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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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

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I. INTRODUCTION

1. Pursuant to Rules 92 and 98(2), the Co-Prosecutors submit this brief in support of their request that the Trial Chamber consider the extended form of joint criminal enterprise ("JCE III") as an alternative mode of liability. This request can otherwise be stated as a request for the Trial Chamber to recharacterize the facts in the Indictment at Judgement, where appropriate, as crimes committed pursuant to JCE III (rather than JCE I or II).

2. The Co-Prosecutors have consistently maintained the position that the first form of joint criminal enterprise ("JCE I") best reflects the nature of the liability of the Accused on the basis of the evidence on the casefile, including that referenced in the Final Submission and Closing Order. However, in light of the ECCC's procedural framework, the Co-Prosecutors will not have an opportunity to vet the witnesses and civil parties called before the Trial Chamber and must rely on secondhand assessments of their testimony. Thus, the Co-Prosecutors acknowledge that there is a possibility – albeit, a remote one – that a very limited number of criminal events alleged in the Closing Order may not have been within the scope of the common criminal plan as originally conceived.

3. If the evidence were to show that certain criminal acts carried out by a member of the JCE fell outside the common criminal plan, the Co-Prosecutors would submit that the Accused are nevertheless criminally liable for such acts as they were a natural and foreseeable consequence of the criminal plan, and each of them willingly took the risk the crimes would be committed and continued to participate in and contribute significantly to the joint criminal enterprise. Accordingly, the Co-Prosecutors request that the Trial Chamber consider JCE III as an alternative mode of liability.

4. As detailed below, the Co-Prosecutors believe that JCE III is an applicable mode of liability at the ECCC for the following reasons:

   (A) Article 29 of the ECCC Law allows for the application of joint criminal enterprise, including the extended form of joint criminal enterprise (JCE III), at the ECCC.

   (B) JCE III liability existed in customary international law during 1975-1979.

   (C) The application of JCE III liability at the ECCC conforms with the principle of legality, including the requirements of foreseeability and accessibility to the Accused.

   (D) JCE III liability is consistent with the object and purpose of international criminal law.

II. PROCEDURAL BACKGROUND

5. On 28 July 2008, the Defence for Ieng Sary filed a motion requesting that the Co-Investigating Judges declare Joint Criminal Enterprise ("JCE") to be inapplicable at the ECCC.[1] On 8 December 2008, the Office of the Co-Investigating Judges ("OCIJ") ordered that all three forms of JCE were applicable to international crimes tried before the ECCC ("OCIJ Order on JCE").[2] In January and February 2010, the Defence teams for Ieng Sary, Khieu Samphan and Ieng Thirith each filed separate appeals against the OCIJ Order on JCE.[3]

6. On 20 May 2010, the Pre-Trial Chamber issued its Decision on the Appeals Against the Co-Investigating Judges' Order on Joint Criminal Enterprise ("PTC Decision on JCE"). The PTC dismissed the Defence Appeals insofar as they applied to the basic form of JCE ("JCE I") and the systemic form of JCE ("JCE II"). In considering JCE III, however, the PTC indicated that it considered that there was not "sufficient evidence of consistent state practice or opinio juris at the time relevant to Case 002."[4] Accordingly, it decided that JCE III could not be applied as a mode of liability before the ECCC.[5]

7. The Pre-Trial Chamber's determination with respect to JCE III is reflected in the Closing Order, which specifically addresses the application of only JCE I and JCE II.

III. PRELIMINARY ISSUES

8. As a preliminary matter, the Co-Prosecutors note that their request is proper pursuant to Rule 98(2), which permits the Trial Chamber, in its judgement, to "change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced."[6] There is prior precedent for this type of request. In Case 001, the Trial Chamber accepted the Co-Prosecutors' Rule 98(2) request for the Trial Chamber to change the legal characterization of facts in the Indictment to accord with a new form of responsibility – JCE – which had not been included in the Indictment.[7] In its analysis, the Trial Chamber clarified

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1 Motion Against the Application at the ECCC of the Form of Liability known as Joint Criminal Enterprise by the Defence for Ieng Sary, Case File No. 002/19-09-2007-ECCC/OCIJ, D97, 28 July 2008.

2 Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case File No. 002/19-09-2007-ECCC/OCIJ, D97/13, 8 December 2009.

3 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 2010, Case File No. 002/19-09-2007-ECCC/OCIJ, D97/15/1, 18 January 2010; Khieu Samphan, Appeal Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case File No. 002/19-09-2007-ECCC/OCIJ, D97/16/1, 18 January 2010; Ieng Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, D97/14/5, 22 January 2010.

4 Decision on the Appeals Against the Co-Investigating Judges' Order on Joint Criminal Enterprise, 002/19-09-2007-ECCC/OCIJ (PTC 38), 20 May 2010, para. 77 [hereinafter "PTC Decision on JCE"].

5 PTC Decision on JCE, para. 88.

6 ECCC Internal Rules, rev. 7, 23 February 2011 [hereinafter "ECCC Rules"], rule 98(2).

7 Although the Case 001 Indictment did not include joint criminal enterprise as a form of liability, the Trial Chamber – pursuant to Rule 98(2) – changed the legal characterization of the facts and found that the

that the restriction on "new constitutive elements" in Rule 98(2) prevents a recharacterization that goes "beyond the facts set out in the charging document" but does not exclude changes to the mode of liability applicable to the charged crimes.[8]

9. The Co-Prosecutors recognize that the manner in which recharacterization takes place must comply with the fair trial rights of the Accused set out in Article 35 of the ECCC Law, namely that the accused "be informed promptly and in detail in a language they understand of the nature and cause of the charge against them" and "have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing."[9] The jurisprudence of the European Court of Human Rights, applying a similar standard,[10] indicates that recharacterization of the crimes charged is permitted so long as the accused is apprised of the possibility that the legal characterization of facts may be subject to change and has the opportunity to prepare their defence accordingly, including by making oral or written submissions on the pertinent issues.[11]

10. The Co-Prosecutors submit that the Accused are on notice of the possibility that the third form of joint criminal enterprise may be applied by the Trial Chamber. The Accused have been apprised through the present submission of the Co-Prosecutors, the Co-Prosecutors' prior

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Accused had individual responsibility for various crimes by virtue of his participation in the systemic joint criminal enterprise at S-21. Judgement, Case File No. 001/18-07-2007-ECCC/TC, Trial Chamber, E188, 26 July 2010 [hereinafter "Case 001 Judgement"], paras. 496, 516.

8 Case 001 Judgement, paras. 493-494. The Trial Chamber in Case 001 found that the phrase "no new constitutive elements" was a reiteration of the "well-established limitation [] that any re-characterization must not go beyond the facts set out in the charging document." *Id.*, para. 494. Despite the Trial Chamber's explicit finding, the Ieng Sary Defence has suggested that the restriction on the addition of new "constitutive elements" extends not only to factual elements, but also to legal elements. *See* Ieng Sary's Observations to the Co-Prosecutors' Notification of Legal Issues It Intends to Raise at the Intial [sic] Hearing, Trial Chamber, Case File No. 002/19-09-2007-ECCC/TC, E9/30/1, 3 May 2011 [hereinafter "Ieng Sary's Observations"], para. 10. This position is untenable. The process of changing the legal characterization of crimes, by its very nature, involves a modification of legal elements. Any other interpretation of rule 98(2) would render the provision superfluous.

9 Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) [hereinafter "ECCC Law"], art. 35.

10 *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, at art. 6(3).

11 *See, e.g. Pelissier and Sassi v France*, ECHR, 25444/94, 25 March 1999, paras. 42, 62 (finding a fair trial violation where the addition of a new charge of aiding and abetting was unknown to the Accused until the appeal judgement and where the Accused had no opportunity to make written or oral submissions on the relevant issues while the Court of Appeal was in deliberation); *Sipavicius v. Lithuania,* ECHR (no. 49094/99), 21 February 2002, paras. 26, 31-32 (finding no violation of the accused's fair trial rights, even though the accused did not find out until judgement that the charge against him had been recharacterized, since the accused had the opportunity in the course of appeal hearings to respond to the relevant legal and factual matters and advance his defense); *I.H. and Others v Austria*, ECHR (no. 42780/98), 20 April 2006, para. 34 (finding a fair trial violation where the accused had no indication that the trial court might arrive at a different conclusion than the prosecution as regards the qualification of an offence and stating that "in order that the right to defence be exercised in an effective manner, the defence must have at its disposal full, detailed information concerning the charges made, including the legal characterization that the court might adopt in the matter. This information must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges").

indication of their intent to seek recharacterization,[12] and the fact that the issue of the applicability of JCE, including JCE III in particular, has been extensively litigated at the pre-trial stage and in Case 001 at the ECCC. As far as the adequate preparation requirement, the Co-Prosecutors note that this issue has been raised prior to the commencement of the trial, and the Accused will have the opportunity to put forth their views on JCE III in response to the present submission.

11. In light of the above, any recharacterization that may take place at Judgement would be fully consistent with the fair trial rights of the Accused. However, for the avoidance of any possibility of uncertainty, the Co-Prosecutors request that the Trial Chamber either decide on the applicability of JCE III prior to the commencement of the trial proceedings or make a formal indication that it has taken the Co-Prosecutors' request under consideration.

IV. ARGUMENT

12. For a mode of liability to be applied at 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 accused at the relevant time; and (4) the accused must have been able to foresee that they could be criminally liable for their actions.[13] As detailed below, JCE III satisfies each of these conditions and, therefore, is a valid mode of liability at the ECCC.

A. ARTICLE 29 OF THE ECCC LAW PROVIDES FOR THE APPLICATION OF JCE III.

13. Article 29 of the ECCC Law provides for the individual criminal responsibility of any "suspect who planned, instigated, ordered, aided and abetted, or *committed*" the crimes punishable by this Court.[14] In Case 001, the Trial Chamber found that "the notion of commission through participation in a joint criminal enterprise is included in Article 29 (new) of the ECCC Law."[15]

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[12] The Ieng Sary Defence recently argued that the Co-Prosecutors' recharacterization requests are Rule 89 "preliminary objections" as they purportedly constitute objections to the ECCC's jurisdiction. *See* Ieng Sary's Observations, para. 6. This is incorrect. First, the Co-Prosecutors have no "objection" to the jurisdiction of the ECCC, as set out in the ECCC Agreement and Law, which constitute the relevant points of reference. Second, the question of how particular facts are legally characterized is not a jurisdictional issue. Indeed, the Trial Chamber did not treat this type of request as a Rule 89 preliminary objection previously. *See* Case 001 Judgement, para. 14, 489 (where it can be inferred that the Co-Prosecutors' request at the initial hearing for the application of joint criminal enterprise pursuant to Rule 98(2) was not considered a preliminary objection since the Trial Chamber stated that "no preliminary objection to the jurisdiction of the ECCC" was raised at the initial hearing).

[13] *See* PTC Decision on JCE, para. 43; *Prosecutor v. Milutinović*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise Liability, Case No. IT-99-37-AR72, ICTY Appeals Chamber, 21 May 2003 [hereinafter "*Milutinović* Decision"], para. 21.

[14] ECCC Law, art. 29 (emphasis added).

[15] Case 001 Judgement, para. 511.

The Co-Prosecutors submit that the Trial Chamber's prior finding is correct for several reasons.

14. First, the wording of Article 29 of the ECCC Law is virtually identical to the analogous provisions in the statutes for the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the Special Court for Sierra Leone ("SCSL").[16] All of these tribunals have read the word "committed" as including participation in the realization of a common design or purpose.[17] The Co-Prosecutors submit that it is appropriate for the Trial Chamber to be guided in its interpretation of Article 29 by the interpretation of analogous statutory provisions at its sister tribunals.

15. Second, when the ECCC Law was adopted in 2001, its drafters were aware of the seminal decision on JCE, namely the ICTY Appeals Chamber decision in *Prosecutor v. Tadić*. In particular, they knew that the ICTY Appeals Chamber had found that JCE, including JCE III, was encompassed in Article 7(1) of the ICTY Statute on the basis of the object and purpose of the Statute, the nature of international crimes, a review of the post-World War II jurisprudence and comparative study of several countries' legislation.[18] The Co-Prosecutors submit that if the drafters of the ECCC Law wished to exclude JCE, or JCE III in particular, they would have framed Article 29 in terms that differed from those employed in the ICTY statute.[19]

16. Third, the inclusion of JCE liability in the ECCC Law conforms to the object and purpose of the ECCC Law. Article 1 of the ECCC Law 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 realize its mandate to prosecute the "senior leaders" and those "most responsible" for those crimes, it is critical that this Court is able to assign

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16 The statutes of the ICTY, ICTR, and SCSL contain two minor differences from the ECCC Law in that (1) the former includes the word "otherwise" prior to aiding and abetting; and (2) the mode of liability of commission is listed before aiding and abetting. Statute of the International Criminal Tribunal for the Former Yugoslavia, 25 May 1993, amended 7 July 2009 [hereinafter "ICTY Statute"], art. 7(1) (providing for individual criminal liability for individuals who "planned, instigated, committed or otherwise aided and abetted" the crimes punishable by the Court); Statute of the Internatioanl Criminal Tribunal for Rwanda, 8 November 1994, amended 16 December 2009 [hereinafter "ICTR Statute"], art. 6(1) (same); Statute of the Special Court for Sierra Leone, 16 January 2002 [hereinafter "SCSL Statute"], art. 6(1) (same). Given that the criminal responsibility set out in these provisions is described using the same words as in the ECCC provision, there is no reason to think that the omission of the word "otherwise" and the slight reordering of terms was intended to give the ECCC provision a different meaning.

17 *See, e.g. Prosecutor v. Tadić*, Judgement, Case No. IT-94-1-A, ICTY Appeals Chamber, 15 July 1999 [hereinafter "*Tadić* Appeal Judgement"], paras. 230-234; *Prosecutor v. Ntakirutimana*, Judgment, Case Nos. ICTR-96-10-A and ICTR-96-17-A, ICTR Appeals Chamber, 13 December 2004, paras. 461-484; *Prosecutor v. Brima, Kamara and Kanue* (AFRC Case), Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, Case No. SCSL-04-16-T, 31 March 2006, paras. 308-326.

18 *Tadić* Appeal Judgment, paras. 189, 191, 195-226.

19 For further discussion, see the Co-Prosecutors' Joint Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on JCE, 002/19-09-2007-ECCC/OCIJ (PTC 35, 38 and 39), D97/16/5, paras. 55-56.

criminal responsibility to the individuals who created and implemented the criminal policies of Democratic Kampuchea, 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.

B. JCE III LIABILITY EXISTED IN CUSTOMARY INTERNATIONAL LAW DURING 1975-1979.

17. While the Trial Chamber has previously affirmed the establishment of JCE I and II in customary international law during the 1975 to 1979 period,[20] the Trial Chamber has not yet decided whether JCE III was similarly established in customary international law during that period.[21] The Co-Prosecutors submit that all forms of JCE, including its extended form, were established at the time.

18. As the Trial Chamber has recognized, the three forms of JCE share the following *actus reus* elements: (1) a plurality of persons; (2) the existence of a common plan, design, or purpose which amounts to or involves the commission of a crime provided for in the relevant law; and (3) "significant" participation of the accused in the common design involving the perpetration of one of the crimes provided for in the relevant law.[22]

19. The three forms of JCE vary, however, with respect to their mental elements. JCE I and II both require a showing that the underlying crime was intended: JCE I requires that the accused intend to perpetrate the crime and that this intent is shared by all co-perpetrators[23] while JCE II requires that the accused have knowledge of the nature of the system and the intent to further a common system of ill-treatment.[24] Pursuant to JCE III, however, the accused need not have intended the specific criminal act; rather, the accused can be held responsible for crimes that are a natural and foreseeable consequence of the common plan for which the accused held a shared intent, so long as the accused is "aware that the crimes outside of the common plan are a natural and foreseeable consequence of the plan and [...] willingly took the risk."[25]

20. The Co-Prosecutors submit that the Trial Chamber should follow the approach of the ICTY Appeals Chamber in *Tadić* in finding that the notion of joint criminal enterprise liability – including its extended form – was rooted in customary international law pursuant to the international instruments enacted following the Second World War and the related

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[20] Case 001 Judgement, para. 512.
[21] Case 001 Judgement, para. 513.
[22] Case 001 Judgement, para. 508. *See also Prosecutor v. Brdjanin*, Judgment, Case. No. IT-99-36-A, ICTY Appeals Chamber, 3 April 2007, para. 430.
[23] Case 001 Judgement, para. 509.
[24] Case 001 Judgement, para. 509.
[25] Case 001 Judgement, para. 509.

jurisprudence.[26] The relevant international instruments relied on by the Appeals Chamber include the London Charter of the International Military Tribunal ("IMT Charter" and "IMT" respectively),[27] Control Council Law Number 10 ("CCL 10"),[28] and the Charter of the International Military Tribunal for the Far East ("Far East Charter").[29] The ICTY's interpretation of customary international law is equally applicable to the ECCC since there were no relevant major developments in international humanitarian law between 1975 and the establishment of the ICTY in 1993.

21. Furthermore, as the Co-Prosecutors have previously argued, the IMT Charter, CCL 10 and related jurisprudence – taken together – constituted what international law scholars term a "Grotian Moment."[30] Such a moment occurs when there is a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.[31]

22. The Co-Prosecutors submit that one of the customary law doctrines that emerged in the aftermath of the Second World War was the rule that individuals who participate in a common criminal plan can be held responsible for acts committed by others in execution of that plan. This rule was enshrined in article 6 of the IMT Charter, which stated that individuals "participating in the formulation or execution of a common plan or conspiracy to commit any of the [crimes within the jurisdiction of the tribunal] are responsible for all acts performed by any persons in execution of such plan"[32] and in article II(2)(d) of CCL 10, which provided that an individual could be convicted of a crime pursuant to CCL 10 if the individual "was connected with plans or enterprises involving its commission."[33]

23. The Co-Prosecutors further submit that the concept of common criminal plan liability that was contained in international instruments and employed in international jurisprudence following

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[26] The ICTY's position on JCE has been affirmed in subsequent cases at the ICTY and at the ICTR, SCSL, and the Special Tribunal for Lebanon ("STL"). *See infra*, para. 14, n 17 (citing cases); Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/1, Special Tribunal for Lebanon, 16 February 2011 [hereinafter "Interlocutory Decision of the Special Tribunal for Lebanon "], paras. 239-247.

[27] London Charter of the International Military Tribunal, 8 August 1945, art. 6 [hereinafter "IMT Charter"].

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

[29] Charter of the International Military Tribunal for the Far East, 19 January 1946, art. 5.

[30] *See* Co-Prosecutors' Supplementary Observations on JCE, Case File No. 002/19-09-2007-ECCC/OCIJ, 31 December 2008, para. 11-25.

[31] *See, e.g.* Leila Nadya Sadat, "The Establishment of the International Criminal Court: From the Hague to Rome and Back Again", 8 Mich. St. U. J. Int'l L. 97, 101 (1999) (arguing that the Rome conference establishing the Statute of the International Criminal Court constituted a "Grotian moment" in international law).

[32] IMT Charter, art. 6.

[33] CCL 10, art. II(2)(d). *See also* Charter of the International Military Tribunal for the Far East, 19 January 1946, art. 5.

the Second World War encompasses the notion of what is now referred to as JCE III liability, i.e. the idea that an accused can be held responsible for crimes that were not necessarily intended by the Accused but were the natural and foreseeable consequence of a common criminal plan that the Accused entered into with intent. This conclusion is reasonable in consideration of the object and purpose of the Nuremberg Charter and the post-Second World War II trials – i.e. the imposition of individual criminal liability for collectivised crimes. The existence of this principle is reflected in at least two CCL 10 cases,[34] which are detailed below:

24. The first case, which was tried by the British Military Court for the Trial of War Criminals, is known as the *Essen Lynching Case*.[35] In this case, seven people were jointly charged with murder as a war crime based on allegations that they were involved in the killing of three British prisoners-of-war ("POWs"). Two of the accused were members of the German army; the remaining accused were civilians. According to the prosecution, the illegal acts of the accused occurred in three stages. First, one of the accused in the case, a captain in the German army, instructed another of the accused, a German private, to escort the three POWs from the barracks in which they were being held, through the German town of Essen, to another building where the POWs were to be interrogated. The captain's instruction was given before a crowd of civilians, and the private was ordered not to "interfere in any way with the crowd if they should molest the prisoners."[36] In the second stage, the prisoners were marched through town by the German private, while an ever-gathering crowd was permitted to hit the POWs with sticks and stones. Finally, members of the crowd threw the three POWs over a bridge; one was killed by the fall, while the other two were then fired upon by the crowd from above and kicked and beaten by other individuals until they died.

25. The prosecution in *Essen Lynching* argued that each of the defendants was responsible for the deaths, saying that the German captain "lit the match" when he gave the public order regarding the transport of the POWs, each person from the crowd who struck a blow put "flame to the fuel," and finally, the "explosion" came on the bridge. In sum, the prosecution posited that:

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[34] International criminal courts frequently treat CCL 10 and related jurisprudence as evidence of customary international law. *See, e.g.* PTC Decision on JCE, para. 57 (stating that CCL 10 was a legislative act "reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the military courts called upon to rule on such crimes") (emphasis added); *Prosecutor v. Kupreskic*, Judgement, IT-95-16-A, ICTY Trial Chamber, 14 January 2000, para. 541 (indicating that CCL 10 was one of the international instruments "laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law").

[35] *Trial of Erich Heyer and Six Others*, British Military Court for the Trial of War Criminals, Essen, 18–19 and 21–22 December 1945, UNWCC, Vol. 1 (1949) [hereinafter "*Essen Lynching Case*"] p. 88.

[36] *Essen Lynching Case*, p. 89.

> [i]t was impossible to separate any one of these acts from another; they all made up what is known as lynching. From the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men.[37]

26. The court seemed to agree with the prosecution's theory, finding the captain, the private, and three of the civilians guilty of murder as a war crime.[38] While the judgement does not specify the theory of liability under which the court held each accused responsible, the United Nations War Crime Commission's notes to the case state that the three convicted civilians "were found 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, though against none of the accused had it been exactly proved that they had individually shot or given the blows which caused the death."[39] As the ICTY in *Tadić* recognized, it seems apparent that the court in *Essen Lynching* applied the equivalent of JCE III liability with respect to at least some of the accused.[40]

27. A second case supporting the existence of JCE III liability in customary international law is *United States v. Kurt Goebell et. al.*, more commonly known as the *Borkum Island Case*.[41] This case was heard before the American Military Tribunal at Dachau. The facts of the *Borkum Island* case are very similar to the *Essen Lynching* case described above: a group of American airmen were taken prisoner in German territory and subsequently marched through the town of Borkum Island, where they were beaten and eventually shot to death by a group of civilians and off-duty German soldiers.[42] This occurred despite the presence of seven German soldiers who had been assigned to escort the prisoners to a naval unit for processing.[43]

28. The prosecution based its case on common design liability, arguing in its opening statement that the accused were "cogs in the wheel of common design, all equally important, each cog doing the part assigned to it."[44] After deliberating in closed session, the judges rendered an oral

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37 *Essen Lynching Case*, p. 89.

38 Two of the civilians were acquitted; one "because the blows he inflicted where neither particularly severe nor proximate to the airman's death" and the other "because it was not proved beyond reasonable doubt that he actually took part in the affray." *Tadić* Appeal Judgement, para. 208, n. 259.

39 *Essen Lynching Case,* p. 91.

40 *Tadić* Appeal Judgement, para. 209 (finding that it can be inferred that "the court assumed that the convicted persons who simply struck a blow or implicitly incited the murder could have foreseen that others would kill the prisoners; hence they too were found guilty of murder.").

41 Although not published in the Report of the UN War Crimes Commission, a detailed record of this case is publicly available through the U.S. National Archives Microfilm Publications. The United States Archives, Publication Number M1103, "Records of United States Army War Crimes Trials, *United States of America v. Goebell*, et. al., 6 February–21 March 1946. Moreover, a detailed report of the trial (based on trial transcripts) was published in 1956. *See* Maxilimian Koessler, "Borkum Island Tragedy and Trial", 47 *Journal of Criminal Law* 183-196 (1956).

42 *See* Koessler, pp. 184-189.

43 *See* Koessler, pp. 184-189, esp. 185.

44 *Tadić* Appeal Judgment, para. 210 (quoting from Borkum Island Charge Sheet, in U.S. National Archives Microfilm Publications I, p. 1186).

verdict in which they convicted the mayor and several officers of both the killing and assault charges and found other accused guilty of assault only. While no Judge Advocate stated the law, the facts of the case, coupled with the Prosecutor's opening statement, suggest that the court upheld the common design doctrine, in its extended form. Essentially, it appears that the court decided that though certain defendants had not participated in the murder, nor intended for it to be committed, they were nonetheless liable because it was a natural and foreseeable consequence of their treatment of the prisoners. As the ICTY Appeals Chamber concluded:

> It may be inferred from this case that all the accused found guilty were held responsible for pursuing a criminal common design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even where there was no evidence that they had actually killed the prisoners. Presumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault.[45]

29. In addition to the above-cited evidence of JCE III as part of customary international law, the Co-Prosecutors submit that there is substantial reason to believe that JCE III liability may have been established in international law by virtue of its status as a "general principle of law."[46] As the Co-Prosecutors have previously submitted, during the relevant time period, many domestic jurisdictions recognized modes of co-perpetration similar to JCE III, including conspiracy, the felony murder doctrine, the concept of *association de malfaiteurs* and numerous other doctrines of co-perpetration.[47] For example, the 1930 Revised Penal Code of the Philippines, a regional counterpart of Cambodia, recognized that "criminal liability shall be incurred [...] by any person committing a felony (*delito*) although the wrongful act be different from what he intended."[48] The ICTY Appeals Chamber in *Tadić* cited various other examples demonstrating that this concept was rooted in the national law of many States, including civil law countries such as France and Italy.[49]

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45 *Tadić* Appeal Judgement, para. 213.

46 *See* Statute of the International Court of Justice, art. 38(1)(c); International Covenant on Civil and Political Rights, art. 15(2) (indicating that it is not a breach of the principle of legality to charge an accused "for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations").

47 *See* Co-Prosecutors' Supplementary Observations on JCE, para. 10.

48 The Revised Penal Code of the Philippines, Act No. 3815, 8 December 1930, art. 4.

49 *See Tadić* Appeal Judgment, para. 224; *see also* Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine, D99/3/24, 27 October 2008 [hereinafter "JICJ Amicus Brief"], paras. 63-68 (citing examples). It should be noted that the ICTY in *Tadić* concluded that national recognition of common purpose doctrine could not be relied upon as reflective of an international principle since the Chamber deemed it necessary to show that "most, if not all, countries adopt the same notion of common purpose." *See Tadić* Appeal Judgement, para. 225. In concluding that this standard had not been met, the Chamber noted that countries such as Germany and the Netherlands did not impose criminal responsibility on an accused for crimes committed by other participants that were not envisaged in the original common design. *Id.*, para. 224. However, other authorities suggest that "universal acceptance of a particular principle by every nation within the main systems of law is [not] necessary before lacunae can be filled; it is enough that 'the prevailing number of nations within each of the

30. In the PTC Decision on JCE, the Pre-Trial Chamber addressed the possibility that "a number of national systems, which can be regarded as representative of the world's major legal systems, recognise that a standard of *mens rea* lower than direct intent may apply in relation to crimes committed outside the common criminal purpose and amount to commission."[50] However, the Pre-Trial Chamber ultimately declined to decide the issue on the basis that even if the third form of JCE was punishable on the basis of a general principle of criminal law, it could not be applied at the ECCC as it would not have been foreseeable to the Accused.[51]

31. As discussed below in Section C, the Co-Prosecutors contend that the Pre-Trial Chamber erred in law in its assessment of whether the application of JCE III was foreseeable, and thereby erred in its determination that it need not determine whether JCE III was recognized as a general principle of law during the relevant period. The Co-Prosecutors submit that, if the Trial Chamber were to find that JCE III did not form part of customary international law during the relevant time period, it would be appropriate and advisable for the Trial Chamber to request *amicus* submissions from a qualified academic or research institution on the question of whether JCE III liability could still be applied at the ECCC on the basis of its status as a "general principle of law recognised by civilized nations" during the relevant time period. The Co-Prosecutors submit that the comprehensive analysis that a qualified *amicus curiae* could provide would be beneficial in this instance considering the breadth and complexity of the necessary comparative survey and the stage of the proceedings, where the parties are heavily engaged in trial preparation. Alternatively, the Co-Prosecutors would request leave to file supplemental submissions on this question.

C. THE APPLICATION OF JCE III WAS FORESEEABLE AND ACCESSIBLE TO THE ACCUSED.

32. As discussed above, in order to apply a particular mode of liability, a court must be satisfied that such application is consistent with the principle of legality, i.e. that the mode of liability was sufficiently foreseeable and that the law providing for it was sufficiently accessible at the relevant time.[52] Both of these requirements are met with respect to the application of JCE III at the ECCC.

33. With respect to the foreseeability prong of the principle of legality test, the Co-Prosecutors submit that the international jurisprudence cited above provided notice to the Accused that their participation in a common plan could result in criminal liability not just for the acts intentionally included in the plan, but also for those criminal acts that flowed as a natural and

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main families of laws' recognize such a principle." *See, e.g. Prosecutor v. Erdemović*, IT-96-22-A, Judgement, Appeals Chamber, 7 October 1997, Separate Opinion of Judge Stephen, para. 25.

50 PTC Decision on JCE, para. 87; *see generally id.*, para. 84-87.

51 PTC Decision on JCE, para. 87.

52 *Milutinović* Decision, para. 37.

foreseeable consequence of its implementation. The forseeability of the application of JCE III is also supported by the fact that many domestic jurisdictions at the time recognized modes of co-perpetration similar to JCE III.[53] For example, French law, which has been influential in the development of the Cambodian legal system, provided for the imposition of criminal liability for acts committed by an accomplice going beyond the criminal plan where the conduct bore some relationship to the planned crime.[54]

34. As noted above, the Pre-Trial Chamber decided that it need not reach the issue of whether JCE III was recognized as a general principle of law since it was not satisfied that the third form of JCE was foreseeable to the Accused in 1975-1979.[55] In explaining why it was "not satisfied," the Pre-Trial Chamber stated that it had "not been able to identify, in Cambodian Law, applicable at the relevant time, any provision that could have given notice to the Charged Persons that such extended form of responsibility was punishable as well."[56]

35. The Co-Prosecutors note that the principle of legality does not mandate a conclusion that a principle of customary international law, such as JCE III, would only have been foreseeable to the Accused had it been codified in domestic law. While domestic law may provide some notice that a given act is regarded as criminal under international law, this is not always the case, particularly with respect to customary international law.[57] In any event, the Co-Prosecutors note that the Penal Code of 1956 ("Penal Code"), by virtue of its use of "complicity" as a mode of liability, generally supports the concepts underlying JCE III.[58] This further underscores the foreseeability and accessibility of JCE III to the Accused during the DK period.

36. The conclusion that JCE III liability was foreseeable is also supported by the nature of the crimes committed by the Khmer Rouge during the relevant period. It is inconceivable that a reasonable person would not have appreciated that their participation in a common plan, the foreseeable product of which included mass atrocities, violated universal dictates of law and decency such as to warrant criminalization.[59]

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53 *See infra*, para. 29.

54 *See Tadić* Appeal Judgement, para. 224, n 285 (quoting a 1947 French Court of Cassation judgment that stated that an accomplice "devait prévoir toutes les qualifications dont le fait était susceptible, toutes les circonstances dont il pouvait être accompagné," i.e., "should expect to be charged on all counts that the law allows for and all consequences that might result from the crime" (unofficial translation)).

55 PTC Decision on JCE, para. 87.

56 PTC Decision on JCE, para. 87.

57 *Milutinović* Decision, para. 41.

58 1956 Penal Code of Cambodia, art. 145. *See also* "JICJ Amicus Brief", paras. 74-80.

59 *Milutinović* Decision, para. 42 (stating that "although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalization under customary international law, it may in fact play a role in

37. With respect to the accessibility prong of the principle of legality, the general approach of other international tribunals has been to presume that the foreseeability and accessibility requirements are met if the conduct is found to be punishable under international customary law.[60] As discussed above, JCE III formed part of customary international law by 1975 and, accordingly, should be presumed to have been accessible to the accused. It is not necessary that the accused was actually aware of potential liability pursuant to JCE III.[61] In any event, the materials necessary to conclude that JCE III existed as a valid mode of liability during 1975 to 1975 were available and accessible at the relevant time. Most of the relevant CCL 10 cases were published in summary form in the widely disseminated, official UN War Crimes Commission Report in 1949. Similarly, the IMT Charter and decisions arising from it were published and widely disseminated well before 1975.

D. JCE III Is Consistent With the Object and Purpose of International Criminal Law.

38. The Co-Prosecutors submit that JCE III doctrine is consistent with the object and purpose of international criminal law, as reflected in the international instruments and jurisprudence following the Second World War. JCE III protects society against persons who (1) join together to take part in criminal enterprises; and (2) foresee or should foresee a future crime but continue to contribute to the criminal enterprise and fail to prevent or stop the extra crime or to drop out of the criminal enterprise to avoid being a participant in the extra crime. The world community has a strong interest in deterring this type of wilful and reckless behaviour, especially since, as noted by Lord Justice Steyn in the House of Lords for England and Wales, "[e]xperience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences."[62]

39. JCE III doctrine is a reasonable and necessary mechanism for addressing the unique threats posed by organized criminality and the unique challenges of prosecuting such perpetrators. In this context, it is relevant to note that the criminal means of achieving the common objective of a joint criminal enterprise is not static and may evolve over time. As the Special Tribunal for Lebanon has observed, "[w]hile, originally, the participants in a common enterprise may agree on only a few, 'core' crimes, what were foreseeable crimes in the early stages of a JCE may

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that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.").

60 Amicus Brief for Pre-Trial Chamber on Joint Criminal Enterprise from McGill Centre for Human Rights and Legal Pluralism, Case No. 002/18-07-2007-ECCC/OCIJ (PTC 02), D99/3/25, 27 October 2009 [hereinafter "McGill Brief"], para. 13; *Prosecutor v Martic*, ICTY, IT-95-11-A, Judgement on Appeal – Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martic, 8 October 2008.

61 *Ignorantia juris non excusat.*

62 *Regina v. Powell and another, Regina v. English*, UK House of Lords, [1999] 1 A.C. 1, p. 14.

well become accepted criminal objectives of an increasing number of JCE members."[63] The difference between JCE I, which requires direct intent, and JCE III "while theoretically important, may not thus be so pivotal when it comes to actual evidence and allowed inferences: often, when a participant in a JCE foresees an additional crime he originally had not subscribed to and nevertheless agrees to continue providing his significant contribution to the JCE, the only reasonable inference might be that he has come to agree to that additional crime, therefore bringing his liability back into the fold of JCE I."[64]

40. Furthermore, although it has been suggested that application of JCE III unreasonably broadens the scope of criminal liability or results in the criminalization of conduct involving minimal culpability, this is not the case. The Co-Prosecutors submit that while the perpetrator under JCE III theory may not be as culpable as the primary offender, his behaviour is still serious and merits sanction, and any difference in level of culpability is more properly taken into account at the sentencing stage.[65]

V. CONCLUSION

41. For the reasons set forth above, the Co-Prosecutors respectfully request: (a) that the Trial Chamber find that JCE III is a valid mode of liability at the ECCC; (b) that the Trial Chamber recharacterise the charges in the Indictment at Judgement, where appropriate, as crimes committed pursuant to the extended form of joint criminal enterprise, i.e. JCE III; (c) that the Trial Chamber decide the issue of whether JCE III can be applied at the ECCC prior to the commencement of the trial or, alternatively, provide notice that it has taken the issue under consideration.

Respectfully submitted,

Date	Name	Place	Signature
17 June 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

63 Interlocutory Decision of the Special Tribunal for Lebanon, para. 246.
64 Interlocutory Decision of the Special Tribunal for Lebanon, para. 246.
65 *See* Interlocutory Decision of the Special Tribunal for Lebanon, para. 245 (stating that [1] while the "secondary offender did not have the intention (*dolus*) to commit the un-concerted crime . . . the extra crime was rendered possible both by his participation in the criminal enterprise [which must include a significant contribution to the achievements of the enterprise's criminal plan] and by his failure to drop out or stop the extra crime once he was able to foresee it" and [2] the lower level of culpability and blameworthiness of the secondary offender should be taken into account at sentencing stage).