D99/3/3

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

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

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I.SUMMARY of ARGUMENT

1. On 8 August 2008, the Co-Investigating Judges issued a Closing Order ("Indictment" or "Closing Order") in the case of the Accused, Kaing Guek Eav alias DUCH ("DUCH").[1] After setting out the material facts in some detail,[2] the Co-Investigating Judges indicted DUCH for crimes against humanity and grave breaches of the 1949 Geneva Conventions ("grave breaches"),[3] on the basis of certain modes of liability.[4]

2. Pursuant to the ECCC Internal Rules 67(5), 73 and 74 (2) ("the Rules") the Co-Prosecutors appeal the Indictment because the Co-Investigating Judges committed two errors of law when they:

   (i) failed to indict DUCH for the crimes of Homicide and Torture as defined by the 1956 Penal Code and punishable under Article 3 of the Law on the Establishment of the ECCC ("national crimes"), even though these crimes were fully disclosed by the material facts as found in the Indictment **(Ground 1)** ; and

   (ii) failed to indict DUCH for the commission of crimes through participation in a joint criminal enterprise ("JCE"), even though such a mode of liability was fully disclosed by the material facts as found in the Indictment **(Ground 2)**.

3. Unless the Indictment is modified, the totality of DUCH's alleged criminality will not be adequately reflected and there is a possibility of acquittal on procedural grounds. The Pre-Trial Chamber is therefore requested to amend the Indictment, to include the crimes of Homicide and Torture pursuant to the Penal Code of 1956 and to include as a mode of liability the commission of the crimes by participation in a JCE. The Co-Prosecutors submit proposed language to correct the errors in the Closing Order, which is included below.

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1 *Case of Kaing Guek Eav alias DUCH*, Closing Order Indicting Kaing Guek Eav alias Duch, 8 August 2008, D99 [hereafter "Indictment"].
2 Paras. 10-128 of the Indictment.
3 Part IV, "Dispositive" of the Indictment.
4 Paras. 153-161 of the Indictment.

II.RELEVANT PROCEDURAL BACKGROUND

4. On 18 July 2007 the Co-Prosecutors filed an Introductory Submission[5] which opened a judicial investigation against DUCH and four others. It requested the Co-Investigating Judges to charge the five suspects with the crimes of: (1) Homicide, Torture and Religious Persecution under the Penal Code of 1956; (2) Genocide; (3) Crimes Against Humanity; and (4) Grave Breaches of the 1949 Geneva Conventions.[6] In this Introductory Submission the Co-Prosecutors also requested that all five suspects be investigated for committing the crimes as participants in a JCE amongst other forms of criminal liability.[7]

5. At DUCH's initial appearance on 31 July 2007, having first advised him of the facts filed in the Introductory Submission, the Co-Investigating Judges charged him with crimes against humanity.[8] On 2 October 2007 the Co-Investigating Judges additionally charged DUCH with grave breaches.[9] After notification by the Co-Investigating Judges that they considered the judicial investigation closed,[10] the Co-Prosecutors again requested that the Co-Investigating Judges charge DUCH with the crimes of Homicide and Torture pursuant to the 1956 Penal Code.[11] The Co-Investigating Judges rejected this request stating that *"the Closing Order must determine the exact legal definition to be retained in order to characterize any crimes committed at S-21 for which the Charged Person is being prosecuted; and that, in the absence of any new elements, it is not, thus, necessary at this stage to re-open the investigation in order to lay any supplementary charges [emphasis added]."*[12]

6. On 18 July 2008, the Co-Prosecutors filed their Final Submission concluding that the evidence on the Case File required DUCH to be prosecuted for crimes against humanity, grave breaches and national crimes.[13] The Co-Prosecutors also argued that the evidence

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5 Introductory Submission, 18 July 2007, D3 [*hereafter* Introductory Submission].
6 Introductory Submission, Paragraph 122.
7 Introductory Submission, Paragraph 116.
8 *Case of Kaing Guek Eav alias DUCH* , Writtten Record of Initial Appearance, 31 July 2007, D7, page 2.
9 *Case of Kaing Guek Eav alias DUCH* , Writtten Record of Interview, 2 October 2007, D20, page 2.
10 *Case of Kaing Guek Eav alias DUCH* , Notice on Conclusion of Judicial Investigation, 15 May 2008, ERN 00189149-00189149, D89.
11 *Case of Kaing Guek Eav alias DUCH*, Co-Prosecutors' Request to Charge Kaing Guek Eav alias DUCH for the national crimes of Homicide and Torture Under Article 3 of the ECCC Law, 2 June 2008, ERN 00194698-00194700, D94.
12 *Case of Kaing Guek Eav alias DUCH*, Order Concerning Requests for Investigative Actions, 5 June 2008, ERN 00194703-00194704, D94/I, page 2. *Emphasis added.*
13 *Case of Kaing Guek Eav alias DUCH*, Rule 66 Final Submission Regarding Kaing Guek Eav alias DUCH, 18 July 2008, D96, Paragraph 275(a).

on the Case File established that DUCH had committed the crimes at S-21 as a participant in a JCE, amongst other modes of liability.[14]

7. On 8 August 2008 the Closing Order was issued indicting DUCH for crimes against humanity and grave breaches.[15] The Co-Investigating Judges declined to indict DUCH for national crimes stating: *"Certain acts characterised by the judicial investigation also constitute the domestic offences of homicide and torture pursuant to [...] the 1956 Cambodian Penal Code [...]. However, these acts must be accorded the highest available legal classification, in this case, crimes against humanity or grave breaches of 1949."*[16] The Indictment made no reference to JCE liability or any other form of committing a crime by co-perpetration.

8. By the Introductory Submission filed on 18 July 2007, the Request to the Co-Investigating Judges on 2 June 2008 and the Final Submission filed on 18 July 2008, the Co-Prosecutors have given ample notice to the Accused of their request that DUCH be prosecuted for the national crimes of Homicide and Torture and that he be held accountable for the crimes at S-21 as a participant in a joint criminal enterprise.

III. PRELIMINARY ISSUES

A. NO ORAL HEARING REQUIRED

9. An oral hearing of this appeal is not necessary. The Co-Prosecutors submit that the parties can sufficiently brief the Pre-Trial Chamber on the relevant factual and legal issues through their written pleadings as permitted in the Practice Direction on Filing of Documents ("Practice Direction")[17] and previously followed by the Pre-Trial Chamber.[18] The Co-Prosecutors also recognise the need for an expeditious resolution of all outstanding legal issues to enable the public trial to commence as soon as possible.

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14 *Case of Kaing Guek Eav alias DUCH*, Rule 66 Final Submission Regarding Kaing Guek Eav alias DUCH, 18 July 2008, D96, Paragraph 250.

15 Indictment, part IV, "Dispositive."

16 Indictment, Paragraph 152.

17 Filing of Documents Before the ECCC, Practice Direction 01/2007/Rev.1, 5 October 2007, Art. 8.4 [*hereafter* Practice Direction].

18 *Case of Ieng Sary*, Decision on Appeal Concerning Contact Between the Charged Person and his Wife, Case No. 002/19-09-2007-ECCC/ OCIJ (PTC 05), 30 April 2008, ERN 00184951–00184956, A104/II/7, Paragraph 8.

B. THE APPEAL SHOULD BE PUBLIC

10. Rule 77(6) provides that the Pre-Trial Chamber may hold all or a part of its hearings (and, by inference, all pleadings and decisions) in public, if the Chamber considers that it is in the interests of justice and neither public order nor protective measures are affected. The Co-Prosecutors request that the Pre-Trial Chamber publish this written appeal on the ECCC's website along with other related filings. By so doing, the interests of justice would be served and there would be no detriment to public order nor to any protective measures authorised by this Court.

C. THE SCOPE OF THE APPEAL

11. In a recent decision relating to an appeal against a rejection order by the Co-Investigating Judges to seize the Pre-Trial Chamber with a view to annulment, this Chamber has found that its examination of procedural defects is confined to those issues that have been raised by the party. The Chamber explicitly stated that it was "bound by the application made by the party."[19] The Co-Prosecutors request that the Pre-Trial Chamber apply the same principle in this appeal.

12. The scope of this appeal is narrow and specific, limited to the two errors of law described. The Co-Prosecutors are only appealing the Co-Investigating Judges' failure to indict DUCH for national crimes and their failure to include JCE liability. The Co-Prosecutors are not appealing any of the material facts found by the Co-Investigating Judges. However, the Co-Prosecutors do not agree with every conclusion drawn by the Co-Investigating Judges from the evidence on the Case File. The Co-Prosecutors reserve the right to request the Trial Chamber to make such factual findings as they consider necessary to reflect the full extent of DUCH's criminality.

IV. LAW ON INDICTMENTS

A. INDICTMENT MUST CONTAIN ALL CRIMES AND MODES OF LIABILITY ESTABLISHED BY THE FACTS

13. The Co-Prosecutors submit that where the Co-Investigating Judges consider that the facts are established for a particular crime or particular mode of liability, such a crime or mode of liability must be included in the Indictment.

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19 *Case of Nuon Chea,* Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment, D55/I/8, Paragraph 35.

Limited Discretion to Charge Crimes and Modes of Liability in Indictment

14. The Co-Investigating Judges have discretion during the conduct of the judicial investigation, but that discretion is limited.[20] They cannot, for instance, decline to investigate crimes within the jurisdiction of the ECCC when seized by an Introductory Submission or a Supplementary Submission.[21] Similarly, the Co-Investigating Judges have some discretion in drafting the Indictment[22] but such discretion is likewise limited. This is demonstrated by the fact that the Co-Prosecutors are entitled to appeal even an indictment,[23] a privilege which is granted to them because of their right to submit a Final Submission[24] and their obligation to prove the case beyond reasonable doubt at trial.[25]

15. The Co-Investigating Judges' discretion is strongest when acting as a finder of fact. However, once they have concluded that the judicial investigation establishes a certain fact, they have limited discretion in determining the legal consequences of that fact. This limitation can be inferred from Article 1 of the ECCC Agreement, Articles 1 and 29 of the ECCC Law, Rules 67(1), 67(3) and 67(4) and Article 247 of the Cambodian Criminal Procedure Code ("CPC"). This interpretation is also supported by the procedures adopted in other domestic systems, such as France and Germany, and mirrors the policy goals of international tribunals.

16. Rule 67 establishes a system where all the criminal acts described in the Closing Order that are not specifically dismissed must lead to an Indictment. Rule 67(1) states that the investigation shall conclude with either an Indictment or a dismissal. Rule 67(4) allows for partially dismissing certain aspects of the case while sending the remainder to trial. Thus, a judicial investigation can only end with an Indictment, a Dismissal Order or an Indictment that contains a partial dismissal of "certain acts or [of charges] against certain persons." No other resolution of the judicial investigation is permitted.

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20 *See* Rule 55(5) ("In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertain the truth.") Even this discretion is not unlimited because investigative action must still be conducive to ascertaining the truth. It must also be limited to facts set out in an Introductory or Supplementary Submission. *See* Rule 55(2).

21 *See* Rule 55(1) ("A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.")

22 *See* Rule 67(1) ("The Co-Investigating Judges are not bound by the Co-Prosecutors' submissions.").

23 *See* Rule 74(2) and especially Rule 77 (13)(b) ("As regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seised on the basis of the Closing Order of the Co-Investigating Judges..")

24 *See* Rule 66. The Internal Rules assign significant importance to this submission, given the extended time for filing. Similarly, the Practice Direction does not stipulate any page limit for Final Submissions.

25 *See* Rule 87(1)

17. According to Rule 67(3), a Dismissal Order shall be issued if: (1) the acts in question do not amount to crimes within the jurisdiction of the ECCC; (2) the perpetrators have not been identified; or (3) there is insufficient evidence to support the charges. Taken together, Rules 67(1), 67(3) and 67(4) indicate that if the acts investigated by the Co-Investigating Judges do constitute a crime within the jurisdiction of the ECCC, the perpetrator has been identified, and if there is sufficient evidence to support the charges, the Co-Investigating Judges must send the charged person to trial for that crime. Rule 67 does not allow the Co-Investigating Judges to conclude that there is sufficient evidence of a crime to avoid a Dismissal Order yet choose not to include that crime in the Indictment.

18. This interpretation of Rule 67 is consistent with the purpose of the ECCC. Article 1 of the ECCC Law and Agreement state that the primary purpose of the ECCC is to "bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations" of Cambodian and international law that occurred between 17 April 1975 and 6 January 1979. Article 29 of the ECCC Law exhibits a similar purpose.[26] This purpose would be frustrated if senior leaders and those who were most responsible were not charged and brought to trial even though the Co-Investigating Judges had concluded at the end of the judicial investigation that sufficient evidence existed to avoid a Dismissal Order under Rule 67(3).

19. This interpretation of Rule 67 is also supported by an analysis of the CPC.[27] Rule 67 mirrors many of the provisions of Article 247 of the CPC.[28] However, whilst Rule 67 does not expressly address whether the Co-Investigating Judges have discretion not to charge crimes if there is sufficient evidence to avoid a Dismissal Order, Article 247 states

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26 ECCC Law, Art. 29 ("Any Suspect who planned, instigated, ordered, aided and abetted or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.").

27 While the Rules constitute the "primary" source for determining procedures before the ECCC, the CPC can be consulted where there is a gap in the Rules: *See Case of NUON Chea*, Public Decision on NUON Chea's Appeal Against Order Refusing Request for Annulment, Pre-Trial Chamber, 002/19-09-2007/ECCC/OCIJ (PTC 06), 26 August 2008, Case File No. D55/I/8, ERN 00219322-00219333 (ENG) at paras. 14-15. Alternatively, the Cambodian Criminal Procedure Code can be used as a guide to the interpretation of the Rules in cases where the Rules are ambiguous. *See* Public Decision on NUON Chea's Appeal Against Order Refusing Request for Annulment, Pre-Trial Chamber, 002/19-09-2007/ECCC/OCIJ (PTC 06), 26 August 2008, Case File No. D55/I/8, ERN 00219322-00219333 (ENG) at Paragraph 36.

28 For example, the first sentence of Rule 67 is essentially the same as the first two sentences of Article 247. The second sentence of Rule 67 appears in the fourth paragraph of Article 247. Rule 67(3) can be found in the third paragraph of Article 247. The first sentence of Rule 67(4) appears as the first sentence of paragraph 4 of Article 247. There are many other similarities and it seems clear that Rule 67 was based on the provisions of Article 247.

that: "If the investigating judge concludes that the facts constitute a felony, a misdemeanour or a petty offence, he/she will indict the charged person and send him/her to trial."[29] This language requires the Investigating Judge to send the charged person to trial, if he or she concludes that the underlying facts constitute a crime. Given the similarities between Article 247 and Rule 67 they should be interpreted consistently.

20. Such an interpretation of Rule 67 is also consistent with the procedures adopted in other national jurisdictions, including the French and German systems. The French Criminal Procedure Code ("FCPC") shares many of the same provisions as both Rule 67 and Article 247 of the CPC.[30] In particular, the FCPC contains provisions similar to Article 247 that limit the Investigating Judge's discretion when he or she concludes that the facts constitute an offence.[31] Articles 178, 179 and 181 of the FCPC state that, "if the judge considers that the facts constitute a crime the judge orders the case to be sent to the relevant chamber..."[32] Also the general rule is similarly clear in the German Criminal Procedure Code, where a prosecution must proceed in situations where there are "sufficient factual indications" that a crime has occurred.[33]

Cumulative Charging in an Indictment is Desirable

21. Cumulative charging is a practice where an indictment charges an accused with more than one offence for the same conduct.[34] It is a permitted form of charging which is standard at both the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the Former Yugoslavia ("ICTY").[35] It is permitted where each

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29 Uncertified translation from the French : "S'il estime que les faits constituent un crime, un délit ou une contravention, le juge d'instruction ordonne le renvoi du mis en examen devant le tribunal." Projet de Code de procédure pénale du Royaume du Cambodge, Version du 7 Juin 2007 adoptée lors de la session pléniére de l'Assemblée Nationale, Article 247.

30 For example, Article 177 of the FCPC mirrors Rule 67(3) and the third paragraph of Article 247 of the CCPC. This is not surprising given that the Rules are based to a large extent on the CCPC and the CCPC is based to a large extent on the FCPC.

31 *See* French Criminal Procedure Code, Arts. 178, 179, 181.

32 "[s]i le juge estime que les faits constituent un crime, il prononce, par ordonnance, le renvoi de l'affaire devant le tribunal compétent."

33 "Except as otherwise provided by law, the public prosecution office shall be obliged to take action in the case of all criminal offenses which may be prosecuted, provided there are sufficient factual indications" German Criminal Procedure Code, Section 152(2). There are a limited number of exceptions to this rule. *See Id.*, Sections 153(1), 153c, 153e, 154a.

34 *Prosecutor v. Blagojevic et al.*, Decision on Motion of Accused Blagojevic to Dismiss Cumulative Charges, Case No. IT-02-60-PT, Trial Chamber II, 31 July 2002, at p. 3. *See also* Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) at 214-216 (generally discussing cumulative charging).

35 *Prosecutor v. Delalic et al.*, Judgment, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, Paragraph 400.

separately-indicted crime requires a material element not present in any of the other indicted crimes.[36]

22. Cumulative charging has been found to be desirable for at least two reasons. First, it is not possible to determine prior to trial whether the Trial Chamber will accept a particular element of one charge that does not have to be established for the other charges. Consequently, the charging should be as broad as possible until after the presentation of the evidence.[37] Second, cumulative charging may be necessary to accurately reflect the totality of the accused's criminal conduct.[38] This is one aspect of a general concern that the proceedings should accurately reflect the criminality of the accused.[39]

23. Cumulative charging is particularly suited to prosecutions of violations of international criminal law. For such crimes, the practice promotes; the discovery of the truth; the creation of an accurate historical record; vindication of the rights of victims; the advancement of justice and education of the public by more accurately reflecting the

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36 *Prosecutor v. Delalic et al.,* Judgment, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, Paragraph 412 ("[M]ultiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other."). *See also* Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) at 214 (discussing the concept of lesser included offences).

37 *Prosecutor v. Delalic et al.*, Judgment, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, Paragraph 400; *Id.,* Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, at Paragraph 12; *Prosecutor v. Blagojevic et al.*, Decision on Motion of Accused Blagojevic to Dismiss Cumulative Charges, Case No. IT-02-60-PT, Trial Chamber II, 31 July 2002, at p. 3; *Prosecutor v. Musema*, Judgment, Case No. ICTR-96-13-A, Appeals Chamber, 16 November 2001, paras. 346-370; *Prosecutor v, Nahimana et al.,* Judgment and Sentence, Case File No. ICTR-99-52-T, Trial Chamber, 3 December 2003, Paragraph 1089. *See also* Vladimir Tochilovsky, *Charges, Evidence and Legal Assistance in International Jurisdictions* (Wolf Legal Publishers 2005) at 22 (collecting cases).

38 *Prosecutor v Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No IT–97–25–PT, 24 February 1999, Paragraph 10; *Prosecutor v. Kayishema and Ruzindana*, Separate and Dissenting Opinion of Judge Khan, Case No ICTR–95–1–T, 21 May 1999, Paragraph 52 ([Cumulative charging and convictions] "properly avoids entering into the legal quagmire of overlapping acts, elements and social interests at the stage of conviction. Rather, it concentrates upon the criminal conduct at the stage of sentencing. In doing so, it ensures that the accused's culpable conduct is reflected in its totality and avoids prejudice through concurrent sentencing").

39 Similar concerns have been raised during sentencing and plea agreements. The overarching goal in sentencing at international tribunals must be to ensure that the final sentence reflects the totality of the criminal conduct and the overall culpability of the offender. *Prosecutor v. Delalic et al.*, Judgment, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 429-430. The ICTY has held that the Trial Chamber can review plea agreements that narrow the charges against the accused to ensure that the remaining charges reflect the totality of the criminal conduct, that the more limited charges will not result in an inaccurate historical record, and that the agreement is in the interests of justice. *Prosecutor v. Momir Nikolic*, Sentencing Judgment, Case No. IT-02-60/1-S, Trial Chamber, 2 December 2003, paras. 50, 52, 54, 63, 67.

criminality of the accused. [40] Such goals are important for all international tribunals dealing with crimes of mass atrocity, including the ECCC. The inclusion of national crimes and JCE liability in this Indictment would therefore be consistent with the overall purposes of the ECCC.

B. ACCUSED'S RIGHT TO NOTICE OF CRIMES AND MODES OF LIABILITY AT TRIAL AND RULE 98(2)

24. Article 35 (new) of the ECCC Law requires that an accused be informed "promptly and in detail" of the nature and cause of the charge against him and to have adequate time and facilities for the preparation of his defence. This incorporates the minimum guarantees afforded to an accused pursuant to Article 14 of the International Covenant on Civil and Political Rights ("ICCPR").[41]

25. In other tribunals prosecuting similar crimes to the ECCC, a failure to indict an accused for crimes with which he is later prosecuted at trial may be considered an infringement of his rights to know the nature of the case against him and to be given adequate time to prepare his defence. The jurisprudence of these tribunals provide some guidance in how Article 14 rights are to be interpreted:

(i) In the determination of any charge against him, the accused should be informed promptly and in detail of the nature, cause and content of the charges he faces. An Indictment is materially defective if it fails to plead the essential aspects of the case.[42] These are "material facts" that must be pleaded in the indictment.[43] The

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40 *See, e.g.*, Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 Law & Contemp. Probs. 9 (1996) at 24 (emphasizing the importance of establishing "central truths" in post-conflict situations to provide a historical record and vindication for victims). *See also* Mark W. Janis, *Symposium: Law, War and Human Rights: International Courts and the Legacy of Nuremberg: The Utility of International Criminal Courts*, 12 Conn. J. Int'l L. 161 at 163-170 (highlighting certain primary functions of international criminal courts, including: achieving justice and punishment; deterrence; record keeping; and the progressive development of international law). The potential for international criminal tribunals to provide a measure of justice to victims and hence catalyze broader social transformation is also considered in Alexander Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court,* 39 N.Y.U.J. Int'l L. & Pol 583 at 601-602. The ECCC is designed to advance many of these same purposes.

41 *See* International Covenant on Civil and Political Rights, Art. 14(3). In addition, Article 33 new of the ECCC Law states that the ECCC shall exercise its jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Article 14 and 15 of the ICCPR.

42 *Prosecutor v. Norman et al*, Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, Case No. SCSL-04-14-T, 29 November 2004, Paragraph 23; *Prosecutor v. Halilovic*, Decision on Prosecution's Motion Seeking Leave to Amend the Indictment, Case No. IT-01-48-PT, 17 December 2004, Paragraph 13.

nature of charges refers to the precise legal qualification of the offence, and the cause of the charges refers to the facts underlying it.[44]

(ii) The alleged mode of liability of the accused in a crime should be clearly laid out in the indictment.[45] If the prosecution intends to rely on JCE to hold the accused criminally responsible as a principal perpetrator of an underlying crime rather than as an accomplice, the indictment should plead this in an unambiguous manner and specify which form of JCE the prosecutor relies upon.[46] In cases of JCE, the accused must be informed by the indictment of (1) the nature of purpose of the JCE, (2) the time period during which it lasted, and (3) the identity of those engaged in the JCE.[47]

26. According to Rule 98(2), the Trial Chamber may "change the legal characterization of the crime as set out in the Indictment, as long as no new constitutive elements are introduced." If Rule 98(2) is read restrictively, it may permit only those legal re-characterisations that contain no new *legal* constitutive elements from the crimes alleged in the Indictment. If the Indictment failed to indict DUCH for national crimes, such an interpretation of Rule 98(2) may prevent the Trial Chamber from characterising the acts as national crimes, because homicide and torture under the 1956 Penal Code have different legal elements compared to murder and torture as crimes against humanity and wilful killing and torture as grave breaches, as discussed below. Similarly, if the Indictment failed to additionally indict DUCH for committing the crimes charged via JCE the Trial Chamber may consider itself barred from applying this mode of liability because it has distinct legal elements from other modes of liability, as discussed below.

27. If Rule 98(2) is read more broadly, it would permit the Trial Chamber to legally re-characterise the crimes or modes of liability in the Indictment, as long as the new crimes

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43 *Prosecutor v. Brdanin and Talic*, Decision on Objections by Radislav Brdanin to the Form of the Amended Indictment, Case No. IT-99-36-PT, ICTY Trial Chamber, 23 February 2001, Paragraph 13.

44 *Prosecutor v. Ntagerura*, Judgement and Sentence, Case No. ICTR-99-46-T, ICTR Trial Chamber, 25 February 2004, paras 29, 31.

45 *Prosecutor v. Kordic and Cerkez*, Judgement, Case No. IT-95-14-2A, ICTY Appeals Chamber, 17 December 2004, Paragraph 129.

46 *Prosecutor v. Ntagerura, Judgement and Sentence*, Case No. ICTR-99-46-T, ICTR Trial Chamber, 25 February 2004, para 34; Prosecutor v. Limaj, Decision on the Prosecution's Motion to Amend the Amended Indictment, Case No. IT-03-66-PT, ICTY Trial Chamber, 12 February 2004, Paragraph 18.

47 *Prosecutor v. Niyitegeka*, Appeal Judgement, Case No. ICTR-96-14-A, ICTR Appeals Chamber, 9 July 2004, Paragraph 193.

or modes of liability contain no new *factual* elements that were not within the scope of the investigation. If this interpretation is preferred by the Trial Chamber, a failure by the Co-Investigating Judges to specifically indict for national crimes and JCE liability would not prevent the Co-Prosecutors from introducing these legal qualifications at trial.

28. As the Co-Prosecutors cannot predict the Trial Chamber's approach to Rule 98(2) it is submitted that the Indictment should be amended, to include national crimes and JCE liability, to ensure that the Co-Prosecutors have the ability to present these issues at trial.

V.GROUND 1 : FAILURE TO CHARGE NATIONAL CRIMES

A. ECCC LAW AUTHORISES THE PROSECUTION OF NATIONAL CRIMES

29. Article 3 of the ECCC Law explicitly authorises the prosecution of suspects for the crimes of homicide, torture and religious persecution contrary to the 1956 Cambodian Penal Code.

30. There is no hierarchy of crimes at the ECCC . Articles 3 to 8 of the ECCC Law list the crimes under the Court's jurisdiction, but there is no indication that some crimes are more important than others.[48] Indeed, the opposite appears to be true. Articles 1 and 2 of the ECCC Law place Cambodian penal law on an equal footing with the international criminal law and, indeed, all the crimes carry the same penalty.[49] Some commentators have suggested that the decision to place national crimes first in the ECCC Law was "a conscious one, to emphasize the fact that the trials will mix both Cambodian domestic and international law."[50] Others have argued that charging national crimes will foster a sense of "ownership" of the judicial proceedings for the Cambodian judiciary and the population as a whole.[51]

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48 Paragraph 152 of the Indictment suggests that the principal reason the Co-Investigating Judges refused to charge DUCH with national crimes was a belief that national crimes have a lower "legal classification" than the international crimes.

49 ECCC Law, Art. 39.

50 Page 222, Chapter 11, Clinching Convictions, Helen Jarvis and Tom Fawthrop, "Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal," Pluto Press, Chase Publishing Services, England, 2004.

51 Etelle Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reforms*, 23 Arizona Journal of International and Comparative Law 347.

B. DISTINCTIVE CHARACTER OF NATIONAL CRIMES

31. The Co-Investigating Judges' decision not to indict DUCH with the national crimes is based upon the premise that national crimes are subsumed by crimes against humanity and grave breaches, which represent the "highest available legal classification"[52] of the facts found in the Indictment. The Co-Prosecutors submit that this conclusion is wrong for three reasons. Firstly, as discussed above, there is no hierarchy between any of the crimes in the jurisdiction of the ECCC and it cannot be said that the homicide and torture contrary to the 1956 Penal Code are "lesser" crimes than crimes against humanity or grave breaches. Secondly, the interpretation adopted by the Co-Investigating Judges implies that these national crimes may never be prosecuted before the ECCC.

32. Thirdly, each of the international crimes contains an element that is not present in the national crimes. Torture and murder as crimes against humanity require jurisdictional elements that are not present in the 1956 Penal Code. Similarly, torture and wilful killing as grave breaches of the Geneva Conventions also require jurisdictional elements that are not present in the 1956 Penal Code. Therefore, each of the international crimes requires proof of an element that is not required for violations of the 1956 Penal Code.

33. Each of the national crimes also contains an element that is not present in the international crimes. Torture under the 1956 Penal Code occurs when acts of torture are committed either: (1) with the intent to obtain information; or (2) in a spirit of repression or barbarity.[53] Torture as a crime against humanity and torture as a grave breach both require that the torturous act must be carried out with the intent to obtain information, punish, intimidate or coerce the victim or a third person, or discriminate against the victim or a third person.[54] Torture under the 1956 Penal Code can be proven using a mental element, a "spirit of repression of barbarity," that is not present in the international crimes. Therefore, it has a materially different element from the international crimes.

34. Murder under the 1956 Penal Code requires an intent to cause death.[55] By contrast, murder as a crime against humanity and murder as a grave breach can be satisfied by

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52 Indictment, Paragraph 152.
53 Final Submission, Paragraph 232.
54 Final Submission, Paragraph 199, 228.
55 Final Submission, Paragraph 125.

either an intent to kill or by an intent to inflict grievous bodily harm or serious injury.[56] The two mental states must be viewed as different material elements because there are situations where the same conduct could be murder under the international crimes but not murder under the 1956 Penal Code.[57]

35. The national crimes thus cannot be subsumed by the international crimes in this Indictment because each national crime requires a material element that is not present in the international crimes and vice versa.

C. INDICTMENT FACTS ESTABLISH NATIONAL CRIMES

36. The crimes of torture and homicide under the 1956 Penal Code are established by the factual findings in the Closing Order. The Co-Prosecutors submit that it is not necessary for the Pre-Trial Chamber to evaluate the evidence on the Case File as the Co-Investigating Judges have already found in paragraph 152 of the Closing Order that "acts characterized by the judicial investigation also constitute the domestic offences of homicide and torture." Once the Co-Investigating Judges found that the facts constitute national crimes under the applicable law, they must indict for these crimes.

D. UNNECESSARY RISK OF ACQUITTAL AT TRIAL

37. In failing to charge national crimes, the Co-Investigating Judges have potentially created an unnecessary risk that DUCH may be completely acquitted at trial.

38. The international crimes require proof of specific jurisdictional elements established in addition to the facts of the crime itself. For crimes against humanity, the Co-Prosecutors are required to prove, in addition to the accused's liability for the underlying crime itself, that the underlying crime formed: (1) part of a widespread or systematic attack; which was (2) directed against; (3) a civilian population; (4) on national, political, ethnical, racial or religious grounds; and that (5) that the accused was aware of that attack; and that (6) his acts were a part of that attack.

39. Similarly, for grave breaches, the Co-Prosecutors are required to prove, in addition to the underlying crime itself, that: (1) the victim was a protected person under the Geneva

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56 Final Submission, Paragraph 203, 230.

57 For example, a killing that resulted from an intent to inflict grievous bodily harm could be murder under the international crimes, but could not be murder under the 1956 Penal Code.

Conventions; (2) there was a relationship between the underlying crime and an international armed conflict; (3) the accused was aware of the existence of the international armed conflict; and (4) the accused was aware that the victim was a protected person.

40. Failure by the Co-Prosecutors to prove each and every part of these jurisdictional elements would result in the Trial Chamber entering an acquittal on these charges. National crimes, in contrast, do not require proof of these additional elements. If national crimes were specifically listed in the indictment, the sole question for the Trial Chamber would be to consider whether the elements of the national crimes were proved beyond a reasonable doubt.

41. However, if DUCH had *not* been indicted with national crimes prior to trial, the Trial Chamber would be required to consider the application of rule 98(2). If the Trial Chamber were to adopt a restrictive approach to rule 98(2) as discussed above, a re-characterisation of the facts as national crimes may be prohibited without even considering the evidence. This may result in a complete acquittal. To remove this possibility of an acquittal on all charges, the Pre-Trial Chamber is requested to amend the Closing Order in the terms below.

E. RECOMMENDED AMENDMENT TO CLOSING ORDER

42. It is requested therefore that the PTC amend the Closing Order and indict DUCH with the crimes of Homicide and Torture pursuant to the 1956 Penal Code. It is submitted it is not necessary for the PTC to evaluate the evidence on the Case File as the Co-Investigating Judges have already found that "acts characterized by the judicial investigation also constitute the domestic offences of homicide and torture." Accordingly the Co-Prosecutors request that the Indictment be amended by removing the second sentence of paragraph 152 of the Indictment and adding the following new paragraph 3 in Part IV of the Indictment:

3. VIOLATIONS OF THE 1956 PENAL CODE

- homicide (Articles 501, 503 & 506)
- torture (Article 500)

Offences defined and punishable under Article 3 (new), 29 (new) and 39 (new) of the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

VI.GROUND 2 : FAILURE TO CHARGE COMMISSION VIA JCE

43. The Co-Investigating Judges erred in failing to categorise DUCH's conduct as commission through participation in a JCE even though the facts in the Indictment support the use of JCE. This is an error for two reasons. First, the three forms of liability characterised as ordering, instigating and planning are not broad enough to cover the full criminality of DUCH's actions. Second, the two other forms of liability, aiding and abetting and superior responsibility, do not fully reflect the central criminal role that DUCH had at S-21. The Indictment is unduly narrow without JCE, and there is a significant possibility that DUCH would not be fully held accountable for his actions.

44. Joint criminal enterprise is not a crime. It is a method by which crimes can be committed.[58] In a joint criminal enterprise, a group of people[59] agree to act together to accomplish an illegal purpose.[60] Each member of the group that: (1) agrees to accomplish the illegal purpose;[61] and (2) commits a significant act to advance the illegal purpose,[62] is a participant in the joint criminal enterprise. There are three forms of JCE, and the scope of the accused's liability under this mode of liability depends on whether the JCE liability is considered to be "basic", "systematic" or "extended."

45. An accused participates in a "basic" JCE when he or she has the intent to perpetrate the specfic crime(s) and all of the other participants in the JCE share this intent.[63] "Systematic" JCE is normally associated with prison camps or any "organized system of

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58 JCE is discussed at greater length in paragraphs 241-253 of the Co-Prosecutors' Final Submission Regarding KAING Guek Eav alias Duch, 18 July 2008, Court Document D96.

59 *Vasiljevic* Appeal Judgment, Paragraph 100; *Prosecutor v. Stakic*, Judgment, ICTY Appeals Chamber, Case No. IT-97-24-A, 22 March 2006, Paragraph 64 ("*Stakic* Appeals Judgment").

60 *Tadic* Appeal Judgment, Paragraph 227; *Vasiljevic* Appeal Judgment, Paragraph 100.

61 The *mens rea* for participants depends on whether an Accused is alleged to be a member of a "basic," "systematic," or "extended" forms of JCE. *Tadic* Appeal Judgment, Paragraph 220, 228 (basic form); *Krnojelac* Appeal Judgment, Paragraph 32 (systematic form); *Vasiljevic* Appeal Judgment, paras. 101, 105 (systematic form); *Kvocka* Appeal Judgment, Paragraph 83 (extended form); *Tadic* Appeal Judgment, Paragraph 228 (extended form); *Mrksic* Trial Judgment, Paragraph 546 (extended form); *Brdjanin* Appeal Judgment, paras. 411, 431 (extended form).

62 *Tadic* Appeal Judgment, Paragraph 227; *Stakic* Appeal Judgment, Paragraph 64; *Brdanin* Appeal Judgment, paragraphs 418, 430; *Kvocka* Appeal Judgment, Paragraph 98.

63 *Tadic* Appeal Judgement, paragraph 220, 228.

ill-treatment."[64] It requires the accused to have personal knowledge of the system of ill-treatment and the intent to further that system.[65] In an "extended" JCE, an accused who acts with the intent to further the illegal purpose of the JCE is held liable for the crime(s) of others, if: (1) they are a "natural and foreseeable consequence" of the illegal purpose even though they are committed outside the scope of the illegal purpose[66] and (2) the accused willingly took the risk that these crime(s) would be committed by joining or continuing to participate in the enterprise.[67]

46. JCE is a widely accepted mode of liability and is routinely used at other international tribunals because it more accurately reflects the responsibility of participants in international crimes than other modes of liability. JCE liability has been employed when prosecuting mass atrocities because it captures conduct which may not constitute the *actus reus* of ordering, planning, or instigating of specific crimes but nevertheless is significant for the commission of the atrocities. As a participant in a JCE, the accused, often a higher-ranking member of a group and thus distant from the physical commission of the crimes, is a willing participant in the criminal purpose. Without JCE liability, a high-level accused may only be held liable for a handful of specific acts of ordering, instigating and planning specific crimes, or may only be held liable as an aider and abetter. With JCE, the accused can be convicted of all the crimes committed in furtherance of the joint criminal purpose.

47. The jurisprudence of other international tribunals demonstrates that an accused's acts may be sufficient to attract liability as a co-perpetrator in a JCE even where they may not be sufficient for other forms of liability. For example, in the context of a prison camp, it has been held that merely "holding an executive, administrative, or protective role in a camp constitutes general participation in the crimes committed therein."[68] Similarly, it has been held that a deputy commander of a prison camp may be liable as a participant in a JCE

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64 *Vasiljevic* Appeal Judgement, paragraph 98.

65 *Krnojelac* Appeal Judgement, paragraph 32; *Vasiljevic* Appeal Judgement, paras. 101, 105.

66 *Tadic* Appeal Judgement, paragraph 204 An example of this would be a common criminal purpose to ethnically cleanse a certain area by gunpoint, but with the common criminal intent *only* to deport unwanted people out of the area. During the operation, someone is shot and killed. While the common criminal purpose might be to ethnically cleanse the area, not commit murder, it is a predictable and foreseeable consequence that someone might be killed if the perpetrators of the ethnical cleansing campaign are armed with guns, *Vasiljevic* Appeal Judgement, paragraph 99.

67 *Kvocka* Appeal Judgement, para. 83; *Tadic* Appeal Judgement, para. 228; *Mrksic* Trial Judgement, paragraph 546; *Brdjanin* Appeal Judgement, paras. 411, 431.

68 *Kvocka* Appeal Judgement, para. 103, *citing Kvocka* Trial Judgement, para. 278.

where he (1) has extensive knowledge of the camp's abusive practices; and (2) where he witnesses some of the crimes being committed; yet (3) does little to prevent or mitigate the abuses.[69]

48. The utility of the JCE liability to more completely capture the reality of the commission of complex crimes involving numerous actors can be illustrated through an example of torture. This crime may be committed by various players working in concert to bring about physical pain to the victim: one individual might make the order to torture, another might be physically administering beatings, while another asks the questions, and still another measures the degree of injury to insure maximum pain short of causing death. JCE accurately captures the criminality of such persons when such crimes are part of a lengthy and complex campaign, when the offending individuals may take on different roles, or be absent for various periods of offence. It would be no defence in the role of a JCE for a co-perpetrator to argue that he only sometimes ordered the crimes and at others only asked questions. By not applying a theory of co-perpetration via JCE to complex criminal cases the ability to assess the criminal liability of an accused is significantly limited.

A. ECCC LAW AUTHORISES THE APPLICATION OF JCE LIABILITY

49. For a mode of liability to be used by the ECCC, it must satisfy four conditions: (1) it must be provided for in the ECCC Law, either explicitly or implicitly; (2) it must have existed under customary international law at the relevant time; (3) the law providing for it must have been sufficiently accessible to the defendants at the relevant time; and (4) the defendants must have been able to foresee that they could be criminally liable for their actions.[70] JCE satisfies each of these conditions and is a valid mode of liability at the ECCC.

50. Article 29 of the ECCC Law provides for individual criminal responsibility for any "suspect who planned, instigated, ordered, aided and abetted, or committed" the crimes punishable by this Court. These forms of criminal responsibility are identical to those

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69 In *Kvocka,* the accused was held responsible even though he had been deputy commander of the prison camp for only 17 days.

70 *Prosecutor v. Milutinović, et al.,* Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, IT-99-37-AR72, ICTY Appeal Chamber, 21 May 2003, Paragraph 21 [*hereafter* Milutinović Decision].

found in the statutes of the ICTY and ICTR and the Special Court for Sierra Leone ("SCSL"). Each of those tribunals has held that participation in a common criminal plan or purpose is a form of "committing" a crime.[71] These courts have followed the *Tadić* decision, which held that participation in a JCE is a form of commission and that JCE more accurately reflects the responsibility of co-perpetrators in most international crimes than other modes of liability.[72]

51. The inclusion of JCE within Article 29 of the ECCC Law is supported by the object and purpose of the ECCC Law. Article 1 states that the "purpose" of the Law is to bring to trial "senior leaders of Democratic Kampuchea and those who were most responsible" for the crimes under that regime. To successfully prosecute the "senior leaders" and those "most responsible," this Court must be able to assign criminal responsibility to the individuals who created and implemented the criminal policies of the DK regime, not just to the individuals who physically perpetrated the crimes that resulted from those policies. JCE is the mode of liability best suited to this task.[73] Inclusion of JCE as a form of "commission" is therefore consistent with the purposes of the ECCC Law, with the nature of international crimes, and with the manner in which other international tribunals have interpreted identical language in their respective statutes.

52. While "joint criminal enterprise" is a relatively new expression, similar concepts of common criminal purpose or common criminal plan have existed since at least World War II.[74] These can be found in three of the foundational legal documents from the post-War period: the London Charter of the International Military Tribunal ("IMT Charter"

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71 *Prosecutor v. Gacumbitsi*, Judgment, ICTR-2001-64-A, 7 July 2006, Paragraph158; *Prosecutor v. Fofana & Kondewa*, Judgment, Case No. SCSL-04-14-T, 2 August 2007, Paragraph 208. An express reference to JCE in the statute is not required for a tribunal to apply it. *Milutinović Decision*, paras. 18, 20.

72 *Prosecutor v. Dusko Tadić*, Judgment, ICTY Appeals Chamber, 15 July 1999, IT-94-1-A, paras. 188-193 [*hereafter* Tadić Judgment]. The *Tadić* decision held that commission should be interpreted to include participation in a common plan because: (1) most international crimes do not result from the acts of single individuals but from groups of individuals acting pursuant to a common criminal plan; and (2) although only some members of the group may physically perpetrate the criminal act, the participation and contribution of other members of the group is often vital in facilitating the commission of the offence. JCE is an appropriate mode of liability because it accurately reflects the totality of the criminal conduct in situations where other modes of liability would understate the criminal responsibility of co-perpetrators.

73 *Tadić Judgment*, Paragraph 190.

74 *Tadić Judgment*, paras. 195, 220, 226-227. *Tadić* found that while post-WWII legislation and jurisprudence does not specifically refer to "joint criminal enterprise", the concepts of "common purpose" and "common plan" are synonymous with JCE. *Milutinović Decision*, Separate Opinion of Judge David Hunt, paras. 3-5; *Milutinović Decision*, Paragraph 36.

and "IMT" respectively),[75] Control Council Law Number 10 ("Control Council Law"),[76] and the Charter of the International Military Tribunal for the Far East.[77] The IMT Charter provided that a person who participated in a common plan or conspiracy to commit any crime under the IMT Charter would be liable for all acts performed in execution of that common plan or conspiracy.[78] Essentially identical language was included in Article 5 of the Far East tribunal. Article II(2) of the Control Council Law established criminal liability for those who were "connected with plans or enterprises" involving the commission of a crime.

53. In addition to the IMT trial and those conducted under the Control Council law, there were also thousands of national prosecutions.[79] These prosecutions are relevant because they help establish that JCE was part of customary international law.[80] It is evident from the British Military Court's judgments[81] that it applied a form of JCE. In the *Essen Lynching Case,*[82] it found three civilians "guilty because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims," even though "against none of the accused was it proved that they had individually shot or given the blows which caused the death."[83]

54. In the *Almelo Trial*, the Judge Advocate explained: "If people were all present together at the same time taking part in a common enterprise which was unlawful, each one in his own way assisting the common purpose of all, they were all equally guilty in law."[84] In *Jespen*, the Court applied a form of JCE to assign responsibility for the murder of

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75 London Charter of the International Military Tribunal, art. 6 [*hereafter* IMT Charter].

76 Control Council Law No. 10, in *Official Gazette of the Control Council for Germany* (1946), vol. 3, p. 50 [*hereafter* Control Council Law].

77 Charter of the International Military Tribunal for the Far East, art. 5.

78 IMT Charter, art. 6.

79 *M. Cherif Bassiouni,* Crimes Against Humanity in International Criminal Law, 2nd Ed. (The Hague: Kluwer Law International, 1999) at pp. 531-532.

80 *Tadić Judgment*, paras. 195-219.

81 All cases tried in the British zone of occupied Germany were tried by British Military Courts. *See* Royal Warrant – Regulations for the Trial of War Criminals, 0160/2498, 14 June 1945, available at http://www.yale.edu/lawweb/avalon/imt/imtroyal.htm.

82 *In re Erich Heyer et al*, British Military Court for the Trial of War Criminals, Essen, (discussed at 1 United Nations Commission Law Reports for the Trials of War Criminals, United Nations War Crimes Commission 88 (1947)) [*hereafter* Essen Lynching Case].

83 Essen Lynching Case, p. 91.

84 *Almelo Trial*, Trial of Otto Sandrock and Three Others, British Military Court for the Trial of War Criminals, at p. 40 (discussed in the Law Reports for the Trials of War Criminals, United Nations War Crimes Commission (1949)) [*hereafter* Almelo Trial].

POWs.[85] In his summing-up, the Judge Advocate observed: "[i]f Jespen actively associated himself with and assisted other guards in a wholesale slaughter, the act of every one of those persons became the act of all.[86]

55. In the *Dachau Concentration Camp Trial*, the American Military Tribunal[87] concluded that "there was in the camp a general system of cruelties and murders of the inmates," that "this system was practiced with the knowledge of the accused, who were members of the staff, and with their active participation," and that this was done "in pursuance of a common design to violate the laws and usages of war."[88] The *Mauthausen Camp Case*[89] made three "special findings": (1) that the running of the camp was a criminal enterprise; (2) that every official who was employed or merely present in the camp at any time must have been aware of the criminality of the enterprise; and (3) that every official who was engaged in the operation of this criminal enterprise "in any manner whatsoever" was guilty of a violation of the laws and usages of war.[90] The facts of the *Borkum Island* case suggest that the defendants were convicted because they participated in a common criminal design involving the murder of POWs.[91]

56. There were also a series of WWII cases decided by Italian courts, applying Italian law, which adopted a mode of liability similar to JCE.[92] In addition, many common law and civil law jurisdictions embrace forms of liability similar to JCE.[93] The IMT Charter, the

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85 *Gustav Alfred Jespen*, British Military Court, Luneburg, Judgment, 24 August 1946, 5 Journal of International Criminal Justice, March 2007, p. 228 [*hereafter* Jespen Judgment].

86 *Jespen* Judgment, p. 229.

87 The American Military Tribunal was created pursuant to the Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders, 8 July 1945, Copy No. 26, JCS. 1023/10, art. 3, available at http://www.yale.edu/lawweb/avalon/imt/imtjcs.htm [*hereafter* Directive]. The Directive specified that the term "criminal" included all those who had been "connected with plans or enterprises involving" the commission of a crime.

88 *Dachau Concentration Camp Trial*, Trial of Martin Gottfried Weiss and Thirty-Nine Others, General Military Government Court of the United States Zone, *reprinted in* Law Reports of Trials of War Criminals, United Nations War Crimes Commission, 1947, p. 14 [*hereafter* Dachau Concentration Camp Trial].

89 General Military Government Court of the U.S. Zone, Dachau, Germany, 29 March-13 May 1946 (discussed in Dachau Concentration Camp Trial, p. 15-16).

90 Dachau Concentration Camp Trial, p. 15.

91 *Tadić Judgment*, Paragraph 210.

92 *Tadić Judgment*, paras. 214-219. In *D'Ottavio,* for example, the Italian Court of Cassation applied Article 116 of the Italian Criminal Code that provided that: "[w]henever the crime committed is different from that willed by one of the participants, that participant also answers for the crime, if the fact is a consequence of his action or omission." *D'Ottavio*, Italian Court of Cassation, Criminal Section I, Judgment of 12 March 1947, No. 270, *reprinted in* 5 Journal of International Criminal Justice 232, March 2007.

93 *Tadić Judgment*, Paragraph 224. For example, France has, at least since 1947, applied the notion of "co-perpetration," which holds that if one of the persons taking part in a common criminal plan or enterprise

Control Council Law and the decisions of the courts that considered conduct arising out of WWII all establish that participation in a common criminal purpose or plan was a valid mode of liability prior to the temporal jurisdiction of this court.

57. The ECCC Law incorporates the principle of legality found in Article 15(1) of the International Covenant on Civil and Political Rights ("ICCPR").[94] The principle of legality requires that the law used to prosecute an accused was sufficiently foreseeable and sufficiently accessible at the time of the allegedly criminal acts.[95] Using JCE as a mode of liability does not violate the principle of legality if the accused's crimes are atrocious in nature and there are judicial decisions, international instruments or domestic legislation that recognize a form of liability similar to JCE.[96]

58. Both of these factors are present in this Case. First, the crimes charged in the Indictment are atrocious and include more than twelve thousand executions, systematic torture and inhuman detention conditions.[97] Any objective individual would have realized these actions should result in criminal liability.[98] Second, the instruments and judgments emanating from the post-Second World War efforts to prosecute war criminals, coupled with the broad use of JCE-type liability in both common law and civil law systems, are sufficient to support a finding that defendants before this Court had notice that participation in a JCE would entail criminal liability. That conclusion is strengthened by

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perpetrates another offence that was outside the common plan but nevertheless foreseeable, those persons are all liable for that offence. Tadić Judgment, Paragraph 224.

94 ECCC Law, art. 33 new (incorporating Articles 14 and 15 of the ICCPR). Article 15(1) of the ICCPR states that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

95 Milutinović Decision, Paragraph 37. This, however, does not prevent the tribunal from "interpreting or clarifying the elements of a particular crime," nor does it preclude a progressive development of the law. Milutinović Decision, Paragraph 38.

96 Milutinović Decision, paras. 39-42. These two factors represent "foreseeability" and "accessibility." The atrocious nature of the crimes makes punishment foreseeable, while the existence of judicial decisions, international instruments and domestic legislation makes the law accessible to the accused.

97 Indictment, Paragraphs 107-128 (executions), 85-89 (systematic use of torture), 100-105 (torture techniques), 62-71 (detention conditions).

98 Indeed, DUCH did foresee that his actions would result in criminal liability. DUCH has admitted that he knew from an early time that his work in obtaining confessions was a sham and that the confessions were simply "excuses to eliminate those who represented obstacles" and that the work of S-21 was "obviously not compatible with the existence of tribunals and safeguards." Indictment, Paragraph 44. He has admitted responsibility for the crimes that were committed at S-21 under his command and acknowledged that "from 1971 onwards" he became "an actor in criminal acts." *Id.*, paras. 167, 169.

the provisions of the Cambodian Penal Code of 1956, which has several articles that criminalize actions undertaken by groups of people acting together.[99]

B. INDICTMENT FACTS ESTABLISH JCE LIABILITY

59. The Indictment contains all the facts necessary to indict DUCH for his participation in a joint criminal enterprise at S-21. Consequently, the Co-Investigating Judges were required to indict DUCH for his participation in a JCE, as discussed above. The Co-Prosecutors are not asking the Pre-Trial Chamber to make any new factual findings because the elements of JCE are already plainly described in the factual findings of the Indictment.

60. The group of persons who participated in the JCE is described in paragraphs 20, 21 and 22 of the Indictment and includes the members of the S-21 Committee. As the Indictment describes,[100] S-21's undisputed aims were the identification of real or perceived "enemies" and their subsequent unlawful arrest, detention, torture and execution. The common purpose of the S-21 Committee, including DUCH, was to achieve these aims by the commission of the crimes described in the Indictment. The Indictment found that "due to his position of authority at S-21, DUCH knew the purpose that S-21 served."[101]

61. It is clear from the facts found in the Indictment that DUCH participated at every stage of S-21's operations. These acts include participating in the meeting to establish S-21;[102] selecting experienced staff to work at S-21 from his previous security office M-13;[103] enforcing the general rules of the Party at S-21;[104] disseminating the CPK political line of "smashing" enemies through staff meetings at S-21;[105] exercising exclusive rights within

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99 Penal Code of 1956, arts. 82, 145. [*hereafter* Penal Code]. It divides crimes involving more than one perpetrator into two categories: "co-action" and "complicity." Penal Code, art. 82. To qualify as a co-actor, an accused must voluntarily and directly participate in the commission of a crime. The Penal Code provides a definition of criminal "co-authorship." It states that there exists a plurality of authors when two or more persons "confer or consult" regarding the commission of a crime. Penal Code, art. 145. When the actions of a second person amount only to aiding or assisting, such person is considered an accomplice rather than a co-author.

100 Paragraph 31 of the Indictment: "The primary role of S-21 was to implement 'the Party political line regarding the enemy' according to which prisoners 'absolutely had to be smashed.'"

101 Paragraph 131 of the Indictment. Additionally, DUCH has admitted that "his role as Chairman of S-21 was to focus the office on smashing purported traitors within the ranks of the revolution itself." Paragraph 37 of the Indictment.

102 Indictment, Paragraph 20.

103 Indictment, Paragraph 21.

104 Indictment, Paragraph 25.

105 Indictment, Paragraph 40.

S-21 to communicate with senior leaders on matters of security[106] and presenting them his analysis of the "confessions," which influenced the decision to arrest particular suspects;[107] communicating directly with other unit chiefs about arrests of cadre from within these other units;[108] participating in meetings at which the strategy and planning of arrests were discussed;[109] teaching methods of interrogation and torture to S-21 staff;[110] mistreating and torturing S-21 prisoners by himself;[111] ordering executions, either directly, and/or by delegating to his subordinates;[112] deciding to re-locate the execution of the majority of S-21 victims away from the central S-21 compound due to the risk of disease;[113] teaching execution techniques;[114] and being present at least once at the Choeng Ek execution site.[115] These acts are properly characterized as acts which "in some way [...were...] directed to the furtherance of the common design" at S-21.[116]

62. Under the "basic" form of JCE,[117] DUCH's intent can be inferred from the combination of his acts in furtherance of the common purpose. In addition, the Indictment specifically found that DUCH "intended his actions to contribute to" S-21's criminal purpose.[118] Under the "systematic" form of JCE,[119] DUCH's knowledge of the system of ill-treatment within S-21 is clear from the facts and from his own admissions. In the alternative, under the "extended" form of JCE the crimes identified in the Indictment were the natural and foreseeable consequences of the execution of the purpose of the JCE.

C. FAILURE TO INCLUDE JCE LIMITS CHAMBER'S ABILITY TO FULLY ASSESS LIABILITY

63. In failing to charge commission via JCE, the Indictment has limited the Trial Chamber's ability to hold DUCH accountable for his actions. This omission creates a significant possibility that DUCH will only be held liable for the majority of the crimes that occurred

106 Indictment, Paragraph 42.
107 Indictment, Paragraphs 43 and 45.
108 Indictment, Paragraph 55.
109 Indictment, Paragraph 56.
110 Indictment, Paragraphs 83 and 86.
111 Indictment, Paragraphs 90-100.
112 Indictment, Paragraphs 107-110.
113 Indictment, Paragraph 29.
114 Indictment, Paragraph 110.
115 Indictment, Paragraphs 109 and 113.
116 *Kvocka*, Appeals Chamber, 28 February 2005, para 89.
117 *Case of Kaing Guek Eav alias DUCH*, Rule 66 Final Submission Regarding Kaing Guek Eav alias DUCH, 18 July 2008, D96, Paragraphs 245, 246 and 247.
118 Paragraphs 131 of the Indictment.
119 *Case of Kaing Guek Eav alias DUCH*, Rule 66 Final Submission Regarding Kaing Guek Eav alias DUCH, 18 July 2008, D96, Paragraphs 245, 246 and 247.

at S-21 as an aider and abetter or through superior responsibility. However, these forms of liability would mischaracterize his actual criminal role at S-21. JCE is necessary to ensure that the sentence, if DUCH is held liable, reflects the totality of his criminal conduct and the central importance of his role in the functioning of S-21.

64. Under "**commission**," the Indictment limits DUCH's participation via commission to his physical commission of a small number of crimes. The Indictment states under this mode of liability that DUCH "tortured or mistreated detainees at S-21 on a number of separate occasions."[120] This does not appear to cover any of the executions or other deaths that occurred at S-21. In addition, it does not seem to cover the full scope of torture or mistreatment of detainees that was practiced at S-21.[121] As it is currently written, the majority of the crimes that were committed at S-21 are not covered by the commission section of the Indictment.

65. Under "**planning**," the Indictment finds that DUCH planned the establishment of S-21 with knowledge of its criminal function and that he planned the specific crimes committed at S-21.[122] The Co-Prosecutors believe this to be true, but the facts in the Indictment may not support such a finding.[123] Consequently, there is a possibility that DUCH's liability under planning will be limited to a subset of the crimes that occurred at S-21.

66. Under "**instigation**," the Indictment finds that DUCH "induced, encouraged, and prompted staff" to commit the crimes described in the Indictment.[124] However, there are only a limited number of occasions where the Indictment explicitly identifies instances where DUCH induced, encouraged or prompted staff to commit crimes.[125] The Indictment does not explicitly find that DUCH encouraged or induced every crime that

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120 Indictment, Paragraph 153.

121 Depending on how the Indictment is interpreted, it might limit DUCH's liability for commission to only the acts described in paragraphs 90-94 of the Indictment.

122 Indictment, Paragraph 159.

123 With respect to the establishment of S-21, the Indictment only finds that DUCH met other leaders to plan S-21. It does not identify what happened at that meeting or DUCH's specific contribution to the planning. Indictment, Paragraph 20. With respect to planning the crimes committed at S-21, the Indictment does not contain an explicit finding that DUCH planned each crime. Indeed, with respect to detention conditions, it is unclear who planned the crimes. Indictment, paras. 62-71.

124 Indictment, Paragraph 160.

125 The Indictment states that DUCH attended training sessions and promoted the policy of extra-judicial killings (Paragraph 40-42), taught torture techniques and encouraged the use of torture (paras. 87, 95-98), and encouraged a particular execution technique (Paragraph 110).

occurred at S-21.[126] There is a possibility that DUCH's criminal liability under instigation will be limited to a small number of acts.

67. Under "**ordering**," the Indictment states that "DUCH had the ability to direct, instruct or order his subordinates to perform any task associated with the functioning of the S-21 complex."[127] Specific orders issued by DUCH are identified in other parts of the Indictment. DUCH is found to have ordered torture[128] and executions.[129] However, the Indictment leaves open the possibility that DUCH did not order every instance of torture or every execution,[130] which raises the possibility that DUCH may not be liable for all torture and killing through ordering. In addition, there does not seem to be an express finding that DUCH ordered the conditions of detention at S-21,[131] which could result in him not being held liable for those conditions under ordering.

68. Under "**aiding and abetting**," the Indictment covers all of the criminal conduct that occurred at S-21,[132] but aiding and abetting is a less serious form of liability than joint criminal enterprise. The ICTY Appeals Chamber has ruled that "aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator" and has accordingly imposed higher sentences for co-perpetration.[133] The ICTR has come to a similar conclusion.[134]

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126 In particular, there is no finding that DUCH induced, encouraged or prompted staff to mistreat detainees. Indictment, paras. 62-71.

127 Indictment, Paragraph 154. The Indictment does find that orders could be "implicit, explicit, broad or specific." *Id.*, Paragraph 155.

128 Indictment, Paragraph 95.

129 Indictment, Paragraph 107.

130 Paragraph 95 says that DUCH ordered torture but leaves open the question of whether he ordered all torture. Paragraph 107 suggests that DUCH only personally ordered executions after an incident where a prisoner was killed before the completion of his interrogation. The Indictment does note that there was an "implicit standing order" from DUCH to kill all prisoners. It is not clear if this would cover the deaths of prisoners who were not executed but died from starvation, disease or torture.

131 Indictment, paras. 62-71. These paragraphs do not explicitly identify any orders given by DUCH that relate to the detention conditions.

132 Indictment, Paragraph 161.

133 Prosecutor v. Mitar Vasiljevic, Appeals Judgment, Case No. IT-98-32-A, 25 February 2004, Paragraph 182; Prosecutor v. Radislav Krstic, ICTY Appeal Judgment, Case No. IT-98-33-A, 19 April 2004, Paragraph 268l; Tadic Judgment, Paragraph 192. *See also* Ines Monica Weinberg de Roca and Christopher M. Rassi, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 Stanford Journal of International Law, at 28, 2008 (noting that aiding and abetting is a lesser form of liability than JCE).

134 Prosecutor v. Laurent Semanza, ICTR Appeals Chamber, Case No. ICTR-97-20-A, 20 May 2005, Paragraph 388 (increasing the accused's sentence on the grounds that he was responsible for ordering and not merely aiding and abetting the killings at Musha Church).

69. Under "**superior responsibility**" the Indictment covers all of the criminal conduct that occurred at S-21. However, superior responsibility is a lesser form of liability than joint criminal enterprise. Joint criminal enterprise requires a finding that the accused intended to participate in a common criminal purpose and that he or she contributed to the fulfilment of that criminal purpose. JCE is a form of direct commission. In contrast, superior responsibility does not require the superior to have intended the criminal acts of his or her subordinate or that the superior significantly contributed to the subordinate's criminal acts. Consequently, like aiding and abetting, it should be viewed as a lesser form of liability than joint criminal enterprise.

70. In addition, finding an accused liable for crimes on the basis of superior responsibility requires the proof of specific elements not required for JCE liability, such as effective control over the subordinates who committed or were about to commit a crime. As with the other forms of liability, failure to prove these specific elements would, in the absence of a JCE liability, increases the possibility that DUCH may not be held fully accountable for his actions.

71. As discussed above, a significant number of the Accused's acts established during the judicial investigation might be impossible to link to any particular crime and, therefore, may not necessarily be found by the Trial Chamber to meet the *actus reus* requirements for planning, ordering, instigating or aiding and abetting liability. Certain of DUCH's acts may thus go unpunished, or alternatively fall under a lesser form of accessory liability, which would not accurately reflect DUCH's criminality.

D. RECOMMENDED AMENDMENT TO CLOSING ORDER

72. It is requested therefore that the Pre-Trial Chamber amend the Closing Order and indict DUCH for committing all the crimes that occurred at S-21 via participation in a joint criminal enterprise. It is submitted that the Pre-Trial Chamber need not evaluate the evidence on the Case File as the Co-Investigating Judges have already found the material facts necessary for this theory of liability. Accordingly the Co-Prosecutors request that the Indictment be amended by replacing paragraph 153 of the Indictment with the following paragraph as requested in the Co-Prosecutor's Final Submission:

(a) "DUCH personally tortured and mistreated detainees at S-21 on a number of separate occasions and through a variety of means.

(b) DUCH committed the crimes described as a participant in a JCE. The JCE came into existence on 15 August 1975 when SON Sen instructed NATH and DUCH to set up S-21.[135] The JCE existed through October 1975,[136] when S-21 began full-scale operations, to at least 6 January 1979 when the DK regime collapsed.[137] The purpose of the JCE was the systematic arrest, detention, ill-treatment, interrogation, torture and execution of "enemies" of the DK regime[138] by committing the crimes described in this Closing Order. An organized system of repression existed at S-21 throughout the entirety of the duration of the JCE.[139] All crimes occurring in S-21 and described in this Closing Order were within the purpose of this JCE.

(c) DUCH participated throughout the entire existence of the JCE,[140] together with other participants in this JCE who themselves participated for various durations and who included the former Secretary of S-21 NATH,[141] and the other members of the S-21 Committee, namely KHIM Vath alias HOR and HUY Sre as well as their subordinates.[142]

(d) DUCH participated in the JCE as a co-perpetrator. DUCH and the other members of the JCE acted according to the common purpose and with the shared intent to bring about this common purpose (the "basic" form of JCE). Additionally, DUCH actively participated in the enforcement of the system of repression at S-21 through his positions as Deputy and then as Secretary. DUCH was fully aware of the nature of this system of repression at S-21. Together with the other members of the JCE, DUCH intended to further the system of repression at S-21 (the "systematic" form of JCE).

(e) Alternatively, the crimes enumerated in this Indictment were the natural and foreseeable consequences of the execution of the purpose of the JCE. DUCH was aware that such crimes were a possible consequence of the S-21 enterprise and with that awareness decided to participate in the enterprise (the "extended" form of JCE). He could foresee that potential outside perpetrators would commit barbarous crimes while fulfilling their tasks and nevertheless decided to participate in the enterprise."

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135 Indictment, Paragraph 20.
136 Indictment, Paragraph 21.
137 Indictment, Paragraph 27.
138 Indictment, Paragraph 31, 33 and 37.
139 Indictment, Paragraphs 24 and 46 through 128.
140 Indictment, Paragraphs 20-25, 27, 29, 31, 33, 37, 38, 40-45, 51-59, 61, 70, 74, 79, 82-87, 90-99, 102, 104, 105, 107-111, 113, 118, 119, 121 and 122.
141 Indictment, Paragraph 20.
142 Indictment, Paragraphs 22 and 24.

VII.REQUEST

73. The Co-Prosecutors request that the Pre-Trial Chamber amend the Indictment to include the crimes of Homicide and Torture and JCE liability as specified above. The Co-Prosecutors further request that the Case File be forwarded to the Trial Chamber for hearing.

Respectfully submitted,

CHEA Leang
Co-Prosecutor

Robert PETIT
Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this 5th day of September 2008.