

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' REQUEST FOR THE APPLICATION OF
JOINT CRIMINAL ENTERPRISE

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alias Duch

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I. INTRODUCTION

1. Internal Rule 92 (“Rules”) states that the parties may make written submissions to the Trial Chamber. Rule 98(2) states that the Trial Chamber may change the legal characterization of the crimes set out in the Indictment. Pursuant to Rules 92 and 98(2), the Co-Prosecutors request that the Trial Chamber apply Joint Criminal Enterprise (“JCE”) as a mode of criminal liability for the Accused’s role in the crimes committed at S-21.
2. The Co-Prosecutors submit that the mode of criminal liability known as JCE is an applicable and acceptable mode of liability in the case against KAING Guek Eav *alias* DUCH because (1) there is sufficient evidence in the Indictment to conclude that DUCH committed the charged crimes through his participation in a JCE; (2) a JCE was properly pleaded by the Co-Prosecutors in their Final Submission; and (3) JCE has existed in customary international law since the 1940s and is applicable before the ECCC.

II. PROCEDURAL BACKGROUND

3. On 15 May 2008, the Co-Investigating Judges notified the parties that the investigation in Case File 001/18-07-2007-ECCC/OCIJ (“Case File 001”) was concluded. Pursuant to Rule 66, Case File 001 was forwarded to the Co-Prosecutors. The Co-Prosecutors filed their Final Submission, entitled “Rule 66 Final Submission regarding Kaing Guek Eav alias ‘Duch’” on 18 July 2008 (“Final Submission”).¹ The Co-Lawyers for DUCH filed their Response to the Final Submission on 24 July 2008.² On 8 August 2008, the Co-Investigating Judges issued a Closing Order indicting DUCH (hereafter “Closing Order” or “Indictment”).³
4. The Co-Prosecutors filed a notice of appeal against the Closing Order on 21 August 2008⁴ and filed their Appeal Brief on 5 September 2008⁵ alleging an error of law in the failure to indict DUCH for the commission of crimes through participation in a JCE (“Appeal”). The

¹ Rule 66 Final Submission regarding Kaing Guek Eav alias “Duch”, 18 July 2008, D96 (“Final Submission”).

² Response of Kaing Guek Eav's Defence Team to the Prosecutor's Final Submission, 24 July 2008, D96/1 (“Response to the Final Submission”).

³ Closing Order indicting Kaing Guek Eav alias Duch, 8 August 2008, D99 (“Closing Order” or “Indictment”).

⁴ Record of Appeals, 21 August 2008, D99/3 (“Notice of Appeal”).

⁵ Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch" dated 8 August 2008, 5 September 2008, D99/3/3 (“Appeal Brief”).

Co-Lawyers for DUCH filed their Response to the Co-Prosecutor's Appeal on 16 September 2008.⁶ The Pre-Trial Chamber ("PTC") issued its Decision ("Appeal Decision") on the Appeal on 5 December 2008, amending the Closing Order, ordering the continuation of DUCH's Provisional Detention, and ordering DUCH to be sent for trial.⁷

5. The Trial Chamber began the trial of Case File 001 on 17 February 2008. During the Initial Hearing, the Co-Prosecutors notified the Trial Chamber that they were requesting that the Trial Chamber apply the mode of liability known as JCE to DUCH's actions at S-21 and that they would file a written submission regarding the applicability of JCE in the case against DUCH.⁸

III. SUMMARY OF ARGUMENT

6. This is not an appeal from a decision of the PTC. Instead, this request ("Request") asks the Trial Chamber to exercise its authority under Rule 98(2) to "change the legal characterisation" of the crimes set out in the Indictment so that the charges match the evidence collected during the judicial investigation and described in the Indictment.⁹
7. Decisions of the PTC regarding the legal characterisation of the crimes are not binding on the Trial Chamber. Accordingly, despite the fact that the PTC made a preliminary ruling on the applicability of JCE, the Trial Chamber is free to address that issue and change the legal characterisation of the crimes based upon the facts contained in the Indictment and those presented during the trial. Adding JCE as a mode of liability is appropriate because the PTC erred in concluding that JCE should not be applied. The addition of JCE will not prejudice DUCH's defence, all the facts necessary for a determination of JCE are in the Indictment and the Co-Prosecutors have satisfied all the elements needed to properly plead JCE. Moreover, JCE is needed to accurately describe the extent of DUCH's criminal conduct.

⁶ Defence Lawyers' Response for the Co-Prosecutors' Appeal of the Closing Order dated 8 August 2008, 16 September 2008, D99/3/8 ("Defence Response to the Appeal").

⁷ Pre-Trial Chamber, "Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias 'DUCH'", 5 December 2008, D99/3/42 ("Appeal Decision").

⁸ See Transcript of DUCH Trial Proceedings, Public version, dated 17 February 2009, Case File No. E1/3.1, pages 7-8.

⁹ Rule 98(2).

8. Finally, all three forms of JCE are applicable at the ECCC. JCE has been part of customary international law since the 1940s. The application of JCE was accessible and foreseeable during the temporal jurisdiction of the ECCC, and Article 29 of the ECCC Law is broad enough to encompass JCE as a mode of liability. Consequently, the Trial Chamber can and should change the legal characterisation of the facts in the Indictment so that DUCH can be found liable as a participant in a JCE.

IV. ARGUMENT

A. This Request is not an appeal from a decision of the PTC

i. General

9. The Co-Prosecutors submit that DUCH was an integral part of a JCE that included his subordinates at S-21 and that without examining DUCH's participation in this JCE, the Judgment cannot reflect the totality of his criminal conduct and the central importance of his role in the functioning of S-21. JCE is a form of direct commission and a necessary mode of liability to allow the Trial Chamber to accurately determine the role DUCH played in the crimes that were committed at S-21.

ii. Trial Chamber has statutory power to change the legal characterization of crimes

10. Rule 77(13) states that decisions of the PTC are not subject to appeal. However, this is not an appeal of the PTC's decision. Rather, Rule 98 explicitly gives the Trial Chamber the power to "change the legal characterization" of the crimes in the Indictment, "as long as no new constitutive elements are added."¹⁰ This provision allows the Trial Chamber to find that JCE is an applicable mode of liability.
11. Rule 98(2) incorporates the well-known legal principle *iura novit curia* ("the judge knows the law")¹¹ into the procedures of the ECCC. According to this principle, the judge knows the law, and is free to apply the law to the facts before the court. Included in the judge's

¹⁰ Rule 98(2).

¹¹ See Kurt Siehr, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: Failures and Successes in German Practice*, 33 *New York University Journal of International Law and Policy* 207, 211 (2000) (describing *iura novit curia* as a "famous maxim" of Continental European procedure).

power is the right to apply whichever legal qualification is applicable to the facts of the case. The Cambodian Code of Criminal Procedure adopts this position,¹² as does the International Criminal Court (“ICC”).¹³ As demonstrated below, the facts of Case File 001 support a finding of JCE, and Rule 98(2) gives the Trial Chamber the authority to apply the proper legal characterization to these facts.

iii. Trial Chamber may reconsider the legal characterization of the facts placed before it

12. In its Appeal Decision, the PTC implicitly acknowledged that the Trial Chamber has the power to decide whether to apply JCE. In paragraph 141 of the Appeal Decision, the PTC decided that it would not add a charge of JCE to the Closing Order “at this stage” of the proceedings.¹⁴ This implies that it could be added at a later stage of the proceedings. The defence agrees because they argued in their response to the Co-Prosecutors’ Appeal of the Closing Order that the PTC should dismiss the Appeal and transfer the case to the Trial Chamber where issues concerning the Closing Order—including the issue of JCE—could be resolved.¹⁵
13. The PTC emphasized that the facts as found during the investigation are decisive for the legal characterization “when issuing a Closing Order”,¹⁶ not at any other stage of the proceedings. The Indictment, pursuant to Rule 79(1), will serve “as a basis” for the trial;¹⁷ however, as Rule 98(2) clearly illustrates, its legal characterization of the crimes is not binding on the Trial Chamber as the Trial Chamber is empowered to decide on this issue during trial, after appreciating the evidence brought before it.

¹² See Cambodian Code of Criminal Procedure, art. 348.

¹³ See, e.g., International Criminal Court, Regulations of the Court, Regulation 55 (“[T]he Chamber may change the legal characterization of facts to accord with the crimes . . . or to accord with the form of participation of the accused [...], without exceeding the facts and circumstances described in the charges[...]).

¹⁴ Appeal Decision, paragraph 141.

¹⁵ Defence Response to the Appeal, paragraph 4.

¹⁶ Appeal Decision, paragraph 39.

¹⁷ *Id.*, paragraph 40.

14. The power of the Trial Chamber to revisit issues preliminarily addressed by the PTC has been acknowledged by the PTC in its decisions relating to appeals of DUCH¹⁸ and IENG Sary¹⁹ against provisional detention orders. The PTC held that:

It would not be appropriate for the Pre-Trial Chamber to make the statements requested when another judicial body may well become seized of this case for trial and will have to make its own decisions on the basis of the evidence and the submissions made before it.²⁰

15. Similarly, the PTC declared that it did not have the power to conclusively decide legal questions that would be raised before the Trial Chamber. The PTC concluded that it would be imprudent to decide whether or not IENG Sary's 1979 trial and conviction by the People's Revolutionary Tribunal would bar a conviction by the ECCC because it would be more appropriate to bring the issue before the Trial Chamber.²¹ Thus, the PTC has recognized that the Trial Chamber has the authority to revisit issues that have been raised before the PTC if their resolution is more appropriate before the Trial Chamber. Since the application of JCE turns on the facts placed before the Trial Chamber during the trial and legal qualification of those facts, the decision whether or not to apply JCE is most appropriately resolved by the Trial Chamber.
16. These decisions by the PTC mirror similar decisions at other criminal tribunals, like the ICC. Similar to the ECCC, the ICC has a PTC, before which pre-trial proceedings occur. Article 19(6) of the Rome Statute states that, upon confirmation of the charges, challenges to the admissibility of a case "shall be referred to the Trial Chamber," granting the Trial Chamber permission to withdraw or amend the charges or to change the admissibility of the case.²² Under the provisions of the Rome Statute, the Trial Chamber may also "exercise any

¹⁸ Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "DUCH", 3 December 2007, C5/45, paragraph 63.

¹⁹ Decision on Appeal against Provisional Detention Order of IENG Sary, 17 October 2008, C22/I/73, paragraph 53.

²⁰ Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "DUCH", 3 December 2007, C5/45, paragraph 63.

²¹ Decision on Appeal against Provisional Detention Order of IENG Sary, 17 October 2008, C22/I/73, paragraph 53.

²² See Rome Statute, art. 19(6).

functions of the Pre-Trial Chamber referred to in Art. 61, paragraph 11.”²³ As a result, the Trial Chamber may amend or withdraw charges.

17. In *Lubanga*, the PTC of the ICC confirmed its Trial Chamber’s right to change the legal characterization of the facts set out in the indictment. In a May 24, 2007 decision,²⁴ the ICC’s PTC denied both the Prosecutor’s and the Defense’s applications for leave to appeal the PTC’s confirmation of charges. In denying the parties leave to appeal, the PTC noted that nothing “prevent[ed] the Prosecution or Defence from requesting that the Trial Chamber reconsider the legal characterization of the facts described in the charges against Thomas Lubanga Dyilo and as confirmed by the [Pre-trial] Chamber.”²⁵
18. The Trial Chamber is not bound by the Appeal Decision insofar as it relates to JCE. Rule 98(2) gives the Trial Chamber the authority to change the legal characterization of the crimes in the Indictment and the PTC could not limit the Trial Chamber’s ability to change the legal characterization of the crimes, even if that was what the PTC had intended.

iv. Trial Chamber has statutory power to conduct its own investigations

19. Rule 93, which allows the Trial Chamber to conduct its own supplementary investigations, also demonstrates that the Trial Chamber cannot be bound by the decisions of the PTC on the legal characterization of the crimes in the Indictment. Rule 93 gives the Trial Chamber the right to conduct new investigations “under the same conditions as the Co-Investigating Judges.” It would be superfluous for the Trial Chamber to have this authority if it did not also have the authority to change the legal characterization of the crimes to match the results of its Rule 93 investigation. Rule 98(2) and Rule 93 both demonstrate that the Trial Chamber has the authority to change the characterization of the crimes identified in the Indictment that cannot be limited by a PTC decision.

²³ *Id.*, art. 64(6)(a).

²⁴ *Prosecutor v. Lubanga Dyilo*, Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, Case No. ICC-01/04-01/06, Pre-trial Chamber I, May 24, 2007, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-915_English.pdf (“Lubanga Decision”).

²⁵ Lubanga Decision, paragraph 44.

20. The Trial Chamber should exercise its power under Rule 98(2) to examine the Case File, conduct a trial, and make appropriate legal characterizations based on the facts. The Co-Prosecutors submit that the facts demonstrate DUCH's participation in a JCE.

B. The Co-Prosecutors Properly Pleaded JCE and DUCH Had Sufficient Notice

i. JCE Was Properly Pleaded

21. The PTC opted not to include JCE in DUCH's Indictment because the PTC found that DUCH was not adequately informed of his participation in a JCE²⁶ and because the Co-Prosecutors allegedly did not plead the existence of a JCE with sufficient particularity.²⁷ The Co-Prosecutors submit that the PTC erred in finding that the elements of a JCE were not properly pleaded and in its conclusion that DUCH did not receive sufficient notice.
22. To begin with, the Co-Prosecutors did properly plead JCE. According to international jurisprudence, the prosecutor is only required to set forth the following facts to properly plead JCE: (1) the nature or purpose of the joint criminal enterprise; (2) the time at which or the period over which the enterprise is said to have existed; and (3) the identity of those engaged in the enterprise.²⁸ The PTC mistakenly relied upon the *Kvočka* case to support its conclusion that the Co-Prosecutors had not properly pleaded JCE.²⁹ However, the Appeals Chamber in *Kvočka* stated that the prosecutor is only required to: (1) "plead in the indictment all material facts underpinning the charges in the indictment, but not the evidence by which the material facts are to be proven",³⁰ which include the "purpose of the enterprise, the

²⁶ Appeal Decision, paragraphs 138, 141.

²⁷ *Id.*, paragraph 135.

²⁸ *Prosecutor v. Niyitegeka*, Appeal Judgment, Case No. ICTR-96-14-A, Appeals Chamber, 9 July 2004, paragraph 193; *Prosecutor v. Martić*, Decision on Preliminary Motion Against the Amended Indictment, Case No. IT-95-11-PT, Trial Chamber, 2 June 2003, paragraph 12; *Prosecutor v. Galic*, Decision on the Application by Defence for Leave to Appeal, Case No. IT-98-29-AR72, Appeals Chamber, 30 November 2001, paragraph 15; and *Prosecutor v. Kupreskic et al.*, Appeal Judgment, Case No. IT-95-16-A, Appeals Chamber, 23 October 2001, paragraph 89.

²⁹ Appeal Decision, paragraph 135, note 90.

³⁰ *The Prosecutor v. Kvočka et al.*, Judgment, Case No. IT-98-30/1-A, Appeals Chamber, 28 February 2005, paragraph 27 ("Kvočka Decision").

identity of the participants, and the nature of the accused's participation in the enterprise",³¹ and (2) "clearly indicate which form of [JCE] is being alleged."³²

23. The *Kvočka* court did suggest that an indictment could be deemed defective if the material facts are not pleaded with "sufficient specificity."³³ However, the examples of insufficient specificity given by the Chamber – "when the times refer to broad date ranges, the places are only generally indicated, and the victims are only generally identified"³⁴ – demonstrate that the information supplied by the Co-Prosecutors in the Introductory Submission³⁵ and Final Submission³⁶ were sufficiently specific to satisfy the pleading requirements for a JCE.
24. In particular, the Co-Prosecutors pleaded all the necessary elements to support a JCE in the Final Submission. The Co-Prosecutors clearly identified the time period of the JCE and the nature and purpose of the JCE in paragraph 250 of the Final Submission:

The evidence on the Case File and referred to in the material facts section of this Final Submission establishes that 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. The JCE existed through October 1975, when S-21 began its full-scale operations, to at least 7 January 1979 when the DK regime collapsed. The purpose of the JCE was the systematic arrest, detention, ill-treatment, interrogation, torture and execution of "enemies" of the DK regime by committing the crimes described in this Final Submission. An organized system of repression existed at S-21 throughout the entirety of the duration of the JCE. All crimes occurring in S-21 and described in this Final Submission were within the purpose of this JCE.³⁷

³¹ *Id.*, paragraphs 28, 42.

³² *Id.*, paragraph 28.

³³ *Id.*, paragraph 30.

³⁴ *Ibid.*

³⁵ Introductory Submission, 18 July 2007, paragraphs 5-16, 37-72 ("Introductory Submission").

³⁶ Final Submission, paragraphs 250-253.

³⁷ *Id.*, paragraph 250.

25. In paragraph 251 of the Final Submission, the Co-Prosecutors identified the participants in the JCE:

DUCH participated throughout the entire existence of the JCE, together with other participants in this JCE who themselves participated for various durations and who included the former Secretary of S-21 NATH, and the other members of the S-21 Committee, namely KHIM Vath alias HOR and HUY Sre as well as their subordinates.³⁸

26. Paragraphs 252 and 253 of the Final Submission clearly identified the particular forms of JCE in which DUCH participated:

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**).³⁹

Alternatively, the crimes enumerated in this Final Submission 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.⁴⁰

27. The nature of DUCH’s participation in the JCE is summarized in paragraphs 250-253 of the Final Submission and also explained in great detail in paragraphs 138-163 of the Final

³⁸ *Id.*, paragraph 251.

³⁹ *Id.*, paragraph 252 (emphasis added).

⁴⁰ *Id.*, paragraph 253 (emphasis added).

Submission. These passages clearly demonstrate that the requirements needed to properly plead JCE have been satisfied by the Co-Prosecutors and that the PTC erred in concluding that the Co-Prosecutors had not properly pleaded a JCE.

ii. Notification

28. The PTC noted that a Charged Person “has the right to be informed of the charges at the investigative stage to such an extent that he is able to exercise the rights accorded to him during the investigation”.⁴¹ While the Co-Prosecutors do not contest this statement of the law, the Charged Person was adequately informed of the charges as demonstrated by the facts outlined in the Indictment and the addition of a new mode of liability based on those facts does not prejudice the defence.
29. The purpose of providing notification of the charges to a Charged Person or an Accused is to avoid prejudicing the accused in the preparation and conduct of his/her defence.⁴² Prejudice does not occur when additional charges or new modes of liability are added to the indictment, which are based on facts that were included in the original indictment.⁴³ In this case, the Indictment contains all the facts necessary to indict DUCH for his participation in a JCE. 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,⁴⁴ S-21’s undisputed aims were the identification of real or perceived “enemies” and their subsequent unlawful arrest, detention, torture and execution. The common criminal purpose of the S-21 Committee, including DUCH, was to achieve these aims by the

⁴¹ Appeal Decision, paragraph 138.

⁴² *Prosecutor v. Martić*, Decision on the Prosecution’s Motion to Request Leave to File a Corrected Amended Indictment, Case No. IT-95-11-PT, Trial Chamber, 13 December 2002, paragraph 23; *Prosecutor v. Naletilic and Martinovic*, Decision on Vinko Martinovic’s Objection to the Amended Indictment and Mladen Naletilic’s Preliminary Motion to the Amended Indictment, Case No. IT-98-34-PT, Trial Chamber, 14 February 2001, page 6.

⁴³ *Prosecutor v. Naletilic and Martinovic*, Decision on Vinko Martinovic’s Objection to the Amended Indictment and Mladen Naletilic’s Preliminary Motion to the Amended Indictment, Case No. IT-98-34-PT, Trial Chamber, 14 February 2001, pages 4-7; *Prosecutor v. Halilovic*, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, Case No. IT-01-58-PT, Trial Chamber, 17 December 2004, paragraph 22; *Prosecutor v. Mejakic et al.*, Decision on the Consolidated Indictment, Case No. IT-02-65-PT, Trial Chamber, 21 November 2002, page 4.

⁴⁴ Indictment, paragraph 31: “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.’”

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.”⁴⁵

30. 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;⁴⁶ selecting experienced staff to work at S-21 from his previous security office M-13;⁴⁷ enforcing the general rules of the Party at S-21;⁴⁸ disseminating the CPK political line of “smashing” enemies;⁴⁹ exercising exclusive rights within S-21 to communicate with senior leaders on matters of security⁵⁰ and presenting them his analysis of the “confessions,” which influenced the decision to arrest particular suspects;⁵¹ communicating directly with other unit chiefs about arrests of cadre from within these other units;⁵² participating in meetings at which the strategy and planning of arrests were discussed;⁵³ teaching methods of interrogation and torture to S-21 staff;⁵⁴ mistreating and torturing S-21 prisoners himself;⁵⁵ ordering executions directly and by delegating to his subordinates;⁵⁶ teaching execution techniques;⁵⁷ and visiting the Choeng Ek execution site.⁵⁸ These acts are properly characterized as acts which “in some way [were] directed to the furtherance of the common design” at S-21.⁵⁹
31. Under the “basic” form of JCE,⁶⁰ 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.⁶¹ Under the

⁴⁵ Indictment, paragraph 131. 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”: Indictment, paragraph 37.

⁴⁶ Indictment, paragraph 20.

⁴⁷ *Id.*, paragraph 21.

⁴⁸ *Id.*, paragraph 25.

⁴⁹ *Id.*, paragraph 40.

⁵⁰ *Id.*, paragraph 42.

⁵¹ *Id.*, paragraphs 43, 45.

⁵² *Id.*, paragraph 55.

⁵³ *Id.*, paragraph 56.

⁵⁴ *Id.*, paragraphs 83, 86.

⁵⁵ *Id.*, paragraphs 90-100.

⁵⁶ *Id.*, paragraphs 107-110.

⁵⁷ *Id.*, paragraph 110.

⁵⁸ *Id.*, paragraphs 109, 113.

⁵⁹ Kvočka Decision, paragraph 89.

⁶⁰ Rule 66 Final Submission Regarding Kaing Guek Eav alias DUCH, 18 July 2008, D96, paragraphs 245, 246, 247.

⁶¹ Indictment, paragraph 131.

“systematic” form of JCE,⁶² DUCH’s knowledge of the system of ill-treatment within S-21 is clear from the facts. 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.

32. DUCH had notification that he was alleged to be a co-perpetrator in a JCE in the Introductory Submission.⁶³ Moreover, the Introductory Submission, the Co-Investigating Judges’ investigation and the Closing Order all put DUCH on notice as to the facts under investigation. Even if DUCH did not receive formal notice of the exact form of the JCE that is being alleged by the Co-Prosecutors until the Final Submission, that JCE is closely based on the facts that were described in the Introductory Submission,⁶⁴ investigated by the Co-Investigating Judges and which form the basis for the Closing Order.
33. DUCH has not been confronted with any new facts that were not investigated by the Co-Investigating Judges. Therefore, the addition of JCE as a mode of liability does not prejudice DUCH or violate his rights to notice of the facts which were investigated or the crimes with which he is charged. The Trial Chamber should, therefore, exercise its power under Rule 98(2) to change the legal characterization of the facts described in the Indictment and try DUCH for his participation in a JCE.
34. The PTC also took issue with the fact that the Co-Prosecutors failed to present any supplementary submissions concerning JCE.⁶⁵ This interpretation is inconsistent with the nature of the investigation in the Cambodian legal system. The Co-Investigating Judges are seized of “facts” that they investigate,⁶⁶ not legal qualifications, and the Co-Investigating Judges are not bound by the legal qualifications offered by the Co-Prosecutors.⁶⁷

⁶² Final Submission, paragraphs 245, 246, 247.

⁶³ Introductory Submission, paragraph 8.

⁶⁴ The Co-Prosecutors submit that the facts found in the Closing Order and the Final Submission are essentially the same as the facts that the Co-Prosecutors alleged in paragraphs 49-55 and 107-113 of the Introductory Submission, albeit the Final Submission and Closing Order are more detailed. DUCH has been on notice that these facts are under investigation, including the facts that give rise to the JCE, since July 2007.

⁶⁵ Appeal Decision, paragraph 131.

⁶⁶ Rule 55(2).

⁶⁷ Rule 67(1).

35. The facts that the Co-Investigating Judges were seized of through the Introductory Submission were broad enough to include the facts underlying the JCE.⁶⁸ Therefore, the JCE was always within the scope of the investigation. Requiring the Co-Prosecutors to specifically advance new legal characterizations through supplementary submissions as a prerequisite to charging the Accused with them, as the PTC seems to suggest is necessary, would drastically and impermissibly limit the freedom of the Co-Investigating Judges and the Trial Chamber to legally qualify the facts. The introductory submission and any supplementary submissions set the scope of the facts to be investigated, but cannot limit the legal qualification that the Co-Investigating Judges and the Trial Chamber give to those facts.

C. JCE is an Applicable Mode of Criminal Liability before the ECCC

36. 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.⁶⁹ JCE satisfies each of these conditions and, therefore, is a valid mode of liability at the ECCC.
37. 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. Committing an offence through a JCE has been recognized in the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (“ICTY” and “ICTR”) and the Special Court of Sierra Leone (“SCSL”).⁷⁰ As the ECCC Law was drafted

⁶⁸ See Introductory Submission, paragraphs 49-55, 107-113.

⁶⁹ *Prosecutor v. Milutinović, et al.*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72, ICTY Appeal Chamber, 21 May 2003, paragraph 21 (“Milutinović Decision”).

⁷⁰ See Milutinović Decision, paragraph 20 “The Appeals Chamber... regards joint criminal enterprise as a form of ‘commission’ pursuant to Article 7(1) of the Statute”; *Prosecutor v. Gacumbitsi*, Judgement, ICTR Appeals Chamber, Case No. ICTR-2001-64-A, 7 July 2006, paragraph 158 “The Appeals Chamber, following ICTY precedent, has recognized that an accused before this Tribunal may be found individually responsible for ‘committing’ a crime within the meaning of Article 6(1) of the Statute under one of three categories of ‘joint criminal enterprise’ (‘JCE’) liability”; *Prosecutor v. Fofana & Kondewa*, Judgement, SCSL Trial Chamber, Case No. SCSL-04-14-T, 2 August 2007, paragraph 208 “‘committing’ [as used in the Statute] is sufficiently protean in nature as to include participation in a joint criminal enterprise to commit the crime”.

after the creation of the ICTY and ICTR Statutes and contains very similar language on modes of liability, the language of Article 29 of the ECCC Law was also intended to mean the same.

38. The inclusion of JCE within Article 29 of the ECCC Law does not go beyond the object and purpose of the ECCC Law. Article 1 states that the “purpose” of the ECCC 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 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.⁷¹ 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 tribunals have interpreted identical language in their respective statutes.
39. All three forms of JCE have been part of customary international law since well before 1975–9. This is evident from the numerous international statutes, cases and authoritative pronouncements, as well as domestic cases, supporting the prior existence of JCE. All of this provides cogent evidence of the widespread state practice and *opinio juris* that establish customary international law.⁷² As JCE was a form of customary international law during the temporal jurisdiction of the ECCC, it was, therefore, foreseeable that participants in a JCE could be held liable under this mode of liability for crimes committed during that period.
40. The Co-Prosecutors have filed comprehensive memorandums as part of Case File 002 that explain the origins of JCE and JCE’s applicability before the ECCC. The memoranda are entitled “Co-Prosecutors’ Response to Ieng Sary’s Motion on Joint Criminal Enterprise” and

⁷¹ *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-T, ICTY Appeals Chamber, 15 July 1999, paragraph 190.

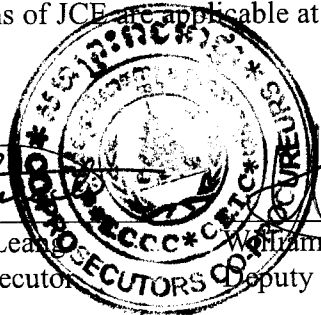

⁷² For the definition of customary international law, see *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Merits, 20 February 1969, ICJ Rep. 3, paragraph 77.

“Co-Prosecutor’s Supplementary Observations on Joint Criminal Enterprise”. They are attached as Annex A. These memoranda contain the complete arguments of Co-Prosecutor pertaining to the applicability of JCE at the ECCC. The Co-Prosecutors adopt those arguments by reference for the purposes of the present filing.

V. CONCLUSION

41. The Co-Prosecutors request that the Trial Chamber apply the legal theory of JCE in their Judgment regarding DUCH’s participation and co-perpetration in the JCE as outlined in the Introductory and Final Submissions and the Appeal Brief. The Co-Prosecutors also request that the Trial Chamber declare that all three forms of JCE are applicable at the ECCC.

Respectfully submitted,



William SMITH
Deputy Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this eighth day of June 2009.