E163/5/11

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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PRELIMINARY SUBMISSIONS CONCERNING THE APPLICABLE LAW

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The Co-Lawyers for Nuon Chea ('the Defence') hereby present these preliminary submissions ('Submissions') concerning the legal elements of the crimes and modes of liability charged in Case 002/01:

I. INTRODUCTION

1. On 8 October 2012, the Trial Chamber requested the parties to file portions of their closing submissions concerning the 'applicable law' by 21 December 2012.[1] On 26 November 2012, the Chamber specified that these submissions should concern, more precisely, the 'legal elements of all crimes and forms of responsibility' charged in Case 002/01.[2] On 7 December 2012, the Chamber explained that parties would be entitled to make additional submissions concerning the applicable law in their post-trial closing briefs ('Closing Briefs').[3] On 14 December 2012, the Chamber granted in part a request from the Defence for an extension of time until 18 January 2013.[4]

2. Accordingly, the Defence presents the instant submissions concerning certain key aspects of the elements of crimes and modes of liability charged in Case 002/01. The Defence reserves its right to elaborate on the positions expressed herein and make additional arguments concerning the applicable law in its Closing Brief.

II. THE JURISDICTION OF THE ECCC IS INCONSISTENT WITH THE DOMESTIC PRINCIPLE OF LEGALITY

3. As the Defence has previously argued,[5] the jurisdiction of the ECCC is inconsistent with the domestic principle of legality. A court (such as the ECCC) established within the jurisdiction of a state may apply *only* the substantive criminal law as it existed within that state at the time the offence was allegedly committed. No matter how the crimes within the subject-matter jurisdiction of the ECCC under Articles 4 through 8 of the ECCC Law were defined under *international* law, it is undisputed that they did not exist under *domestic* law. It follows that the definition under customary international law of

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1 Document No. **E-163/5**, 'Trial Chamber Memorandum – Notification of Decision on Co-Prosecutors' Request to Include Additional Crime Sites Within the Scope of Trial in Case 002/01 (E163) and Deadline for Submission of Applicable Law Portion of Closing Briefs', 8 October 2012, ERN 00850036-00850037, para. 4.

2 Document No. **E-163/5/4**, 'Trial Chamber Memorandum – Further Notification of Modalities for Closing Briefs', 26 November 2012, ERN 00863627-00863628, p. 2.

3 Document No. **E-163/5/6**, 'Trial Chamber Memorandum – Clarification Regarding Applicable Law Briefs', 7 December 2012, ERN 00866790-00866790, para. 3.

4 Document No. **E-163/5/7**, 'Email Communication Concerning Trial Chamber Disposition of Nuon Chea Request for Extension of Time to File Submissions Concerning Applicable Law', 17 December 2012, ERN 00869845-00869848, p. 2.

5 Document No. **E-51/3**, 'Consolidated Preliminary Objections', 25 February 2011, ERN 00648279-00648310, paras 42-44.

the crimes and modes of liability charged in the indictment are *irrelevant*. The Defence incorporates by reference and reiterates its previous arguments in that regard.[6]

III. APPLICABLE INTERNATIONAL LAW

4. In the alternative, the definitions of select crimes and modes of liability as they existed under customary international law at the relevant time are as follows.

A. Formation of Customary International Law

5. A rule of customary international law is formed where it is supported by both state practice and *opinio juris*. State practice must be 'extensive and virtually uniform'[7] and arise from a 'sense of legal obligation, as opposed to motives of courtesy, fairness or morality.'[8] Evidence of *opinio juris* includes official government statements, statements of international organizations and law-making treaties.[9] The extent of state practice may, moreover, itself be indicative of *opinio juris*.[10]

B. Other Inhumane Acts Through Forced Transfer

6. According to the Closing Order, the elements of the *actus reus* of other inhumane acts through forced transfer are as follows: (i) victims endured great suffering, or serious mental or physical suffering or injury or a serious attack on human dignity of similar gravity to other crimes against humanity; (ii) victims were forced to leave the places where they lawfully resided; (iii) without grounds permitted by international law.'[11] With regard to the third element, the CIJs held that such grounds *do* include (i) security of the population and (ii) military necessity and *might* include emergencies of food and/or

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6 Document No. **E-51/3**, 'Consolidated Preliminary Objections', 25 February 2011, ERN 00648279-00648310, paras 42-44.

7 North Sea Continental Shelf cases (Germany v. Denmark and Germany v. the Netherlands), Judgment, ICJ, 20 February 1969, para. 74 ('North Sea Continental Shelf Judgment').

8 Ian Brownlie, 'Principles of Public International Law', Oxford University Press, Sixth Edition, p. 8.

9 North Sea Continental Shelf Judgment, paras. 47-72.

10 North Sea Continental Shelf Judgment, para. 77. The Supreme Court Chamber has held that, as regards the formation of the customary law of individual criminal responsibility, a mere 'paucity of prosecution cannot be found to disprove automatically the existence of State practice.' *See Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/SC, Document No. **F-28**, 'Appeal Judgment', 3 February 2012, ERN 00797698-00798047 ('Duch Appeal Judgment'), para. 93. With respect to forced transfer, the analysis presented here does not rely in *any way* on a 'mere paucity of prosecution'; to the contrary, it depends on (i) the failure of states to *prohibit* the conduct concerned, even, until as late as 1974, in non-binding form and (ii) the *affirmative and enthusiastic approval* thereof by states and international organizations.

11 Document No. **D-427**, 'Closing Order', 15 September 2010, ERN 00604508-00605246 ('Closing Order'), para. 1449.

medical care.[12] The CIJs also held that a forced population movement is justified only where the population is provided the opportunity to return 'home'.[13]

7. For the reasons that follow, this definition relies far too heavily on sources of law which, between April 1975 and 1977,[14] were inapplicable to population movements effected by a sovereign state within its own borders. The correct definition is far more limited, and also, heavily dependent on the circumstances and context surrounding the transfer.

i. Other Inhumane Acts and the Principle of Legality

8. The imprecision inherent in the phrase 'other inhumane acts' raises serious concerns as to its (non-)compliance with the principle of legality.[15] The phrase achieves *some* specificity through the principle of *esjudem generis*, pursuant to which it is limited to those acts of a similar nature or gravity to other, enumerated crimes against humanity.[16] Courts have given the phrase further content by linking it to broadly recognized fundamental rights, including those found in customary international law and widely ratified treaties.[17]

9. At this Court, in light of the long time lapse since the end of its temporal jurisdiction, Chambers must be vigilant in their assessment of changing attitudes toward conduct charged as an other inhumane act. The principle of legality requires, *inter alia*, that the defendant was able to foresee that he could be held criminally liable for his actions if apprehended.[18] It follows that conduct may qualify as an other inhumane act only if it was perceived *at the time the offence was committed* to constitute a violation of international law of a gravity comparable to other, enumerated crimes against humanity. Indications that a form of conduct was not considered a crime against humanity at the relevant time suggest that it was not so perceived and therefore bars criminal liability.[19]

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[12] Closing Order, paras 1458, 1461.
[13] Closing Order, para. 1464.
[14] Population movement phase II is alleged to have continued until some time in 1977, which therefore constitutes the end of this Court's temporal jurisdiction in Case 002/01. *See* Closing Order, para. 163.
[15] *Prosecutor v. Kupreskic et al.*, IT-95-16-T, 'Judgement', 14 January 2000 ('Kupreskic Trial Judgment'), para. 563.
[16] ICC Statute, Art. 7(1) (k); Closing Order, para. 1449.
[17] Kupreskic Trial Judgment, para. 566.
[18] *Prosecutor v. Milutinovic et al.*, IT-99-37-AR72, 'Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction: Joint Criminal Enterprise', 21 May 2003, para. 21; Duch Appeal Judgement, para. 96.
[19] The Pre-Trial Chamber has held that other inhumane acts is a crime in itself and there is therefore no need to establish the existence as an independent crime of conduct charged as such. *See* Document No. **D-427/1/30**, 'Decision on Ieng Sary's Appeal Against the Closing Order', 11 April 2011, ERN 00661785-00661994, para. 378. Even assuming that conclusion is correct, the failure during the relevant period to characterize or prosecute any particular act as a crime against humanity would tend to establish not only that such act was not then an *independent crime*, but also that it was not seen to be of sufficient gravity to rise to the level of

ii. Internal Displacements were Largely Unregulated Prior to 1977

10. 'Population movement' under international law manifests in at least three types of legally distinct conduct:[20] (i) forced transfer by an occupying power of the population under its control; (ii) forced transfer to a different state, commonly known as 'deportation'; and (iii) forced transfer *inside* the borders of a state. Following the ICTY, the OCP concedes that forcible transfer and deportation are distinct acts under customary international law.[21]

11. Expressions of illegality in international instruments prior to 1977 – including those relied upon by the CIJs in the Closing Order – focus overwhelmingly on the first two categories, with virtually no mention of population movement by a state within its borders. The IMT Charter, IMTFE Charter and Control Council Law No. 10 all criminalized 'deportation' as a war crime and/or crime against humanity without reference to 'forcible transfer'.[22] The 1954 Draft Code of Crimes Against Peace does the same – a notable contrast with the 1996 Draft Code and 1998 Rome Statute, both of

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an 'other inhumane act'. As the Supreme Court Chamber has held, 'other inhumane acts' as a crime against humanity has been part of customary international law since 1946. (Duch Appeal Judgement, paras. 108-109). Governments, international organizations, courts and sophisticated commentators must of course be assumed to have known that in their assessments of internal forced transfer.

[20] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Second Revised Edition), Kluwer Law International: 1999 ('Bassiouni'), p. 320 (in describing several categories of population movement, including deportation and transfer of population: 'Customary and conventional law had at the time evolved different rules and standards for each of these categories. Since then, the evolution of international law has not eliminated the legal relevance of these distinctions.').

[21] Document No. **D-427/1/17**, 'Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeal Against the Closing Order', 19 November 2000, ERN 00626531-00626650, para. 191. In the same paragraph, the Co-Prosecutors also arrive at exactly the opposite conclusion – that deportation and forced transfer 'refer to the same criminal act' – on the basis that the Rome Statute, 'which enshrines accepted principles of customary international law', lists deportation and forcible transfer as a single crime. Therefore, they reason, forced transfer was criminalized at Nuremberg, because the IMT Charter included 'deportation'. *See id.*, paras 191-192. Needless to say, that logic is untenable: the status of customary international law as it is reflected in the Rome Statute, adopted more than 50 years after the IMT Charter (and more than 20 years after the events in question here) is completely irrelevant. Indeed, the status of forced transfer under international law *has* undergone a dramatic transformation, in the 1990s in particular, *culminating* in the Rome Statute as the quintessence of that change. *See* paras 22-23, *infra*.

[22] Charter of the International Military Tribunal, 8 August 1945 ('IMT Charter'), Art. 6 (granting jurisdiction over '**(b) WAR CRIMES**: namely...deportation to slave labor or for any other purpose of civilian population of or in occupied territory...and **(c) CRIMES AGAINST HUMANITY**: namely...deportation'); Charter of the International Military Tribunal for the Far East, 19 January 1946 ('IMTFE Charter'), Art. 5(c) ('Crimes Against Humanity: Namely...deportation'); Law No. 10 of the Control Council for Germany ('Control Council Law No. 10'), Article II(1) ('[e]ach of the following acts is recognized as a crime: (…) (b) War Crimes...deportation to slave labour or for any other purpose, of civilian population *from occupied territory*...[and] (c) Crimes against Humanity...deportation'). The Closing Order notes that the German phrase used in the IMT Charter *could* include transfers within borders. (Closing Order, para. 1314, fn. 5198.) Any such ambiguity is resolved by the Indictment, which is specifically restricted to cross-border deportation, and the Judgment, which includes no discussion of transfers within Germany. *See* para. 13, *infra*.

which explicitly criminalize both acts.[23] Other indications of customary law between 1950 and 1970 consistently reinforce a divide between deportation and forced transfer.[24]

12. The only context in which a prohibition on internal displacement *was* recognized was within the law of belligerent occupation, a prohibition based strictly on the limited authority, in time and scope, of an occupying power. Article 49 of the Fourth Geneva Convention prohibits forcible transfer and deportation by *occupying powers* effecting transfers of populations under their control. In 1975, it was not clear that this prohibition applied to any other form of population transfer, even those with a nexus to an international armed conflict.[25] Indeed, it must be understood within the context of the international law of occupation, which prohibits the occupier from exercising most prerogatives of the state.[26] Numerous other sources from the pre-1975 period prohibit,

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[23] UN Doc. A/CN.4/88, Report of the International Law Commission Covering the Work of its Sixth Session, 28 July 1954, Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693) ('1954 Draft Code'), Art. 2(11) ('the following acts are offence against peace and security...deportation'); Draft Code of Crimes Against the Peace and Security of Mankind, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr. 3 (1996) ('1996 Draft Code'), Art. 18(g) ('arbitrary deportation *or forcible transfer of population*'); ICC Statute, Art. 7(1) (d) ('...Deportation *or forcible transfer of population*...'). Even in 1994 the statutes of the ad hoc tribunals recognized deportation but not forced transfer as a standalone crime against humanity. *See* ICTY Statute, Art. 5(d); ICTR Statute, Art. 3(d).

[24] *See* Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto CETS No.: 046, entered into force 2 May 1968, Art. 3 ('No one shall be expelled, by means either of an individual or of a collective measure, *from the territory of the State* of which he is a national'). Similarly, declarations issued by the Allied Forces during World War II condemning Nazi practices specifically described the transfer of populations across borders, such as the 'deportation of Jews to their death in Poland or Norwegians and French to their death in Germany.' *See* Bassiouni, p. 317. The 1919 Report of the Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties also criminalized 'deportation'. *See* Bassiouni, pp. 312-313.

[25] ICRC Rules on Customary Law, Rule 129: The Act of Displacement states: '(A) Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an *occupied territory*... (B) Parties to a non-international armed conflict may not order the displacement of the civilian population.' Whereas the prohibition in (A) is *based on the IMT Charter and the Fourth Geneva Convention*, the prohibition in (B) 'is set forth in *Additional Protocol II*.' *Id.* A brief look at the structure of the Fourth Geneva Convention confirms this. The prohibition on forced transfer was not included in Part II ('General Protection of Populations Against Certain Consequences of War'), Part III, Section I ('Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories') or, importantly, Part III, Section II ('Aliens in the Territory of a Party to the Conflict'), but rather Part III, Section III ('Occupied Territory'). Other provisions in the same section instruct the Occupying Power not to 'alter the status of public officials of judges in the occupied territories' (Art. 54) and that 'the penal laws of the occupied territory shall remain in force' (Art. 64) – provisions which concern the management of the territory, the violation of which would clearly not constitute a crime against humanity.

[26] *See* Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 ('Fourth Hague Convention'), Arts 43 ('The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, *while respecting, unless absolutely prevented, the laws in force in the country*'), 55 ('The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State'); David J. Scheffer, *Future Implication of the Iraq Conflict: Beyond Occupation Law* 97 Am. J. Int'l L. 842, 848 (goal of law of occupation is 'to encourage temporary occupation and to establish rules for that temporary occupation').

directly or indirectly, forced transfer of the population of an occupied territory, thereby demonstrating its longstanding existence as a distinct category of conduct under the law.[27]

13. Not surprisingly, prosecutions at both the IMT and the NMT concerned largely deportation across *de jure* borders. The IMT indictment is specifically limited to deportation '*from* such occupied countries *to Germany* and to *other occupied countries*'.[28] Every instance of population movement in the IMT Judgment relied upon in the Closing Order involves a movement either across borders or in occupied territories.[29] Indictments issued in the NMT cases similarly criminalize 'deportation' and, in both the particulars of the indictments and the judgments issued thereon, link the act of transfer to a movement across borders (or by Germany in an occupied state).[30]

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[27] Fourth Hague Convention, Art. 46; US Regulations Governing the Trials of the Accused War Criminals in the Pacific Region I & II, 1945 (prohibiting 'deportation to slave labour or for any other purpose of civilians of or *in occupied territory*'). *See also, e.g. Cyprus v. Turkey*, ECHR, Application No. 25781/94, 'Judgment', 10 May 2001 (concerning forced transfer by Turkey of Greek Cypriots inside Cyprus beginning in 1974).

[28] 'Indictment: International Military Tribunal', reprinted in *Trial of the Major War Criminals Before the International Military Tribunal*, Vol. I, pp. 27-92 ('IMT Indictment'), Count III (B). The indictment goes on to provide examples of the deportations at issue; every one involved a move across borders, from France, Luxembourg, Denmark, Holland, Belgium, the Soviet Union, Czechoslovakia and Yugoslavia to Buchenwald (Germany), Dachau (Germany) and generally the 'interior of Germany'. Note that although the movements from the Soviet Union and Yugoslavia are not explicitly stated to have been destined for Germany, the indictment notes the *deportation from* each country. In any case, both countries were occupied and any movements within their borders would have come within the laws of war concerning population movement in occupied territory. *See* para. 12, *infra*. Note also that in Count 4(B), which concerned the crimes against humanity of 'Murder, Extermination, Enslavement, Deportation and Other Inhumane Acts', the first paragraph, which describes the period prior to the onset of the war and therefore concerns 'civilians in Germany', concludes with the allegation that the defendants 'subjected them to persecution, degradation, despoilment, enslavement, torture, and murder' – omitting deportation, and only deportation, from the list of crimes charged. The second paragraph *then* states that 'these acts and policies were continued and extended to the occupied countries after 1 September 1939, and until 8 May 1945.'

[29] IMT Judgment, reprinted in *Trial of the Major War Criminals Before the International Military Tribunal*, Vol. I, pp. 171-367 ('IMT Judgment') at pp. 227 ('whole populations were deported to Germany'), 238 (evacuation of population of Crimea), 271 ('evacuation of the Jews from occupied territories'), 300 (transfer from Czechoslovakia to Auschwitz, in Poland), 319 (deportation of Jews in Vienna to General Government).

[30] *United States vs. Josef Altstoetter et al.*, Case No. 3, 'Indictment', para. 20, reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume III, p. 23 (referring to 'deportation'); *United States vs. Ulrich Greifelt et al.*, Case No. 8, 'Indictment', paras. 16, 24, reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume IV, pp. 614, 617-618 (para. 16: victims 'forcibly evacuated from their homes and transferred either to other occupied territories...or to Germany'), (para. 24: referring to 'deportation'); *United States v. Wilhelm List et al.*, Case No. 7, 'Indictment', para. 15(f) and (g), reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume XI, p. 776 (deportation from Croatia to Germany); *United States v. Friedrich Flick et al.*, Case No. 5, 'Indictment', paras. 1, 2, fn 2, reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume VI, pp. 13-14 (para. 1: 'deportation to slave labor on a gigantic scale of members of the civilian populations of countries and territories under the belligerent occupation of, or otherwise controlled by, Germany'), (para. 2: five million workers 'deported to Germany'), (para. 3, fn. 2: 'deportation of Soviet nationals and prisoners of war to work in Germany'); *United States v. Wilhelm Von Leeb et al.*, Case No. 12, 'Indictment', paras. 64, 65, 67(a), 67(b), reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume X, pp. 37-39 (para. 64: at least 5,000,000 workers 'deported to Germany; 'sent under guard to Germany'; inhabitants of occupied countries were conscripted and compelled to work in their own countries'), (para. 65: establishment of recruitment commissions for the purpose of deporting slave labour from occupied

14. That link was made explicit in the *Milch* case in a passage later adopted as a correct statement of the law:[31]

> The prosecution has offered evidence that tended to show that much of the labour which supplied Germany with the tools of absolute and total war was extracted from people who had been uprooted from their homes in occupied territories and imported to Germany against their will and often under the most trying and difficult circumstances. *Displacement of groups of persons from one country to another is the proper concern of international law in as far as it affects the community of nations.*[32]

15. Developments in customary international law with respect to mass population movements between 1949 and 1977 are otherwise limited. The adoption of Additional Protocol II to the Geneva Conventions ('APII') in **June 1977** marked the *first time* that a binding instrument of international law outlawed population transfer in connection with an armed conflict.[33] General Assembly Resolution 2675, adopted in 1970, establishes that internal forced transfer was *not* then unlawful, describing the rules set out therein (including a prohibition on forced transfer) as 'basic *principles* for the protection of civilians in armed conflict, without prejudice to their *future elaboration* within the framework of the progressive development of the international law of armed conflict.'[34] Neither did APII

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territories to Germany; deported to Germany for slave labour), (para. 67(a): French nationals deported to Germany), (para. 67 (b): similar); *United States v. Alfred Krupp et al.*, Case No. 10, 'Indictment', para. 62, reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume IX, pp. 34-35 (describing transportation across borders Berlin to Auschwitz, in Poland); *United States vs. Josef Altstoetter et al.*, Case No. 3, 'Opinion and Judgment', reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume III, p. 1046 (referring to 'the transfer of the inhabitants of occupied territories to concentration camps in Germany'); *United States v. Wilhelm Von Leeb et al.*, Case No. 12, 'Judgment', reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume XI, p. 540 ('Hundreds of thousands of the helpless population of the occupied territories were transferred to the Reich under this program of labor recruitment.'), p. 541 (similarly referred to 'transfer to the Reich'); *United States v. Wilhelm List et al.*, Case No. 7, 'Judgment', reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume XI, pp. 1234, 1255-1256 ('deportation for slave labor'), p. 1301 ('the evacuation of the male population of Croatian towns for deportation to Germany for forced labor'); *United States v. Alfred Krupp et al.*, Case No. 10, 'Judgment, reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume IX, pp. 1429-1435 ('deportation'); *United States vs. Ulrich Greifelt et al.*, Case No. 8, 'Opinion and Judgment', reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume V, p. 100, 106, 126-127, 131, 136, 138-143 (referring to deportations); *United States v. Ernst von Weizsaecker et al.*, Case No. 11, 'Judgment', reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume XIV, p. 468-865 (reference made throughout the Judgment to deportations).

[31] *United States v. Alfred Krupp et al.*, Case No. 10, 'Judgment', para. 62, reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume IX, pp. 1432-33.

[32] *United States v. Erhard Milch*, Case No. 2, 'Judgment', reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume II, p. 865.

[33] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 ('APII'), Art. 17.

[34] UN Doc No. A/RES/2675(XXV), 'Basic Principles for the Protection of Civilian Populations in Armed Conflicts', General Assembly, 1922nd plenary meeting, 9 December 1970 ('GA Res. 2675'), para. 7. This language stands in stark contrast with that used in the introductory clause of Resolution 3318 – also cited by the Closing Order – which 'calls for the strict observance of the Declaration by all Member states.' Resolution 3318 – a non-binding instrument adopted in December 1974, five months prior to the liberation

codify or crystallize emerging norms of custom, having opened for signature in December 1977 with only 40 signatories, then securing 21 state parties in its first five years.

16. The only other sources relied upon in the Closing Order to demonstrate that forcible transfer was considered an 'other inhumane act' after the NMT are broad exhortations in the ICCPR and UDHR in favour of the right to 'security of the person', 'freedom of movement and residence' and protection from 'interference with...[the] home'.[35] Needless to say, those protections are neither absolute nor non-derogeable under international human rights law and do not prohibit population transfer as such or give content to the circumstances under which such transfer would be permitted or prohibited.[36] The ICCPR, with its 41 state parties by the end of 1977, was in any event not at the relevant time binding on Cambodia as a matter of either conventional or customary international law.[37]

17. The international regulation of internal displacement prior to the conclusion of the Phase II population movement in 1977 was therefore in its earliest infancy – and sharply distinct from the rules applicable to transfers across borders or in occupied territory. Whereas the latter two had been recognized as international crimes since *at least* the Second World War, the former was prohibited – in part, indirectly, and in non-binding form – by a single General Assembly resolution five months prior to the liberation of Phnom Penh.[38]

iii. State Practice and *Opinio Juris* Recognized Broad Sovereign Authority With Regard to Internal Population Movements Between 1975 and 1977

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of Phnom Penh – is not by any means a prohibition on forced transfer. Rather, it protects against 'destruction of dwellings and forcible eviction', and applies only to women and children. *See* UN Doc No. A/RES/3318(XXIX), 'Declaration on the Protection of Women and Children in Emergency and Armed Conflict', General Assembly, 2319th plenary meeting, 14 December 1974`, para. 5.

35 UN Doc No. A/RES/217A(III), 'International Bill of Human Rights', General Assembly, 183rd plenary meeting, 10 December 1948 ('UDHR'), Arts 3, 13; International Covenant on Civil and Political Rights, 16 December 1966 ('ICCPR'), Arts 12, 17.

36 Article 4(2) of the Covenant supplies a list of non-derogeable rights which does not include Article 12 or 17, the two provisions of the ICCPR most likely to be understood to be inconsistent with forced transfer. Crucially, in General Comment 29, issued in 2001, the Human Rights Committee concluded that Article 12 had *since become* non-derogeable because forcible transfer *was now* criminalized in the Rome Statute. *See* UN Doc No. CCPR/C/21/Rev.1/Add.11, General Comment 29, States of Emergency (article 4) (2001), para. 13(d). It follows that, according to the Human Rights Committee, forced transfer was *not a criminal act* when the Covenant was adopted in 1966. *See also*, Bassiouni, p. 325 (describing the space between the recognition of a right in a human rights instrument and the criminalization of an act which violates it, including the non-absolute character of human rights protections). Provisions of then-existing regional human rights protecting similar interests are also both derogeable and subject to limitations on the grounds of health, safety and public order, among others. *See* ECHR, Arts 8(2), 15(1), (2); American Convention on Human Rights, entered into force 18 July 1978, Arts 22(3), 27(1), (2). As of 1977, no case law yet existed from the Human Rights Committee interpreting these provisions. The limited case law from the ECtHR which concerned Article 8 was inapplicable to this case.

37 Indeed, the ICCPR did not even enter into force as a matter of conventional law until 23 March 1976.

38 *See* fn 34, *supra*.

18. The muted reaction of international legal instruments to internal displacement is replicated in widespread state practice, pursuant to which projects causing large-scale internal forced displacement were deemed broadly acceptable. Those projects were almost never accused of illegality, and were regularly funded and supported by a panoply of international organizations, including the World Bank and even the United Nations.[39]

19. One UN report describes the goals of land settlement programs under

> four broad heads: (i) redistributive, to relieve population pressure in congested areas; (ii) economic, to raise national or individual incomes or to increase agricultural employment or production; (iii) social, in that governments can more readily supply services to compactly settled populations; (iv) political, to avoid the confiscation of farm land entailed by land reform or to serve some particular segment of the population.[40]

The second objective is especially important in Southeast Asia where, as of 1982, 'most...governments [had] developed programmes to resettle people into areas with [agricultural] development potential.'[41] Frequently, and especially in cases of newly independent states, the political rhetoric of these objectives is deeply bound up in nation-building and the importance of sacrifice for the sake of the state.[42]

20. In general, programs undertaken for these purposes were not, prior to the 1990s, seen as *objectionable*, let alone *illegal*. The World Bank – possibly the world's largest development lender, with 187 member states – did not even have a *policy* toward internal resettlement as a consequence of bank-financed projects prior to February 1980.[43] That general philosophy is reflected in an almost unending list of broadly sanctioned internal displacements. Across India, China and Africa literally *tens of millions* of people were forcibly displaced from 1955 through 1990 as a consequence of dam, mine and industrial

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[39] Bassiouni describes an exchange during the IMT trial in which counsel for the defence attempted to describe the deportation of German nationals from Silesia and the Sudetenland immediately following the war, but was interrupted by the Tribunal on the grounds that those acts have 'no bearing on the present case.' Bassiouni observes: 'Aside from the double standard applied, *the argument was legally relevant to demonstrate that the mere transfer of population was not contrary to customary international law since it was indeed practiced.*' *See* Bassiouni, p. 319.

[40] G.W. Jones and H.V. Richter (eds), *Population resettlement programs in Southeast Asia* (Canberra: Australian National University, 1982) ('Jones and Richter'), pp. 3-4.

[41] Jones and Richter, p. 3.

[42] R.H.B.B.S. Samiti, H. Mander, and V. Nagaraj, 'Dams, Displacement, Policy and Law in India', Contributing Paper to the World Commission on Dams, p. vii (describing the exhortation of Prime Minister Nehru to displacees that 'If you have to suffer, you should do so in the interest of the country'); C. De Wet, 'The Experience with Dams and Resettlement in Africa', Contributing Paper to the World Commission on Dams, pp. 6-7 (dams often seen as 'cornerstones of national, and often nationalistic, projects').

[43] M.M. Cernea, 'Involuntary Resettlement in Development Projects: Policy Guidelines in World Bank-Financed Projects', World Bank Technical Paper No. 80, 1988, pp. 1-2.

construction, warfare, famine, ecological distress and urbanization.[44] In Africa between 1981 and 1994 alone, the World Bank supported large-scale development projects causing involuntary internal displacement in 38 countries.[45]

21. Any one of these movements would have *automatically* entailed international criminal liability had it been effected across a *de jure* or *de facto* border or occurred in occupied territory. At a minimum, then, state practice demonstrates that 'forced transfer' *as such* was not prohibited in the relevant period.

iv. International Opinion Shifted Noticeably Through the 1990s

22. This permissive attitude toward internal forced displacement changed dramatically in the 1990s amidst a sudden and vigorous flurry of activity on the part of states and international organizations. Between 1992 and 2000, a procession of international organizations, including the UN Commission on Human Rights, Human Rights Committee, International Law Commission and UN Secretary General, among others, took turns lamenting or purporting to prohibit internal displacement.[46] The membership of key multilateral treaties – including APII (from 0 state parties in 1977 to over 130 in 1995) and the ICCPR (from 41 parties in 1977 to 103 in 1995) – changed dramatically. In a pointed summary, the ICRC collection of international practice in relation to Rule 129

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[44] N. S. Negi and S. Ganguly, 'Development Projects vs. Internally Displaced Populations in India: A Literature Based Appraisal', Working Paper, Research Conference on 'Environmental Change and Migration: From Vulnerabilities to Capabilities', Bad Salzuflen, Germany, 5-9 December, p. 6 (21 million people displaced in India between 1955 and 1990); L. Heming *et al.*, 'Reservoir resettlement in China: past experience and the Three Gorges Dam', (2001) 167 *The Geographical Journal* 195, p. 197.

[45] Thayer Scudder, 'A Comparative Survey of Dam-Induced Resettlement in 50 Cases with the Statistical Assistance of John Gay' in Thayder Scudder, *The Future of Large Dams: Dealing with Social, Environmental, Institutional and Political Costs*, Taylor & Francis: 2005, at 5-6.

[46] Resolution 1992/28, 35th meeting, 27 August 1992, paras. 2 and 8, included in UN Document No. E/CN.4/Sub.2/1992/L.11/Add.4, 'Draft Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities', 28 August 1992, pp. 18-19 (appointment of a Special Rapporteur on Human Rights and Population Transfer ('Special Rapporteur') by the UN Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities ('Sub-Commission')); 1996 Draft Code, Art. 18(g) (prohibiting forced transfer); UN Document No. E/CN.4/1998/2 & E/CN.4/Sub.2/1997/50, 'Report of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Ninth Session, 5 November 1997 (adoption of a Draft Declaration on Population Transfer and the Implantation of Settlers by the Sub-Commission); UN Document No. E/CN.4/1998/53/Add.2, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39 – Addendum, General Principles on Internal Displacement, 11 February 1998 (issuance of Guiding Principles on internal displacement by the Special Rapporteur of the Secretary General); ICC Statute, Art. 7(1) (d) (prohibiting forcible transfer); UN Document No. CCPR/C/21/Rev.1/Add.9, 'General Comments Adopted by the Human Rights Committee Under Article 40, Paragraph 4, Of the International Covenant on Civil and Political – Addendum, General Comment 27 (67) – Freedom of Movement Article 12', 1 November 1999, para. 7 (prohibiting 'all forms of internal displacement'); Kupreskic Trial Judgment, para. 566 (characterizing forcible transfer as an other inhumane act).

('The Act of Displacement') is comprised *exclusively* of examples from the period after 1990, for the most part prompted by the war in the former Yugoslavia.[47]

23. The volume and significance of these indicia of customary international law in just a few short years demonstrate that the 1990s witnessed a sea-change in the international (il)legality of internal forced transfer. Reliance on any source from that period onward to establish the state of customary law in 1975 is therefore dubious, to say the least.

v. Elements of Forced Transfer as an Other Inhumane Act

24. As noted above, the structure of the definition of forced transfer as an other inhumane act as it is described in the Closing Order is evidently taken from the Elements of Crimes at the ICC, insofar as it treats the forcible transfer of population as a criminal act as such subject to certain unstated 'grounds permitted under international law.' The content of grounds permitted under international law as it was described by the CIJs is based on Article 49(2) of the Fourth Geneva Convention, which would recognize only 'security of the population' and 'military necessity'. For reasons already stated, neither source is applicable to elucidate the definition of forced transfer as an other inhumane act in 1975.

25. Noting the inconsistencies in state practice, Bassiouni argues that forced transfer is not unlawful as such but that it may *become* unlawful depending on its purposes and manner of implementation: '[I]t is not so much the transfer of civilians within a country's jurisdiction that constitutes the violation, but transfer for the purposes of extermination, slavery, slave-related practices and slave labour. *Deportation and population transfers of another belligerent state remain war crimes in and of themselves.*'[48]

26. The Defence submits that such a contextual approach is the only way to express the crime of forced transfer as an other inhumane act between 1975 and 1977 while remaining faithful to the principle of legality and the sources of customary law as they existed at the

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[47] *See* 'Practice Relating to Rule 129. The Act of Displacement', at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule129_sectiona. The handful of examples prior to 1990 all concern either deportation or belligerent occupation (including the legal sources already discussed and instances of practice such as the Israeli occupation or the deportation of Iranian civilians to Iraq in the 1980s), reinforcing the distinction between those forms of movement and internal forced transfer. *See e.g.,* Frédéric de Mulinen, 'Handbook on the Law of War for Armed Forces', ICRC, Geneva 1987, para. 776(f) ('unlawful deportation or transfer of all or parts of the population *of the occupied territory*'); 25th International Conference of the Red Cross, Geneva, 23-31 October 1986, Resolution I, Preamble ('forceful displacement of civilian populations *by occupation troops*'). *Every* instance of practice which concerns internal displacement is after 1990.

[48] Bassiouni, p. 315. In the realm of permissible instances of forced transfers, Bassiouni places the mass transfer of Japanese-Americans into internment camps following the Second World War, despite the massive deprivation of the right to liberty it entailed. *See id.*, p. 320.

time. The only *concrete* standards to be found in the law arise from the law of deportation and belligerent occupation, both of which are plainly inapplicable to forced transfer.

27. For all of these reasons, the elements of internal involuntary forced transfer as an other inhumane act between April 1975 and 1977 can only be described in the most general terms, as follows: (i) victims were forced to leave the place where they lawfully resided; (ii) under circumstances, including its objectives, manner of implementation and effects, seen at the time to be of a gravity equivalent to other enumerated crimes against humanity; (iii) the Accused intended[49] to force victims to leave the place where they lawful resided; and (iv) the Accused intended to do so under circumstances which render such transfer criminal. Whether any particular act satisfies this definition demands a fact-intensive analysis of all of the circumstances in light of then-current state practice.

C. Joint Criminal Enterprise

i. Elements of JCE: General

28. Pursuant to paragraph 1540 of the Closing Order, Nuon Chea is charged with having 'committed the crimes listed in this Closing order' through his membership in a Joint Criminal Enterprise ('JCE').[50] JCE entails criminal responsibility for commission of a crime though the participation of the Accused in a common plan or purpose.[51] There are two categories of JCE applicable at the ECCC: 'JCE I, involving cases where all participants act pursuant to a common purpose and share the same criminal intent; [and] The systemic category of JCE II, referring to instances of systemic ill-treatment in organized institutions, such as concentration camps.'[52]

29. The *objective* elements (*actus reus*) of both variations of JCE are the same, and were articulated by the Chamber in the Duch Judgment as follows: 'First, a plurality of persons...Second, the existence of a common purpose that amounts to or involves the commission of a crime over which the Chamber has jurisdiction...Third, the participation

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[49] General principles of international criminal law require that the accused intend each of the material elements of the offence. *See* ICC Statute, Art. 30(1).

[50] *See* Closing Order, para. 1540.

[51] The Pre-Trial Chamber and the Trial Chamber have both concluded that JCE is a form of commission within the scope of Article 29 (new) of the ECCC law. *See* Case 001, Document No. **E-188** 'Judgment', 26 July 2010, ERN 00572517-00572797 ('Duch Judgment'), para. 551; Document No. **D-97/15/9** 'Decision on the Appeals Against the Co-Investigative Judges Order On Joint Criminal Enterprise', 20 May 2012, ERN 00486521-00486589, para. 49.

[52] *See* Document No. **E-100/6**, 'Decision on the Applicability of Joint Criminal Enterprise', 12 September 2011, ERN 00741351-00741366 ('JCE Decision'), para. 15. The Trial Chamber has already held that JCE III did not exist under customary international law during the temporal jurisdiction of the ECCC and is therefore inapplicable to the Accused. *See Id.*, para. 38, p. 16.

of the accused in the common purpose.'[53] The participation of the Accused must constitute a 'significant contribution' to the crimes charged.[54]

30. The *subjective* element of JCE I is that 'the accused must intend to perpetrate the crime [at the center of the common purpose] and this intent must be shared by all co-perpetrators.'[55] JCE I thus applies where the participants in the JCE all intend to commit the *specific criminal act* which is the object of the JCE.[56] The *mens rea* for JCE II requires that the accused have knowledge of the nature of the system [of ill treatment] and intend[s] to further the common system of ill-treatment.'[57]

ii. Joint Criminal Enterprise Alleged in Case 002/01

31. The essence of the joint criminal enterprise plead in the Closing Order is as follows:

> 1524. The common purpose of the CPK leaders was to implement rapid socialist revolution by in Cambodia through a "great leap forward" and to defend the Party against internal and external enemies, by whatever means necessary. The purpose itself was not entirely criminal in nature but its implementation resulted in and/or involved the commission of crimes within the jurisdiction of the ECCC.'
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> 1525. To achieve this common purpose, the CPK leaders designed and implemented five policies. Their implementation resulted in and/or involved the commission of the following crimes which were committed by members and non-members of the JCE.[58]

Pursuant to the Severance Order, only two of these five 'policies' comes within the scope of Case 002/1, namely, the policies of forced population movement and the treatment of targeted groups.[59] In respect of these policies, Nuon Chea is charged with (i) murder; (ii)

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[53] *See* Duch Judgment, para. 508.
[54] Duch Judgment, para. 508; Closing Order, para. 1522. *See also Prosecutor v. Simic*, IT-95-9-T, 'Judgment', 17 October 2003, para. 159.
[55] *See* Duch Judgment, para. 509.
[56] *See Prosecutor v. Stakic*, IT-97-24-A, 'Judgment', 22 March 2006, para. 65; *Prosecutor v. Kvocka et al.*, IT-98-30/1-A, 'Judgment', 28 February 2005 ('*Kvocka* Appeals Judgment'), para. 82; *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, 'Judgment', 13 December 2004, para. 467; *Prosecutor v. Vasiljevic*, IT-98-32-A, 'Judgment', 25 February 2004, para. 101; *Prosecutor v. Krnojelac*, IT-97-25-A, 'Judgment', 17 September 2003, para. 84; Tadić' para. 196; *Prosecutor v. Krajisnik*, IT-00-39-T, 'Judgment', 27 September 2006, para. 883; *Prosecutor v. Simba*, ICTR-01-76-T, 'Judgment and Sentence', 13 December 2005, para. 388; *Prosecutor v. Limaj et al.*, IT-03-66-T, 'Judgment', 30 November 2005, para. 511; *Prosecutor v. Blagojevic and Jokic*, IT-02-60-T, 'Judgment', 17 January 2005, para. 703; *Prosecutor v. Brdanin*, IT-99-36-T, 'Judgment', 1 September 2004, para. 264; *Prosecutor v. Simic, Tadic and Zaric*, IT-95-9-T, 'Judgment', 17 October 2003, paras. 156, 157, 160; *Prosecutor v. Vasiljevic*, IT-98-32-T, 'Judgment', 29 November 2002, para. 64.
[57] See Duch Judgment para. 509.
[58] *See* Closing Order, paras 1524-5.
[59] *See* Document No. **E-124/7.3**, 'Annex', 18 October 2012, ERN: 00852356-00852358, p. 3 (Section 5(a)).

extermination; (iii) persecution on political grounds; and (iv) other inhumane acts through attacks against human dignity, forced transfer and enforced disappearance.[60]

32. In February 2011, the Ieng Sary defence filed a request asking that portions of the Closing Order pertaining to JCE be struck because the common purpose pled therein was not criminal in nature. In its decision ('JCE Decision'), the Chamber endorsed case law from the ICTY and SCSL to the effect that the common purpose underlying a JCE need not be criminal as such, if – in competing formulations – the purpose 'amounts to', 'involves' or 'contemplates' the commission of a crime.[61] Turning to the Closing Order, the Chamber held that, as pled therein, 'the plan *involved the commission* of criminal acts by members of the JCE', and was therefore sufficient in light of the jurisprudence.[62]

iii. Offer of Proof Required: JCE I

33. The essence of JCE I is, as already noted, that the crime charged was *within the object* of the common plan, and that the Accused *shared the intent* of the person who personally perpetrated the crime.[63] In this case, the accused may therefore be held liable pursuant to JCE I only for those *specific crimes* within the object of the common plan and in respect of which his intent is proved.

34. The Chamber's holding in the JCE Decision – that the Closing Order properly pled that the common plan 'involved' the commission of criminal acts – does not alter this bedrock principle of JCE liability.[64] To begin with, the word 'involved' is ambiguous as to the precise nature of the relationship between the common purpose and the crimes alleged and especially the intent of the Accused in that regard. Moreover, the case law relied upon by the Chamber in the JCE Decision – the Appeals Chamber judgments in the *Brima* case at the Special Court for Sierra Leone ('SCSL') and the *Kvocka* case at the ICTY – has not purported to make any change to the standards applicable to JCE I.

35. Firstly, neither case actually applied JCE I. In *Brima*, the Appeals Chamber concluded that the Trial Chamber erred in law when it held that JCE had not been properly pled in the indictment, but did not attempt to evaluate the liability of the Accused in light of the

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60 *See* Document No. **E-124/7.3**, 'Annex', 18 October 2012, ERN: 00852356-00852358, p. 2 (Section 4).
61 *See* JCE Decision, para. 17.
62 *See* JCE Decision para. 19 (emphasis added).
63 *See* fn 56, *supra*.
64 The language in the Closing Order is even weaker as to the link between the common plan and the crimes alleged, asserting merely that the '*implementation* [of the plan] resulted in and/or involved' the commission of crime. *See* Closing Order, para. 1525.

common purpose alleged.[65] When, in the subsequent RUF case, the SCSL Trial Chamber *did* make factual findings on the basis of that JCE, it explained that the 'where the taking of power and control over State authority *is intended to be* implemented through the commission of crimes within the Statute, this may amount to a common criminal purpose'[66] – and that 'the means *agreed upon* to accomplish these goals entailed massive human rights abuses and violence against and mistreatment of the civilian population.'[67] Similarly, in *Kvocka*, the Trial Chamber applied JCE II, not JCE I;[68] when it *did* address JCE I, it described the standard as 'where all participants act pursuant to a common design and possess the same criminal intent.'[69] The Trial Chamber in *Haradinaj,* the only jurisprudential authority relied upon by the SCSL in *Brima*,[70] did much the same.[71]

36. Moreover, in both *Kvocka* and *Haradinaj* the common purpose pled was inextricable from the criminal conduct alleged. In *Haradinaj*, the indictment stated that the common purpose '*necessarily involved* the commission of crimes against humanity and violations of the laws or customs of war'.[72] Similarly, in *Kvocka*, the common purpose was not, as this Chamber asserted, to create 'a Serbian State within the former Yugoslavia',[73] but 'to rid the Prijedor area of Muslims and Croats as part of an effort to create a unified Serbian State.'[74] In both cases, the criminal conduct is inseparable from the common purpose; such is not true in this case, where the mere objective of achieving rapid socialist revolution *could have been* executed in a way that involved no criminal conduct at all.[75]

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[65] *Prosecutor v. Brima et al*, SCSL-04-16-A, 'Judgment', 22 February 2008 ('Brima Appeals Judgment'), para. 87. The Defence also notes that the *Brima* holding has been subject to substantial academic criticism. *See* G. Boas, J.L. Bischoff and N. L. Reid, International Criminal Law Practitioner Library, Volume I, Forms of Responsibility in International Criminal Law (2007) p. 132-133; W. Jordah and P. Van Tuyl, Failure to Carry the Burden of Proof, How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone, 606 8 J. Int'l Crim. Just. (2010) p. 8; *see* also generally J.Easterday, Obscuring Joint Criminal Enterprise Liability: The Conviction of Augustine Gbao by the Special Court of Sierra Leone, Berkley J. Int'l L. Publicist 3 (2009).

[66] *See Prosecuotor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT-005, 'Judgment', 25 February 2009 ('RUF Trial Judgment'), para. 1979.

[67] RUF Trial Judgment, para. 1980.

[68] *Prosecutor v. Kvocka et al.*, IT-98-30/1-T, 'Judgement', 2 November 2001, para. 268.

[69] *Prosecutor v. Kvocka et al.*, IT-98-30/1-T, 'Judgement', 2 November 2001, para. 267.

[70] The only authority relied upon by *Brima* aside from *Haradinaj* was the ICC Statute. However, the ICC has rejected JCE as a liability ground at the ICC, and specified that Art. 25(3) of the Rome Statute is 'a residual form of accessory liability.' *See Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-Corr, 'Decision on the Issuance of a Warrant of Arrest, 24 February 2006, paras. 300-340. It would therefore be incorrect to use Article 25(3) of the Rome Statute to interpret the scope of the common purpose.

[71] *Prosecutor v. Haradinaj et al.*, IT-04-84-T, 'Judgement', 3 April 2008, para. 138.

[72] *Prosecutor v. Haradinaj et al.*, IT-04-84, 'Second Amended Indictment, 26 April 2006, para. 26.

[73] *See* JCE Decision para. 17 (quoting para. 46 of the *Kvocka* Appeals Judgment).

[74] *See Kvocka* Appeals Judgment, para. 45. As already noted, in applying the *Brima* Appeals Judgment the Trial Chamber in RUF similarly included the criminal conduct within the common purpose.

[75] *See* para. 31, *supra*.

37. Fealty to the well-established standards applicable to JCE I therefore requires that, irrespective of the semantics of the definition of the common purpose, the Prosecution be required to prove the intent of the Accused with respect to the material elements of each of the crimes charged. The Co-Prosecutors must therefore establish: (i) the existence of a common purpose to implement rapid social revolution in Cambodia through a 'great leap forward', which included the commission of murder, extermination, persecution and other inhumane acts; (ii) that the Accused participated in, that is, made a significant contribution to, that common purpose; (iii) that the Accused *intended* that the implementation of the common plan *would include* the material elements of the crimes charged; and (iv) that the Accused had the specific intent to commit any crime charged of which such specific intent is an element.

D. Superior Responsibility

38. Article 29 of the ECCC Law provides that a superior may be held personally responsible for the crimes committed by his subordinates 'if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.'[76]

i. Superior Responsibility was Not Recognized Under Customary International Law in the Relevant Period

39. As other defence teams have previously argued, superior responsibility did not have customary status in the period between 1975 and 1977 because: (i) its elements were not defined with sufficient clarity in the post-Second World War case law; (ii) state practice was not consistent and uniform; and (iii) article 86 of Additional Protocol I to the Geneva Conventions did not reflect a rule of customary law.[77] The Defence concurs in and adopts these arguments.

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[76] The Chamber addressed Superior Responsibility in general terms in the Duch Judgment. *See* Duch Judgment, paras 538-544.

[77] Document No. **D-427/1/6**, 'Ieng Sary's Appeal Against the Closing Order, 25 October 2010, ERN 00617486-00617631, paras. 283-302; *see also*, Document No. **D-427/2/1**, 'Ieng Thirith Defence Appeal from Closing Order', 18 October 2010, ERN 00613874-00613905, paras 81-94.

40. With regard to the lack of clarity in the definition of superior responsibility,[78] the Defence notes additionally that even within the United States, case law prior to 1975 varied greatly, especially with regard to the applicable knowledge standard. For instance, in *Yamashita*, the US Supreme Court merely presumed the knowledge of the accused because the crimes were atrocious and widely spread.[79] By contrast in *Medina*, the US Court of Military Appeal applied a narrow actual knowledge standard pursuant to which even the presence of the accused at the scene was insufficient to establish his knowledge of the crimes alleged.[80] Only at the *ad hoc* tribunals did the definition of superior responsibility attain sufficient clarity[81] – a reality reflected in this Chamber's *exclusive* reliance in the Duch Judgment on that jurisprudence in articulating its definition.[82]

41. At best, the status of superior responsibility in 1975 was uncertain. In accordance with the principle of *in dubio reo*, the Chamber must hold that it is inapplicable to this case.[83]

ii. If Superior Responsibility Did Exist, It Was Pursuant to a Limited Definition

Legal Obligation to Act

42. In addition to the three elements of superior responsibility reflected in the Duch Judgment,[84] post-Second World War case law required that the superior have had a legal obligation to act. As Judge Röling held in his dissent to the IMTFE Judgment:

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78 Elies Van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press: 2003 ('Van Sliedregt, 2003'), p. 135 ('The skeleton concept of superior responsibility that arises from the disparate digest of Second World War [case-law] consists of three aspects: i) a *functional* aspect; a superior's position must entail a duty to act, ii) a *cognitive* aspect; a superior must have known, or should have known of the crimes, and iii) an *operational* aspect; a superior must have failed to act.' Greater specifity is elusive, as differences within this 'disparate digest' of case law 'resulted in wide variations in the scope of superior responsibility.'); *Prosecutor v. Halilovic*, Case No. IT-01-48-T, 'Judgment', Trial Chamber, 16 November 2005 ('Halilovic Trial Judgment'), para. 48 (noting that the criteria for superior responsibility were not consistently and uniformly interpreted).

79 *See United States v. Yamashita*, 327 US 1 (1946) ('Yamashita'). Justice Murphy, dissenting, argued that the majority decision amounted to no knowledge requirement at all. *See id.*, pp. 39-40.

80 *United States v. Medina,* in L. Friedman, *The Law of War. A Documentary History*, Volume II, Random House: 1972, p. 1732.

81 *See e.g.* Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press : 2010, pp. 388-389.

82 Duch Judgment, paras 538-544.

83 *See* Antonio Cassese ed., The Oxford Companion to International Criminal Justice, Oxford University Press: 2009, pp. 440-441 *(In dubio pro reo* 'is the principle [...] requiring, in the case of conflicting interpretations of a rule, then construction that favors the accused.'); *see also Prosecutor v. Akayesu,* Case No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, paras. 500-501; *Prosecutor v. Krstic,* Case No. IT-98-33-T, Judgment, Trial Chamber, 2 August 2001, para. 502.

84 Those elements reflect *today's* definition of superior responsibility. *See e.g. Prosecutor v. Delalic et al*, Case No. IT-96-21-T, 'Judgment', Trial Chamber, 16 November 1998 ('Celebici Trial Judgment'), para. 346, later confirmed on appeal. *Prosecutor v. Delalic et al*, Case No. IT-96-21-A , 'Judgment', Appeals Chamber, 20 February 2001, para. 214.

> One could argue that this duty exists, as soon as knowledge and power are apparent. International law may develop to this point. At this moment, however, one has to look for the specific obligation, placed on government officials and military commanders, which makes them criminally responsible for "omissions".[85]

43. Judge Röling's view is vindicated in a series of leading sources. The American delegation to the 1919 Peace Conference,[86] US Supreme Court in *Yamashita*,[87] and NMT *Medical* Judgment all considered that a legal obligation to act is a requirement of superior responsibility.[88] It is moreover a general principle of law that criminal responsibility for omissions arises only when a positive duty to act exists, is enforceable through a domestic penal code, and is 'widely publicized and known'.[89] That requirement has accordingly been recognized at the ICTR[90] and ICC[91] as an aspect of superior responsibility.

44. Although the legal obligation of military commanders to prevent and punish crimes committed by their subordinates is widely recognized, '[i]t is much less clear whether ... civilian superiors are also in certain circumstances affected by the obligation...and, if so, by what rationale?'[92] Presumably for this reason, Judge Röling argued that 'the

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[85] 'Opinion of Member for the Netherlands (Mr. Justice Röling)', para. 60, in Neil Boister & Rober Cryer ed., *Documents on the Tokyo International Military Tribunal – Charter, Indictment and Judgments*, Oxford University Press: 2008, p. 707 ('Dissenting Opinion of Justice Röling').

[86] Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of the War, and on the Enforcement of Penalties, 29 March 1919, cited in Dissenting Opinion of Justice Röling, pp. 705-706 ('[t]o establish responsibility in such cases... [n]either knowledge of commission nor ability to prevent is alone sufficient. **The duty or obligation to act is essential.**') (emphasis added).

[87] *See Yamashita*, pp. 14-15 (considering whether 'the law of war imposes on an army commander the duty to take such appropriate measures as are within his power to control his troops'), 43-44 (Justice Rutledge, dissenting: liability requires the accused 'knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so.').

[88] *United States v. Karl Brandt et al.*, Case No. 1, 'Judgment', in Trials of War Criminals Before the Nuernberg Military Trinunals, Volume II, pp. 193-194, 212-213.

[89] Alexander Zahar & Göran Sluiter, *Intenational Criminal Law,* Oxford University Press : 2008, p. 259 ('Zahar & Sluiter'). *See also*, Dissenting Opinion of Justice Röling, p. 704 ('[t]he responsibiliy for 'omissions' is a very restricted one, in domestic law recognized in special cases where the legal duty was clearly indicated.').

[90] *Prosecutor v. Mpambara,* Case No. ICTR-01-65-T, 'Judgment', Trial Chamber, 11 September 2006, paras. 25, 27 ('liability for failing to discharge a duty to prevent or punish requires proof that: (i) the Accused was *bound by a specific legal duty to prevent a crime*; (ii) the accused was aware of, and willfully refused to discharge his legal duty.'). See also *Prosecutor v. Rutaganira*, Case No. ICTR-95-1C-T , 'Judgment and Sentence', Trial Chamber, 14 March 2005, paras 67-91; *Prosecutor v. Ntagaerura et al*, Case No. ICTR-99-46-T, 'Judgment', Trial Chamber, 1 September 2009, para. 659-660. The ICTY has held more generally that omission liability requires a duty to act. *See Prosecutor v. Blaskic*, IT-95-14-A, 'Judgment', Appeals Chamber, 29 July 2004, para. 663.

[91] *Prosecutor v.Bemba Gombo*, Case No. ICC-01/05-01/08, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo', 15 June 2009, para. 405 citing Celebici Trial Judgment, para. 334 (superior responsibility is best understood '"against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act".').

[92] Zahar & Sluiter, p. 260.

responsibility for not preventing violations of the rules of war should be limited to these officials especially indicated in the pertinent domestic law.'[93]

45. The Cambodian criminal code did not provide for superior responsibility at the relevant time.[94] Unless a positive duty to act can be identified in the domestic law as it existed, superior responsibility is therefore inapplicable to non-military superiors.

Non-military superiors

46. If a duty on the part of non-military superiors to act *can* be identified, the doctrine of superior responsibility should nevertheless be applied restrictively to such superiors,[95] who should be held liable only 'to the extent that they exercise a degree of control over their subordinates...similar to that of military commanders.'[96]

Remoteness

47. Superior responsibility in the relevant period applied only to the conduct of *direct subordinates*. Leading post-Second World War cases alleging superior responsibility *all* concerned liability for the conduct of the immediate subordinate of the accused;[97] the concept of superior responsibility through intermediaries was not recognized.[98] State practice in the relevant period similarly provides little or no support for such liability.[99]

48. Van Sliedregt argues that superior responsibility should be imposed only:

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93 Dissenting Opinion of Justice Röling, p. 707.

94 Document No. **D-427/1/6**, 'Ieng Sary's Appeal Against the Closing Order, 25 October 2010, ERN 00617486-00617631, para. 293.

95 The *Akayesu* judgment held that 'the application of [superior orders] to civilians remains *contentious*.' The Chamber relied on Judge Röling's dissent in that regard: 'a Tribunal should be very careful in holding civil government officials responsible for the behaviour of the army in the field. Moreover, the Tribunal is here to apply the general principles of law as they exist with relation to the responsibility for "omissions" ... this responsibility should only be recognized in a very restricted sense.' (*Prosecutor v. Akayesu,* Case No. ICTR-96-4-T, 'Judgment', Trial Chamber, 2 September 1998, paras. 490-491).

96 *See e.g.*, Celebici Trial Judgment, para. 378; Zahar & Sluiter, p. 265 ('the legal notion of effective control requires proof that the defendant belonged to a purposeful organization of individuals in the form of a hierarchical unit; that there existed an acknowledged chain of command and a general accepted practice of issuing and obeying orders; that those alleged to have been the subordinates of the accused knew that disobedience or insubordination could trigger a disciplinary response; and that the superior had the means to effectively suppress or punish unauthorized action.').

97 *See e.g, Yamashita*; *United States v. Oswald Pohl et al.*, Case No. 4, 'Judgment', in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume V; *United States v. Wilhelm Von Leeb et al.*, Case No. 12, 'Judgment', in Trials of War Criminals Before the Nuernberg Military Tribunals, Volume XI; *United States v. Wilhelm List et al.*, Case No. 7, 'Judgment', in *Id.*

98 Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford University Press: 2012 ('Van Sliedregt, 2012'), p. 194; Guenael Mettraux, *The Law on Command Responsibility*, Oxford University Press: 2009, pp. 135-136 ('Mettraux').

99 *See* Mettraux, p. 135; Van Sliedregt, 2012, p. 194. The ICTY has also expressed reservations in that regard. *See* Celebici Trial Judgment, para. 377 ('great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote').

> as long as there is reprehensible conduct on the side of the superior that can be linked to the subordinate's crime. Omission liability is by nature difficult to circumscribe because of its 'hypothetical causal link'; there is no natural cause-and-effect relationship. It is in hindsight that one has to establish what a person could have prevented *had* he or she intervened. Such reasoning carries a risk of broadening liability [,which] is even more pertinent with multiple links of omission liability.[100]

49. For these reasons, the Chamber should apply superior responsibility only to the conduct of direct subordinates.[101]

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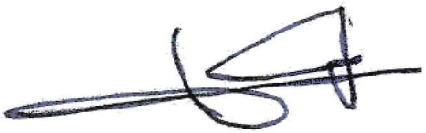

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[100] Van Sliedregt, 2012, p. 194.

[101] The ICTY Appeals Chamber implicitly accepted the concept of multiple superior responsibility in the *Oric* case. (*Prosecutor v. Oric*, Case No. IT-03-68-A, 'Judgment', 3 July 2008, para. 20). In addition to the fact that ICTY case law does not establish liability as of 1975, that decision has been criticized as unsupported by customary law even as it existed in the 1990s. *See* Van Sliedregt, p. 194; Mettraux, pp. 135-136.