

**BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**RESPONSE TO CO-PROSECUTORS' REQUEST FOR THE TRIAL CHAMBER  
TO CONSIDER JCE III AS AN ALTERNATIVE MODE OF LIABILITY**

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## I. INTRODUCTION

1. Counsel for the Accused Nuon Chea (the 'Defence') hereby submits these observations on the application of the extended form of joint criminal enterprise ('JCE III') at the ECCC.
2. On 17 June 2011, the Co-Prosecutors requested the Trial Chamber to consider JCE III as an alternative mode of liability applicable at the ECCC during the period of the Democratic Kampuchea (the 'DK Period').<sup>1</sup> The Co-Prosecutors in essence made the following submissions: (a) that it was permissible to change the legal characterization of the facts in the Indictment to include JCE III; (b) that JCE III was provided for in the ECCC Law; (c) that JCE III existed in customary international law and/or as a general principle of law during the DK Period; (d) that JCE III was foreseeable and accessible to the accused persons; (e) that the application of JCE III was consistent with the object and purpose of international criminal law.
3. The Defence notes at the outset that the applicability of JCE III at the ECCC has been the subject of extensive litigation. It follows that the submissions made by the Co-Prosecutors in this request have already been considered and addressed in past proceedings. Therefore, for the purpose of this response, the Defence supports in particular, while reserving the right to make further representations: (a) the submissions made by the Ieng Sary Defence Team<sup>2</sup> and (b) relevant parts of the Pre-Trial Chamber's (the 'PTC') reasoning on JCE III in its 'Decision on the Appeals Against the Co-Investigating Judges' Order on Joint Criminal Enterprise' (the 'JCE Decision').<sup>3</sup>
4. In the JCE Decision, it was held that the limited authorities cited in favor of JCE III 'do not provide sufficient evidence of consistent state practice or *opinio juris* at the time relevant to Case 002'.<sup>4</sup> The JCE Decision also found that it was unnecessary to decide

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<sup>1</sup> See Document No E-100, 'Co-Prosecutors' Request for the Trial to Consider JCE III as an Alternative Mode of Liability', 17 June 2011, ERN 00708242-00708256 (the 'OCP Request').

<sup>2</sup> See Document No D-97, 'Motion Against the Application at the ECCC of the Form of Liability known as Joint Criminal Enterprise by the Defence for Ieng Sary', 28 July 2008, ERN 00208225-00208240; Document No D-97/7, 'Ieng Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise', 24 November 2008', ERN 00244390-00244418; Document No D-97/14/5, 'Ieng Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise', 22 January 2010, ERN 00429213-00429253.

<sup>3</sup> See Document No D-97/16/10, 'Decision on the Appeals Against the Co-Investigating Judges' Order on Joint Criminal Enterprise', 20 May 2010, ERN 00486521-00486589, paras 45, 75-88.

<sup>4</sup> *Ibid.*, para 77.

whether a representative sampling of the world's major legal systems recognized JCE III for the theory to constitute a general principle of law, as it was 'not satisfied that such liability was foreseeable to the Charged Persons in 1975–1979'.<sup>5</sup> The purpose of the following submissions is to add further support to the JCE Decision with respect to the legal requirement for any purported law attaching criminal liability to be consistent with the principle of legality. Based on this principle, the Defence requests the Trial Chamber to dismiss the request of the Co-Prosecutors.

## II. PROCEDURAL BACKGROUND

5. On 28 July 2008, the Ieng Sary Defence Team filed a motion to challenge the applicability of JCE at the ECCC.<sup>6</sup> On 8 December 2009, the Office of the Co-Investigating Judges (the 'OCIJ') found that the three recognized forms of JCE were applicable at the ECCC.<sup>7</sup> The defence teams of Ieng Sary, Khieu Samphan, and Ieng Thirith filed separate appeals against the OCIJ's Order.<sup>8</sup> On 20 May 2010, the PTC held that JCE I and JCE II applied at the ECCC, but not JCE III.<sup>9</sup> The Closing Order reflects the PTC Decision in not recognizing JCE III as an applicable mode of liability at the ECCC.<sup>10</sup>

## III. ARGUMENT

6. The Co-Prosecutors acknowledge that the ECCC is under a legal obligation to uphold the principle of legality.<sup>11</sup> Pursuant to Article 33(2)*new* of the ECCC Law, the Court must exercise its jurisdiction according to international standards of justice, fairness, and due process. The Defence submits that it is incumbent on the ECCC to uphold the

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<sup>5</sup> *Ibid*, para 87.

<sup>6</sup> *See*, n 2, *supra*.

<sup>7</sup> Document No **D-97/13**, 'Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise', 8 December 2009, ERN 00411047–00411056.

<sup>8</sup> Document No **D-97/15/1**, 'Ieng Thirith Appeal Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise of 8 December 2009', 18 January 2010, ERN 00425765–00425790; Document No **D-97/16**, 'Khieu Samphan, Appeal Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise', 18 December 2009, ERN 00416874–00416874; Document No **D-97/14/5**, 'Ieng Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise', 22 January 2010, ERN 00429213–00429253.

<sup>9</sup> JCE Decision.

<sup>10</sup> Document No **D-427**, 'Closing Order', 16 September 2010, ERN 00604508–00605246.

<sup>11</sup> OCP Request, para 32.

following international standards when determining the question whether JCE III is part of the applicable law.

**A. The Authorities Relied Upon by the Co-Prosecutors in Support of JCE III Do Not Meet the Stringent Requirements of Legal Certainty**

7. The principle of legality, reflected in international criminal law and domestic legal systems, requires any rule giving rise to criminal responsibility to comply with legal certainty.<sup>12</sup> There must be a clear indication in the practice of States as to the definition of a purported criminal rule, which must not be extensively construed to the accused's detriment.<sup>13</sup> Where the scope and applicability of a criminal rule is open to multiple interpretations, then the tribunal should favor the defendant's interpretation in cases of doubt.<sup>14</sup>
8. It is plain that, on the ground of legal certainty, JCE III did not form part of the applicable law during the DK Period. As observed in the JCE Decision, '[a]s to the international case law relied upon by *Tadic*, the Pre-Trial Chamber notes that facts of *Borkum Island* and *Essen Lynching* may indeed be directly relevant to JCE III. However, in the absence of a reasoned judgment in these cases, one cannot be *certain* of the basis of liability actually retained by the military courts.'<sup>15</sup> Commentators, too, have cast serious doubt on the credibility of the authorities relied on to support JCE III, which due to their unreasoned nature could quite conceivably justify many different

<sup>12</sup> The requirement that any rule be certain has its roots in the jurisprudence of domestic legal systems, *see* generally Kevin Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2008), chapter 5. *See also* the commentary by Kai Ambos in his *amicus curiae* brief and citations therein: Document No **D-99/3/27**, 'Amicus Curiae Concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ', 27 October 2008, ERN 00234912-00234942, p 20.

<sup>13</sup> *See Prosecutor v Vasiljevic*, IT-98-32-T, 'Trial Judgment', 29 November 2002, para 198; *Prosecutor v Stakić*, IT-97-24-T, 'Decision Rule 98bis Motion for Judgment of Acquittal', 31 October 2002, para 131. This principle is also firmly enshrined in the jurisprudence of the European Court of Human Rights, *see Kokkinakis v Greece*, App. No. 14307/88 and A260-A, 17 Eur HR Rep 397 (ser A), (1993) para 52. *See further* comments of the UN Secretary General that the ICTY could only apply those rules of international law which were, *beyond any doubt*, part of international law: UN Doc S/25704, 'Report of Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993)', 3 May 1993, para 34.

<sup>14</sup> *See, e.g.*, Article 22(2) of the Rome Statute of the International Criminal Court: 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted'. *See also* Antonio Cassese (Ed), *The Oxford Companion to International Criminal Justice* (Oxford 2009), pp 440-441 (*Favor rei* 'is the principle [...] requiring, in the case of conflicting interpretations of a rule, the construction that favors the accused.'). A strict version of the principle is enshrined in the Cambodian Constitution. *See* Article 38 ('*Any case of doubt [...] shall be resolved in favor of the accused*') (emphasis added).

<sup>15</sup> JCE Decision, para. 79 (emphasis added).

modes of criminal responsibility.<sup>16</sup> Given the dearth of international jurisprudence on JCE III during the DK Period, it comes as no surprise that the Co-Prosecutors are again relying on the exact same cases that have already been comprehensively rejected by the PTC as lacking legal certainty. The Trial Chamber should adopt the considered view of the PTC on JCE III, which is the only approach consistent with the principle of legality.

### **B. JCE III Was Not Foreseeable and Accessible to the Accused During the DK Period**

9. It is axiomatic with basic notions of justice that a charged person must have been put on notice that particular conduct would have given rise to criminal responsibility. It is necessary to establish that the offence or mode of liability was foreseeable and accessible at the relevant time. Foreseeability should be assessed from the perspective of the accused person, which may require consideration of what conduct was prohibited in the domestic law of the country of the accused at the relevant time.<sup>17</sup>
10. The Co-Prosecutors have suggested that the PTC erred in looking to Cambodian domestic law when assessing whether JCE III was foreseeable to the accused.<sup>18</sup> In particular, the Co-Prosecutors suggested that the nature of customary international law mandated a lower threshold of foreseeability.<sup>19</sup> However, in actuality, the degree to which it is necessary to examine what is foreseeable to the accused based on their

<sup>16</sup> Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (Asser Press, The Hague, 2003) pp 27, 31; Stephen Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity', 2 (2004) *Journal of International Criminal Justice*, pp 606–619; Luke Marsh & Michael Ramsden, 'Joint Criminal Enterprise: Cambodia's Reply to Tadic', 11 (2011) *International Criminal Law Review*, 137–154, p 149–150.

<sup>17</sup> See *Prosecutor v. Milutionvic, Sainovic and Ojdanic*, IT-99-37-AR72, 'Decision on Dragoljub Ojdanic Motion Challenging Jurisdiction – Joint Criminal Enterprise', 21 May 2003, para 40 ('*Ojdanic*'); *Prosecutor v. Vasiljevic*, IT-98-32-T, 'Judgment', 29 November 2002, para 199.

<sup>18</sup> OCP Request, para 35.

<sup>19</sup> *Ibid.* In particular, the Co-Prosecutors refer to a single ICTY case to suggest the foreseeability and accessibility limbs of the legality test are presumed once established that an offence was part of customary international law. However, the ECCC should exercise great caution in following ICTY jurisprudence, which itself is set in a fundamentally different legal and historical context. First, the statute of the ICTY does not explicitly provide for the principle of legality. The ECCC, by contrast, is a Cambodian court and must give effect to the principle of legality enshrined in the Cambodian Constitution (Arts 31, 38 ('*in accordance with law*')), the 1956 Penal Code (Art 6) and the ECCC Law (Art 33(2)*new*). Second, the degree to which foreseeability and accessibility is presumed on finding customary international law in the ICTY takes into account the development of international criminal law (including the proliferation of writings by publicists) since Nuremberg. The ICTY's 'jurisprudence is on firmer footing, as some of the relevant developments in the law had been in full swing by the time the defendants acted and these tribunals began operating.' The ECCC's temporal jurisdiction, by contrast, is strictly limited to applying law as it existed in its form before the development of contemporary international criminal law: see Beth Van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals', 97:119, (2008) *The Georgetown Law Journal*, p 182.

country's domestic law will depend on whether international sources are capable of regulating the accused's conduct accordingly.<sup>20</sup> Conversely, where there is an absence of international decisions and instruments, then it is essential to look to the domestic law of the accused in assessing whether the accused had reasonable notice that a particular course of action would entail criminal responsibility in international law. For the reasons submitted in Section A above, the manifest uncertainty surrounding JCE III, based on barely a handful of inconclusive authorities, mandates the ECCC to consider foreseeability from the accused's perspective based on Cambodian law.

11. The Defence submits that it would also be necessary to examine foreseeability from the accused's perspective based on Cambodian law when considering whether any purported general principle of law was consistent with the principle of legality.<sup>21</sup> It would be manifestly unreasonable to find that the accused was put on notice that JCE III was a general principle of law, especially given that such an expansive form of liability was unknown in the national law of many states.<sup>22</sup> The Co-Prosecutors have sought the wholesale inclusion of the *Tadic* approach to JCE into the ECCC, except when such reasoning does not produce the result that it wants. In *Tadic*, the ICTY Appeals Chamber noted that 'it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same

<sup>20</sup> *Ojdanic*, para 40-41. In *Ojdanic*, it was noted that there was a 'consistent stream of judicial decisions, international instruments and domestic legislation which would have permitted any individual to regulate his conduct accordingly...' (para 41) (emphasis added).

<sup>21</sup> See also the JCE Decision, where the PTC applied the foreseeability requirement to determine whether any purported general principle of law would satisfy the principle of legality, at para 87. See further Article 6 of the 1956 Penal Code, which states 'Criminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law before it was committed.' Article 6 is expressed in absolute terms and permits of no exceptions. The ICCPR, applicable to these proceedings by virtue of Article 31 of the Cambodian Constitution, 'preserves the sanctity of any laws that provide a higher level of protection for civil and political rights than those set out in the ICCPR'. (see Document No **D-427/1/6**, 'Ieng Sary's Appeal Against the Closing Order', 25 October 2010, 00617486-00617631, n 210 (citing Manfred Nowak, UN Covenant on Civil and Political Rights: ICCPR Commentary 118 (NP Engel 2005)); ICCPR, Article 5(2). Therefore, the ECCC, as a Cambodian court, is under a duty to observe the strict principle of legality required under Cambodian law, and must take into account the foreseeability of international law from the accused's perspective, having regard to Cambodian law during the DK Period.

<sup>22</sup> See *Prosecutor v Tadic*, IT-94-1-A, 'Judgment', 15 July 1999 ('*Tadic*'), para 224. It should also be noted that serious doubt exists about whether general principles as a source of law are even capable of meeting the stringent principle of legality requirements, given that general principles are abstractions and thus not precise rules: see Machteld Boot, 'Genocide, Crimes Against Humanity, War Crimes: *Nullum Crimen Sine Lege* and the Subject Matter Jurisdiction of the International Criminal Court' (Intersentia Uitgevers N V, 2002), p 300; Fabián O Raimondo, 'General principles of law in the decisions of international criminal courts and tribunals' (Martinus Nijhoff, 2008), p 2.

approach to this notion'.<sup>23</sup> Having conducted a survey, the ICTY Appeals Chamber concluded that JCE III could not be elevated to a general principle of law given the divergence in approach to common plan liability.<sup>24</sup> In effect, the Co-Prosecutors' request for the Trial Chamber to consider inviting *amicus curiae* on this issue itself reinforces the incompatibility of JCE III as a purported general principle of law with the principle of legality: if a comprehensive study of jurisdictions during the DK Period by eminent scholars is deemed necessary to resolve doubts the Co-Prosecutors have about the findings in *Tadic* on this point, then it cannot be said in any shape or form that JCE III as a general principle of law was foreseeable to the accused during the DK Period.

12. The JCE Decision recognized that there was no provision in Cambodian law applicable during the DK Period that could have given notice to the accused that the extended form of responsibility embodied in JCE III was punishable.<sup>25</sup> It was also the considered view of Kai Ambos in his *amicus curiae* brief, that 'JCE III was clearly not encompassed by the Code of 1956'.<sup>26</sup> These observations point to the incontrovertible conclusion that the expansive notion of JCE was entirely alien to Cambodian law during the DK Period and therefore not foreseeable to the accused.
13. Finally, the Co-Prosecutors asserted that JCE III was foreseeable given the nature of crimes allegedly committed.<sup>27</sup> However, whereas an individual who directly perpetrated a grave crime should appreciate that their conduct warranted criminalization, it is erroneous to assert that those who contributed to a common plan would foresee liability for acts committed by others outside the scope of the original plan. This is especially so given that international jurisprudence suggests that the common purpose of the JCE

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<sup>23</sup> *Tadic*, para 225.

<sup>24</sup> *Ibid.* Moreover, as the PTC noted in JCE Decision, para 84 : 'Various legal systems differ as to the *mens rea* required to attach criminal responsibility to an accused for a crime carried out by another individuals who acted in concert, but went beyond what the accused intended. This may explain why *Tadic* itself used multiple expression conveying different shades of meaning when defining the required state of mind for JCE III'.

<sup>25</sup> JCE Decision, para 87.

<sup>26</sup> See n 12, *supra*, p 30.

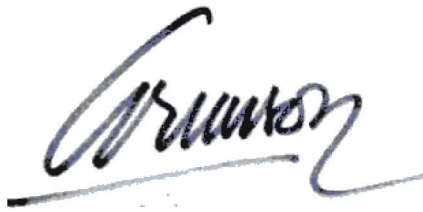
<sup>27</sup> OCP Request, para 36.

need not be unlawful.<sup>28</sup> In such cases, it would be insufficiently foreseeable to an accused that their lawful behavior would incur criminal responsibility.<sup>29</sup>

#### IV. CONCLUSION

14. For these reasons, the Defence requests the Trial Chamber to dismiss the request of the Co-Prosecutors on the application of JCE III as an alternative mode of liability. As noted above,<sup>30</sup> the Defence reserves its right to make further submissions and to file any necessary additional written submissions in the interests of justice.

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<sup>28</sup> See, e.g., *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, SCSL-2004-16-A, 22 February 2008, paras 76, 84 (cited in Document No **D-97/14/5.2**, ‘Synopsis of JCE Submissions by the Ieng Sary Defence Team’, 22 January 2010, ERN 00440434-00440481).

<sup>29</sup> In any event, even if the ECCC were minded to consider the Co-Prosecutors’ approach, that is, to reason backwards in using policy arguments to justify the imposition of an all encompassing mode of liability to guarantee convictions, then the ECCC should have particular regard to the chorus of condemnation directed at JCE III in the international community. Specifically, it has been noted that JCE III ‘diminishes respect for international justice, weakens the significance of a tribunal’s finding of guilt and compromises a tribunal’s historical legacy’: see William A. Schabas, ‘Mens Rea and the International Criminal Tribunal for the Former Yugoslavia’, 37 (2002–2003), *New England Law Review*, pp 1033–34; Luke Marsh & Michael Ramsden, n 16, *supra*, pp 153–154; Jens David Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’, 5 (2007), *Journal of International Criminal Justice*, 69–90. Nor should the moral gravity of the offences alleged in the Closing Order justify departure from the principle of legality. Rather, ‘it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that the defendant is not convicted out of disgust rather than evidence, or of a non-existent crime.’ See *Prosecutor v Hinga Norman*, SCSL-2004-14-AR72(E), ‘Dissenting Opinion of Judge Robertson – Decision on preliminary motion based on lack of jurisdiction (child recruitment)’, 31 May 2004, para 12.

<sup>30</sup> See para 3, *supra*.