as its objective a crime or contemplate crimes as the means of achieving its objective. The common plan itself need not be criminal. .

#### *4.2.2. Treatment of common purpose and mens rea for JCE in the Closing Order*

18. In relation to the nature of the common plan alleged in Case 002, the Closing Order states:

> The common purpose of the CPK leaders was to implement rapid socialist revolution by (*sic*) in Cambodia through a "great leap forward" and to defend the Party against internal and external enemies, by whatever means necessary. The purpose itself was not entirely criminal in nature but its implementation resulted in and /or involved the commission of crimes within the jurisdiction of the ECCC.[47]

19. Although the plain language of this paragraph asserts that the purpose of the common plan was not entirely criminal, it clarifies that its implementation involved the commission of crimes within the jurisdiction of the ECCC. Further, the subsequent paragraph of the Closing Order indicates a number of criminal activities that "resulted in" or "were committed by members and non-members of the JCE."[48] This language makes it clear that the plan involved the commission of criminal acts by members of the JCE. The language accords with the above jurisprudence and does not support an inference that IENG Sary is accused of commission solely by participation in a non-criminal common plan.

20. Concerning the Accused's alleged genocidal *mens rea* as a participant in the JCE, the Amended Closing Order states:

> With regard to the policies targeting Chams and Vietnamese, the plan to eliminate these groups may not have existed until April 1977 for the Vietnamese and from 1977 for the Cham. From that moment, the members of the JCE knew that the implementation of the common purpose expanded to include the commission of genocide of these protected groups. Acceptance of

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[45] *Brima* Appeal Judgement, para. 84.
[46] *Kvočka* Appeal Judgement, para. 46 (finding that the Prosecution gave clear and consistent notice that it intended to rely on the theory of joint criminal enterprise and dismissing the ground of appeal before it).
[47] Amended Closing Order, para. 1524.
[48] Amended Closing Order, para. 1525.

> this greater range of criminal means, coupled with persistence in implementation, amounted to an intention of the JCE members to pursue the common purpose through genocide.[49]

21. Further, paragraphs 1532 to 1541 of the Amended Closing Order set forth the alleged conduct of the Accused and their participation in a joint criminal enterprise. This conduct, if proven, may lead to the conclusion that the Accused possessed the special intent necessary to prove genocide.[50] The Trial Chamber concludes that paragraph 1527 when read with the Amended Closing Order as a whole, does not apply the incorrect *mens rea* to the crime of genocide as committed as part of a joint criminal enterprise.

## 4.3. Applicability of JCE I and II

22. The *Duch* Judgement found that the notion of commission through participation in a joint criminal enterprise falls within the scope of Article 29 (new) of the ECCC law.[51] It further held that the systemic form of joint criminal enterprise, along with the basic form from which it derives (*i.e.* JCE I and II), were a part of customary international law between 1975 and 1979.[52] The applicability of JCE I and II before the ECCC has been further endorsed by the Pre-Trial Chamber as comprising recognized forms of responsibility in customary international law at the time relevant for Case 002.[53] The Trial Chamber accordingly finds that the applicability of JCE I and II before the ECCC constitutes settled law within the ECCC jurisprudence.

## 4.4. Applicability of JCE III

### *4.4.1. Admissibility of Co-Prosecutor's Motion*

23. The Chamber notes that the Co-Prosecutors' theory of the case relies primarily on JCE I. The Co-Prosecutors state in their motion that the first form of joint criminal enterprise (JCE I) best reflects the nature of the liability of the Accused in Case 002.[54] They seek to add JCE

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[49] Amended Closing Order, para. 1527.

[50] *See Simba* Trial Judgement, paras. 415-419 and *Munyakazi* Trial Judgement, paras. 500-501 (finding that where genocidal *mens rea* is established inferentially, this inference must be the only reasonable conclusion based on the evidence at trial).

[51] *Duch* Judgement, para. 511.

[52] *Duch* Judgement, paras. 511-.3. The *Duch* Judgement did not rule on the applicability of JCE III, which was not applicable in that case.

[53] PTC JCE Decision, paras. 54-73 (noting amongst other authorities the London Charter, Control Council Law No. 10, international cases and other authoritative pronouncements).

[54] Co-Prosecutor's Motion, para. 2.

III only in the event that their primary theory proves inapplicable to certain facts.[55] They argue that there is a possibility – even if only remote – that a very limited number of criminal events alleged in the Closing Order may not have been within the scope of the common criminal plan as originally conceived.[56] In this case, they request the Trial Chamber to retain the discretion to criminalize this conduct pursuant to JCE III in the verdict, if appropriate.[57]

24. The Trial Chamber has previously held that legal re-characterization is permissible before the ECCC pursuant to Rule 98(2).[58] The Trial Chamber in the *Duch* Judgement noted that the Accused in that case was on notice that the issue of JCE was before the Chamber and that it intended to rule on the issue in the verdict. It therefore held that application of this mode of responsibility did not breach the fair trial rights of the Accused.[59]

25. The Chamber finds that it may at any time change the legal characterisation of facts contained in the Amended Closing Order to accord with any other applicable form of criminal responsibility up to and including in the verdict. This is subject only to the overriding requirements of a fair trial.[60] Although, unlike in Case 001, the Co-Prosecutors did not notify the parties and the Judges at the Initial Hearing that it would ask the Trial Chamber to consider JCE III in this case, the Co-Prosecutor's Motion has nonetheless raised the issue before the commencement of the trial on the substance.[61] There is accordingly no unfairness to the Accused in considering the Co-Prosecutor's Motion at this time. The Chamber finds that the Prosecutor's request for re-characterisation does not breach the Accused's right to be adequately informed of the nature of the charges against him or any other fair trial principle. The Trial Chamber accordingly rejects IENG Sary's later request to determine this issue solely on grounds of admissibility.[62]

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55 Co-Prosecutor's Motion, para. 3.
56 Co-Prosecutor's Motion, para. 2.
57 Co-Prosecutor's Motion, para. 3.
58 *Duch* Judgement, para. 496.
59 *Duch* Judgement, para. 503.
60 In the specific ECCC context, this requires the Chamber to remain within the confines of the facts as included in the Closing Order (*see* Internal Rule 98(2): "The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced.")
61 *Duch* Judgement, para. 489, fn. 862; *see also* Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case, E73/2, 17 September 2009, paras. 7-13 (contesting the admissibility of the request because the Pre-Trial Chamber excluded JCE from the Amended Closing Order, and as JCE had not been pleaded with sufficient specificity by the Co-Prosecutors).
62 *See* IENG Sary's Request for an Expedited Decision as to Whether the OCP May Raise Requests for Re-characterization at this Stage in the Proceedings, E103, 24 June 2011.

### *4.4.2. Merits of Co-Prosecutor's Motion*

26. The Trial Chamber notes, at the outset, that the applicability of JCE III has been extensively litigated before the ECCC. This issue has also already undergone appellate scrutiny before the Pre-Trial Chamber in Case 002. Although the Trial Chamber is not a review or appellate body from decisions of the Pre-Trial Chamber, it is now confronted with a motion substantially similar to that previously before the Pre-Trial Chamber. For reasons of judicial economy, the Trial Chamber will not issue lengthy decisions in circumstances where it can find no cogent reasons to depart from the Pre-Trial Chamber's analysis and where it concurs in the result.

#### *4.4.2.1. The Pre-Trial Chamber Decision*

27. The Pre-Trial Chamber's JCE Decision extensively reviewed pre-1975 legal instruments, including the Nuremberg Charter and Control Council Law No. 10. It concurred with the findings of the Trial Chamber in the *Duch* Judgement that JCE I and JCE II were recognized forms of responsibility in customary international law during the period relevant to Case 002.[63] However, it held that these international instruments do not specifically recognize JCE III.[64] It also examined the post-World War II cases cited by the *Tadić* Appeal Judgement, including *Borkum Island* and *Essen Lynching,* to determine whether customary international law included JCE III as a form of responsibility at the relevant time.[65] It concluded that the cases decided pursuant to Control Council Law No. 10 did not support an inference that these convictions were based on JCE III.[66] It further found that several national authorities cited in support of the application of JCE III also provided insufficient evidence of consistent state practice or *opinio juris* at the time relevant to Case 002.[67]

28. Finally, the Pre-Trial Chamber considered whether JCE III could be upheld as a form of responsibility as a 'general principle of law recognized by civilized nations.'[68] The Pre-

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[63] PTC JCE Decision, paras. 69, 72.
[64] PTC JCE Decision, para. 78.
[65] PTC JCE Decision, paras. 79-82.
[66] PTC JCE Decision, para. 80.
[67] PTC JCE Decision, para. 82.
[68] PTC JCE Decision, para. 84. "General principles of law recognized by civilized nations" are a source of international law distinct from customary and conventional law (*see* Statute of the International Court of Justice, Article 38(1)(c)). It is unclear in both the case law and the scholarly literature as to whether this principle may independently provide the source of a principle of international law of general application, or whether it is instead merely supplementary proof that this principle has been accepted as a norm of customary international law; *see e.g.* Malcolm Shaw, *International Law* (Cambridge 2003) pp. 93-99 ("There are various opinions as to what the general principles of law concept is intended to refer. .... [M]ost writers are prepared to accept that the

Trial Chamber noted the conclusion in the *Tadić* Appeal Judgement that common purpose liability was not adopted by most domestic legal systems.[69] Ultimately however, the Pre-Trial Chamber did not rule on whether JCE III amounted to a general principle of law, on grounds that any such a principle would not have been sufficiently foreseeable and accessible to the Accused in Case 002, because there was no basis for JCE III liability within Cambodian domestic law.[70]

29. For the reasons outlined below, the Trial Chamber agrees in substance with the Pre-Trial Chamber's analysis of the above post-WWII cases. Further, the Trial Chamber has undertaken its own analysis of the extent to which JCE III is recognized by various national legal systems. It has concluded that JCE III cannot be considered to have been a general principle of law between 1975 and 1979.

#### *4.4.2.2. World War II era cases cited in the Tadić Appeal Judgement*

##### *4.4.2.2.1. Borkum Island and Essen Lynching*

30. In the *Borkum Island* case, the charging instrument accused several German nationals of having wrongfully encouraged, aided, abetted and participated in the assault and killing of seven American airmen.[71] The Americans had crash-landed on Borkum Island and a German military commander ordered that the Americans be marched by a guard unit through the town and not protected against any attack by civilians. The Americans were beaten by several members of the public and, according to one account, one was shot by an off-duty German soldier. All seven Americans were ultimately killed.[72] Fifteen Accused were tried for the deaths, including two civilians, five officers, and the members of the guard detail.[73] Fourteen of the fifteen Accused were convicted and received sentences ranging from two years to the death penalty.[74] However, the basis for these convictions cannot be ascertained because no reasoned judgement was produced. Also unclear from the verdict is the extent to which any defendant was found criminally responsible for an act not directly perpetrated by him.

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general principles do constitute a separate source of law but of fairly limited scope, and this is reflected in the decisions of the Permanent Court of International Justice and the International Court of Justice.")

69 *See* PTC JCE Decision, para. 85, *citing Tadić* Appeal Judgement, paras. 225-226.

70 PTC JCE Decision, para. 87.

71 *See United States v. Haesiker*, Case No. 12-489-1, 16 October 1947, Review Judgement (based on the same facts as *United States of America v. Goebell, et. al.* 6 February-21 March 1946) ("*Borkum Island* case").

72 *Borkum Island* case, at 191.

73 *Borkum Island* case, at 191.

74 *Borkum Island* case, at 191.

Although the basis for conviction in this case could have been JCE III, the Chamber finds that it might equally have been some other form of responsibility.

31. Similarly, the record of the judgement in the *Essen Lynching* case exists only as a summary provided by the UN War Crimes Commission.[75] The legal basis for its conviction is also unclear. In fact, the decision summary makes several references to incitement, instigation, and ordering, lending support to the conclusion that the convictions may have been based on other modes of liability.[76] The Chamber therefore finds that the inference drawn by the *Tadić* Appeal Judgement that this conviction was based on JCE III is not the only possible one based on the surviving record.

#### *4.4.2.3. Other World War II era cases*

32. The Trial Chamber has additionally considered other relevant decisions, cited in a recent decision of the Special Tribunal for Lebanon issued subsequent to the Pre-Trial Chamber's JCE Decision.[77] The Trial Chamber has reviewed these additional World War II era cases, but considers that they also do not support a conclusion as to the existence of JCE III in general international law between 1975 and 1979.

33. Although the Interlocutory Decision of the Special Tribunal for Lebanon found JCE III to be applicable, it distinguished the Pre-Trial Chamber's JCE Decision in view of the relevance to the Special Tribunal for Lebanon of jurisprudence dating from the early 1990s.[78] The Interlocutory Decision of the Special Tribunal for Lebanon, however, also cites a number of additional post-World War II era cases, which it claims support the earlier existence of JCE III within general international law.[79]

34. Two of these cases, *U.S. v. Ulrich and Merkle* and *U.S. v. Wuelfert*, originate from the Dachau Military Tribunal.[80] These cases involved private businessmen who owned factories

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[75] *Trial of Erich Heyer and Six Others,* British Military Court of the Trial of War Criminals, Essen, 18-19 and 21-22 December 1945, UNWCC, Vol. 1 (1949) ("*Essen Lynching* case").

[76] *Essen Lynching* case, at pp. 89-90.

[77] Case No. STL-11-01/1, Interlocutory Decision on the Applicable law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon, 16 February 2011 ("Interlocutory Decision of the Special Tribunal for Lebanon").

[78] Interlocutory Decision of the Special Tribunal for Lebanon, para. 239, fn.360.

[79] Interlocutory Decision of the Special Tribunal for Lebanon, para. 239, fn.360.

[80] *United States* v *Hans Ulrich and Merkle,* Case No. 000-50-2-17, Deputy Judge Advocate's Office, 7708 War Crimes Group - European Command, Review and Recommendations, 12 June 1947, Reviews of United States Army War Crimes Trials in Europe 1945-1948, available at: http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/d19.pdf ("*Ulrich and Merkle* case"); *United Stales* v *Hans Wuelfert el al,* Case No. 000-50-2-72, Deputy Judge Advocate's Office, 7708 War Crimes Group - European Command, Review and Recommendations, 19 September 1947, Reviews of United States Army War Crimes Trials in Europe 1945-1948, available at: http://dev.jewishvirtuallibrary.org/items/7110.html ("*Wuelfert* case").

near the Dachau concentration camp and employed prisoners at their factories for slave labour. They were held responsible for the mistreatment of the prisoners at the Dachau camp and at the factories, including killings, beatings, torture and starvation. Again, the Interlocutory Decision of the Special Tribunal for Lebanon cites review judgements which do not provide the legal reasoning behind the affirmed convictions. The review judgement in *U.S. v. Ulrich* merely concludes that "[b]oth of the Accused were shown to have participated in the mass atrocity and the Court was warranted by the evidence adduced … in concluding … that they not only participated to a substantial degree, but the nature and extent of their participation was such as to warrant the sentence imposed."[81] These cases appear to support JCE I or JCE II because the Accused were part of the concentration camp apparatus and personally participated in the mistreatment of prisoners. These crimes do not necessarily support guilt based upon JCE III; *i.e.*, responsibility for crimes which were outside the scope of the common plan but which were nonetheless the natural and foreseeable consequence of it.

35. Accordingly, the Trial Chamber does not consider these additional authorities to support its conclusion that JCE III had emerged as a principle of customary international law by the time relevant to Case 002.

#### *4.4.2.4. JCE III as a 'general principle of law'*

36. Finally, the Co-Prosecutors cite several national criminal codes to show that JCE III constituted a 'general principle of law recognized by civilized nations' from 1975 until 1979.[82] As the Pre-Trial Chamber did not expressly rule on the issue of whether JCE III constituted a 'general principle of law', the Chamber has additionally considered these arguments.

37. The ICTY Appeals Chamber in the *Tadić* Appeal Judgement found that "reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems."[83] However it also emphasised that "national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common

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81 *Ulrich and Merkle* case, Section 5 ("comments").
82 Co-Prosecutor's Motion, para. 29 (*citing* criminal codes of the Philippines, France and Italy).
83 *Tadić* Appeal Judgement, para. 225.

purpose."[84] The Trial Chamber's own survey of several national legal systems, including the United Kingdom,[85] United States,[86] Germany,[87] the Soviet Union,[88] the Netherlands,[89] France,[90] and Cambodia[91] has also shown considerable divergence of approach between various national jurisdictions. It therefore confirms the assessment of the ICTY Appeals Chamber that state practice in this area lacks sufficient uniformity to be considered a general principle of law.

38. The Trial Chamber consequently finds that the Co-Prosecutors have failed to establish that JCE III formed part of customary international law between 1975 and 1979. It therefore

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[84] *Tadić* Appeal Judgement, para. 225.

[85] The joint enterprise doctrine applied by English courts as of 1975 provided liability only for crimes, which were 'authorized' by the joint enterprise. This form of liability resembles JCE I rather than JCE III (*see e.g. Anderson and Morris* (1966) 2 QB 110; *see also* A. Ashworth, Principles of Criminal Law (Oxford, 1999), p. 448).

[86] In the United States, a type of common purpose liability exists under the label of conspiracy (*see e.g. Pinkerton v. United States*, 328 U.S. 640 (1946)). However, conspiracy is a distinct offence, consummated upon entering into the agreement to commit the offence, and not a form of responsibility.

[87] One form of intent within the German criminal code is referred to as *dolus eventualis* (*see* P. Cramer and G. Heine, in A. Schoenke, H. Schroeder *et al.,* Strafgesetzbuch Kommentar (27th ed., Munich: C.H. Beck, 2006), at 277). However, the German High Court has refused to infer intent in the form of *dolus eventualis* in cases where crimes committed by the co-perpetrator were outside of the agreed plan (*see e.g.* Reichsgericht RGSt 44, 321; a judgment of 2 February 1911, where the common plan was to inflict bodily harm but where one perpetrator instead killed the victim).

[88] Soviet law applicable in 1975 provided that the commission of an offence with a prior agreement is an aggravating factor at sentencing (Article 17.1, Ugolovnii Kodeks RSFSR (The Criminal Code of Russian Soviet Republic), adopted on 27 October 1960). The person creating and directing a group is only liable for the offences committed by members of the group if that was part of the agreement and he intended these crimes to be committed. The modern Russian Criminal Code has further elaborated on that provision, providing that the participants of the agreement are not liable for the so-called 'excess of the perpetrator' when the principal commits crimes not intended by other members: *see* Articles 30(2), 35(7), 36 Ugolovnii Kodeks Rossiskoi Federacii (The Criminal Code of Russian Federation), adopted by the State Duma on 24 May 1996 and by the Federation Council on 5 June 5 1996.

[89] Co-perpetration in Dutch law prior to 1981 resembled JCE I type liability in that it requires shared intent in collaboration (*see* Dutch Supreme Court Ruling dated 17 November 1981, NJ 1983, 84/197 *cited in* van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law, TMC Asser Press, 2003, p. 75).

[90] *Co-action* and *complicité* (which encompasses, *inter alia,* aiding and abetting and instigation) are two modes of criminal liability foreseen in the French Penal Code. *Co-action* implies direct participation in the commission of the crimes together with one or more co-perpetrators (*see* Article 121-7). Both *co-action* and *complicité* imply the existence of a common or shared intent to commit or facilitate a crime. Neither concept reflects JCE III liability as defined in the *Tadič* Appeal judgment as they both exclude liability of co-perpetrators or accomplices for crimes outside the scope of the common or shared intent. In addition, the French legal concept of *association de malfaiteurs* is defined as "a criminal association consist[ing] of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more crimes [...]". This differs from JCE III as *association de malfaiteurs* is not a mode of liability, but is a crime in itself. In 1992, genocide, crimes against humanity, and war crimes were criminalized in the French Penal Code, including a specific form of *association de malfaiteurs* with regard to any of the same; *see* Law No. 92-684, 22 July 1992, JORF No. 169, 23 July 1992, p. 9875.

[91] Cambodia law retains in the 1956 Cambodian Penal Code the same forms of responsibility as are present in French law, including *co-action* and *complicité* (see Articles 82-87). It also criminalizes *association de malfaiteurs* (*see* Article 290). As in French Law, a specific form of *association de malfaiteurs* with regard to genocide, crimes against humanity and, war crimes were recently criminalized in Cambodian law (*see* Articles 185, 190 and 196 of the Cambodian Penal Code of 2009). However, none of these forms of responsibility or crimes (in the case of *association de malfaiteurs*) supports the application of JCE III liability (*see* footnote 94).

denies the Co-Prosecutors' request that the Chamber re-characterize, if appropriate, the crimes alleged in the Closing Order to include JCE III in the verdict.

**FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:**

**REJECTS** the Defence Motions insofar as they allege that joint criminal enterprise was improperly included in the Closing Order in Case 002;

**DECLARES** the Co-Prosecutors' Motion admissible pursuant to Rule 98;

**REAFFIRMS** the applicability of JCE I and II (the so-called basic and systematic forms of joint criminal enterprise) to Case 002 and consequently rejects the Defence Motions insofar as they allege that these forms of JCE did not constitute recognized forms of criminal participation within general international law between 1975 and 1979;

**FINDS** that JCE III (the so-called extended form of joint criminal enterprise) did not form part of customary international law and was not a general principle of law at the time relevant to Case 002; and

**DENIES** in consequence the request of the Co-Prosecutors to re-characterise in the verdict, if appropriate, the crimes alleged in the Closing Order to include JCE III.

**Phnom Penh, 12 September 2011**
**President of the Trial Chamber**

**Nil Nonn**