BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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MAY IT PLEASE THE TRIAL CHAMBER

I. Law applicable to the crimes alleged in Case 002/01: crimes against humanity

1. Pursuant to the principle of legality, the law applicable to the present trial is the law that was in force between 17 April 1975 and 7 January 1979.[1] For the purposes of the present submissions, it is important to determine the definition of crimes against humanity and the alleged forms of responsibility that will be applicable in respect of the temporal jurisdiction of the ECCC.

2. In the *Duch* Appeal Judgment, the Supreme Court Chamber drew attention to the Trial Chamber's duty to ensure that its interpretation of the definition of crimes against humanity and its application did not constitute a retroactive amendment of the definition that was in force between 1975 and 1979.[2]

3. In the absence of a text, customary international law applies. Indeed, after Nuremberg, it was only in 1996 that the International Law Commission established by the United Nations General Assembly ("General Assembly") prepared a Draft Code of Crimes Against the Peace and Security of Mankind, defining what constituted, in its view, a crime against humanity in customary international law. That definition "*is drawn from the Charter of the Nürnberg Tribunal, as interpreted and applied by the Nürnberg Tribunal, taking into account subsequent developments in international law since Nürnberg.*"[3] Although the subsequent jurisprudence of

[1] KAING Guek Eav, *alias Duch* trial, *Appeal Judgment,* **F28**, 3 February 2012, ("*Duch* Appeal Judgment"), para. 97: "*Chambers in this Tribunal are under an obligation to determine that the holdings on elements of crimes or modes of liability therein were applicable during the temporal jurisdiction of the ECCC. Furthermore, they must have been foreseeable and accessible to the Accused. In addition, the Supreme Court Chamber stresses that careful, reasoned review of these holdings is necessary for ensuring the legitimacy of the ECCC and its decisions.*"

[2] *Ibid.*, para. 100: "*the exercise of jurisdiction by the ECCC is limited by the definition of crimes against humanity as it stood under international law at the time of the alleged criminal conduct. In other words, Article 5 of the ECCC law with its catalogue of crimes against humanity over which the ECCC has a priori jurisdiction may not be interpreted as a retroactive amendment to that definition.*"

[3] Report of the International Law Commission ("ILC") on the work of its forty-eight session, 6 May – 26

international criminal tribunals can, to a certain extent, be useful in the interpretation of the definition of crimes against humanity, the Supreme Court Chamber emphasized that it was not binding on the ECCC and should be handled with care.[4]

4. Mr KHIEU Samphan is charged with crimes against humanity (murder, extermination, persecution on political grounds and other inhumane acts, such as attacks on human dignity, forced transfers and forced disappearances). Article 5 of the ECCC Law provides that such offences (qualified as underlying) constitute crimes against humanity if they were committed "*as part of* ***a large-scale or systematic attack against a civilian population on national, political, ethnical, racial or religious grounds***".[5] This is what the Prosecution has to establish.

A. The *actus reus*: the characteristics of the attack

5. All the definitions, regardless of their era, concur on the fact that the attack must: a) be widespread or systematic and, b) be directed against a civilian population. However, there is no consensus as to the context of the attack.

6. For the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the attack must have been committed as part of an armed conflict.[6] For its part, the International Criminal Tribunal for Rwanda ("ICTR") requires that the attack must have been carried out on discriminatory grounds, that is, on national, political, ethnical, racial and religious grounds.

July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No. 10, Document:-A/51/10, Draft Code of Crimes Against the Peace and Security of Mankind ("ILC Draft Code") p. 47.
[4] *Ibid.*, para. 97.
[5] Article 5 of the ECCC Law ("ECCC Law").
[6] See Article 5 of the ICTY Statute: "*The International Tribunal shall have the power to prosecute persons responsible for the following crimes committed in armed conflict, whether international or internal in character, and directed against any civilian population.*"; *The Prosecutor v. Dragoljub Kunarac et al*, IT-96-23 & IT-96-23/1-A, Appeals Judgment, 12 June 2002, ("*Kunarac* Appeal Judgment"), Footnote 99; *The Prosecutor v. Momcilo Perisić*, IT-04-81-T, Judgement, 6 September 2011, ("*Perisić* Judgment"), para. 80, in which the Chamber explains: *"[i]n order to constitute crimes against humanity under Article 5 of the Statute, it is required that (i) there was an armed conflict, and (ii) the acts of the perpetrator were geographically and temporally linked with the armed conflicts.*"

7. Article 5 of the ECCC Law concurs with the ICTR's definition, which provides that the attack must have been carried out on discriminatory grounds.

8. However, in their Final Submission, the Co-Prosecutors rely on the ICTY jurisprudence, in particular the *Kunarac* Appeal Judgment, to assert that "*[t]he notion of "attack" for the purposes of establishing crimes against humanity is not limited to the use of armed force ; it encompasses any mistreatment of a civilian population. An "attack" need not be a military attack or part of an armed conflict.*"[7] Yet, the *Kunarac* Appeal Judgment held that: "*[t]he term "attack" in the context of a crime against humanity carries a slightly different meaning than in the laws of war. In the context of a crime against humanity, "attack" is not limited to the conduct of hostilities. It may also encompass situations of ill-treatment of persons taking no active part in hostilities, such as someone in detention. However, both terms are based on a similar assumption, namely that war should be a matter between armed forces or armed groups and that the civilian population cannot be a legitimate target.*"[8] Accordingly, the requirement of an armed conflict applies to all cases, and it would be wrong to assert, as the Co-Prosecutors are doing, that the attack may consist solely of ill-treatment of the civilian population in the absence of any armed conflict.

9. Consequently, to the extent that crimes against humanity may be committed in peace time, the addition of another criterion is necessary to distinguish crimes against humanity from common law crimes.[9] Thus, in the absence of armed conflict, the question that has arisen is what is meant by attack directed against the "*civilian population*"?

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[7] Co-Prosecutors' Rule 66 Final Submission, **D390**, 16 August 2010, para. 1244.
[8] *The Prosecutor v. Dragoljub Kunarac et al*, IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, ("Kunarac Judgment), para. 416. This definition was confirmed in the *Kunarac* Appeal Judgment, Footnote 157.
[9] Preparatory Committee on the establishment of an international criminal court, A/AC.249/CRP.2/add.3/Rev.1, 9 April 1996: "*[a] number of delegations attributed particular importance to the general criteria for crimes against humanity to distinguish such crimes from ordinary crimes under national law and to avoid interference with national court jurisdiction with respect to the latter, with the discussion focusing primarily on the criteria contained in article 3 of the Rwanda Tribunal Statute.*", p. 1.

10. The ILC was of the view that customary international law did not require the existence of any link between an armed conflict and a crime against humanity. However, it found that to be characterized as a crime against humanity, the offence must have been committed at "*the instigation or direction of a Government or any organization or group*".[10] In *Bagilishema*, the ICTR relied on the ILC's definition to infer that a widespread or systematic attack, by definition, requires the existence of a plan.[11] The ICTR added that the requirement that the attack must have been directed against a civilian population also presupposes the existence of some kind of plan and that the discriminatory element of the attack is, by its very nature, only possible as the consequence of a policy.[12]

11. These three characteristics of the attack, which form the basis for the ICTR's conclusions, that is, a "widespread or systematic" attack, "directed against a civilian population", and "the discriminatory element" are all present in Article 5 of the ECCC Law.

12. To establish the *actus reus* for crimes against humanity, the Prosecution must therefore prove a) that the alleged crimes were committed;[13] b) that they were committed as part of an attack; c) that the attack was widespread or systematic; d) that it was directed against a civilian population; e) that it was carried out on national, political, ethnical, racial or religious grounds; f) that it was carried out in application of or in furtherance of the policy of a State or an organization whose aim was to carry out such an attack.

B. The *mens rea*: link between the accused's knowledge of the attack and the acts committed as part of it

[10] ILC's Draft Code, p. 48.
[11] *The Prosecutor v. Ignace Baglishemana*, ICTR-95-1A-T, Judgment, 7 June 2001, Footnote 71.
[12] *Ibid.*, para. 78.
[13] See, for example, as regards murder: *The Prosecutor v. Milan Milutinović et al.*, IT-05-87-T, Judgment, 26 February 2009, ("*Milutinović* Judgment") in which the Chamber held that: "*in order to prove that murder as crime against humanity was committed, the Prosecution must prove (a) the actus reus and mens rea for murder and (b) the general requirements of crimes against humanity*", para. 173.

13. What remains to be considered is the situation in which the accused is not the principal perpetrator of the crimes. This situation corresponds to that of the present trial.

14. In the *Duch* Judgment, the Trial Chamber relied on the *Kunarac* jurisprudence in defining the *mens rea* for the attack.[14] Accordingly, it held that *"[t]he acts of the accused must, by their nature or consequences,* ***objectively be a part of the attack****, such that they are not wholly divorced from the context of the attack."*[15] However, in both *Kunarac* and *Duch*, the accused were direct perpetrators of the crimes charged.

15. In its judgment in the present case, the Chamber should therefore determine the criteria that may be used to establish the link between the accused and the crimes charged.

16. The jurisprudence of international criminal courts has, for a long time, failed to make the distinction between the *mens rea* of the accused and that of the principal perpetrator of the crime. Such failure has been criticized in legal doctrine[16] and then corrected by the jurisprudence in the *Milutinović* Judgment.[17]

17. In *Milutinović*, the ICTY held that for a crime against humanity to have been committed, the following requirements must be met: 1) the acts of the principal perpetrator of the crimes must be part of the attack,[18] and, 2) the accused—whether or not he or she is the principal perpetrator of the crimes—must have known of the attack.[19]

18. Furthermore, still in the *Milutinović* case, the ICTY held that where the accused is not the principal perpetrator of the crimes, the Prosecution must establish the existence of

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[14] KAING Guek Eav, *alias Duch* Trial, Judgment, **E188**, 26 July 2010, ("*Duch* Judgment"), paras. 318-319.
[15] *Duch* Judgment, para. 318.
[16] See for example, Boas, Bischoff et Reid, *International Criminal Law Practitioner Library, Vol. II - Elements of crimes under International Law*, Cambridge University Press, (2011), pp. 35-41. (annexed Document).
[17] *Milutinović* Judgment, paras. 153 to 162.
[18] *Ibid.*, para. 152.
[19] *Ibid.*, paras. 153 to 156.

a sufficiently **direct or close** link between the accused and the commission of the criminal offence. Where the link is over-stretched, the ICTY has held that no crime against humanity was committed, as would be the case in aiding and abetting.[20] The ICTY has held that such a link is best established when the accused had the **intent** to commit the crime, that is, when he or she committed, planned, ordered or instigated it.[21]

19. Accordingly, in the present trial, an underlying offence could be characterized as a crime against humanity, even if the principal perpetrator of the offences did not know the context in which he or she carried out the acts, so long as the accused who planned, ordered or instigated the conduct of the perpetrator (or the member of the joint criminal enterprise) knew that the acts which constituted the alleged crimes were part of the attack in question.[22]

20. It is important to note here that the ICTY has particularly emphasized the requirement that a direct link between the crimes and the accused be established.[23] Thus, it has made the clear distinction between this analysis and the issue of modes of responsibility.

21. The Judges should therefore proceed in two stages: first, they should determine whether the requirements of the *mens rea* for crimes against humanity are met, and

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[20] *Ibid.*, para. 157.
[21] *Ibid.*, para. 158: [original: "*for an underlying offence to be categorized as a crime against humanity on the basis of an individual's knowledge of the context in which it occurs, the relationship between the individual and the commission of the offence must be sufficiently direct or proximate. In the view of the Trial Chamber, the sufficient directness or proximity of the said relationship is best caught by the requirement that the individual intended that the offence be committed, inherent in four forms of responsibility provided in the Statute: commission, planning, ordering, and instigating. Under all of these forms of responsibility, the knowledge of the context of an offence is part of the mental process resulting in the commission of the offence in question. By contrast, where only individuals whose state of mind does not have to reach the level of intent- such as an aider and abettor or a superior who fails to prevent or punish- possess this knowledge, the offence should not be categorized as a crime against humanity.*"].
[22] *Ibid., para. 158: [original: "even if the physical perpetrator lacks knowledge of the context in which his conduct occurs, where the planner, orderer, instigator of that conduct, or member of the joint criminal enterprise knows that it forms part of the attack.*"].
[23] *Ibid.*, para. 159: [original: "*The Chamber stresses here that this analysis should not be confused with the question of whether the accused bears criminal responsibility for a particular crime against humanity. Instead, the above is simply a determination as to whether such a crime was committed at all.*"].

secondly, they should determine whether the forms of responsibility are applicable. The analysis of the *mens rea* cannot be subsumed in the analysis of forms of responsibility.

C. Law applicable to underlying offences: the case of persecution on political grounds and other inhumane acts

22. In accordance with the principle of non-retroactivity of criminal law, Mr KHIEU Samphan can only be tried for acts punishable within the temporal jurisdiction of the ECCC and which are in conformity with the definition applicable at the time.

23. The underlying offences of "persecution on political grounds" and "other inhumane acts" are indefinite categories.[24] However, to be characterized as crimes against humanity, they must be of the same degree of gravity as the other underlying offences.[25]

a. Persecution on political grounds

24. The term "persecution" encompasses a broad range of acts. According to Article 6 (c) of the Charter of the Nuremberg Tribunal, crimes against humanity are "(…) *persecutions on political, racial or religious grounds* ***in execution of or in connection with any crime within the jurisdiction of the Tribunal****, whether or not in violation of the domestic law of the country where perpetrated.*"[26] Furthermore, at Nuremberg, the judges were of the view that barring such a link, the persecutions of Jews before 1939--the date on which the war began-- as heinous as they were, did not constitute crimes against humanity.[27] The Rome Statute also defines persecution "*in*

[24] *The Prosecutor v. Blagojević et Jokić*, IT-02-60-T, Judgement, 17 January 2005, ("*Blagojević* Judgement"), para. 624.
[25] *Milutinović* Judgment, paras. 178-179 ; *The Prosecutor v. Tihomir Blaskić*, IT-95-14-A, Appeal Judgement, 29 July 2004, ("*Blaskić* Appeal Judgement"), para. 131.
[26] Charter of the Nürnberg Tribunal, ("Charter of the Nürnberg Tribunal", London, 8 August 1945.
[27] International Military Tribunal, 1 October 1946: "*The policy of persecution before the war of 1939, which were likely to be hostile to the Government, was most ruthlessly carried out. (...) To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were*

connection with any act referred to in this paragraph or any other crime within the jurisdiction of the Court".[28]

25. Contrary to the practice at both tribunals, the ICTY judges do not require the existence of a link between the act of persecution and another international crime. The ILC Draft Code is mute on this question. It is pointless to engage in the debate on whether customary international law still required such a link during the period from 1975 to 1979. In fact, Cambodia is a State party to the International Criminal Court and the law that is applicable to Cambodia today as regards crimes against humanity is the Rome Statute. The principle of legality envisages retroactive application of the more lenient criminal law. Similarly, Article 9 of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea provides that the definition applicable to the underlying offences is that set out in the Rome Statute.[29]

26. In these conditions, the onus is on the Prosecution to establish: a) that the acts of persecution are of the same degree of gravity as the other underlying offences; b) that there exists a link between the acts of persecution and any other underlying offence within the jurisdiction of the ECCC.

b. <u>Other inhumane acts (forced transfers and disappearances, attacks on human dignity)</u>

27. The ILC recognizes that an act or omission comes under the category of other inhumane acts when the following criteria are met: a) it is similar in gravity to the

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done in execution of, or in connection with, any such crime."
[28] Article 7 (1) (*h*) of the Rome Statute.
[29] Article 9 of the Agreement provides that: "[*t*]*he subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of [...] crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court [...].*"

other underlying offences; "*b) the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity.*"[30]

28. However, fulfilling these criteria does not suffice for the category "other inhumane acts" to be converted into an omnibus provision that derogates from the principle of legality.

29. Furthermore, as regards forced disappearance, it is important to emphasize here that even if the ILC Draft Code recognized the existence of forced disappearance as a crime against humanity, it was careful to point out that "*[f]orced disappearance was not included as a crime against humanity in the previous instruments. Although this type of criminal conduct is a relatively recent phenomenon, the Code proposes its inclusion as a crime against humanity because of its extreme cruelty and gravity.*"[31]

30. The ILC's definition of forced disappearances is drawn from the Declaration on the Protection of All Persons from Enforced Disappearances adopted by the General Assembly in 1992 and from the 1994 Inter-American Convention on Forced Disappearance of Persons.[32]

31. These last two instruments were respectively adopted 13 and 15 years after the temporal jurisdiction of the ECCC. Hence, the crime of "forced disappearances" was not part of customary international law during the period from 1975 to 1979. Similarly, it was not defined in the 1956 Cambodian Penal Code.

32. Accordingly, since the crime is not defined in respect of the ECCC's temporal jurisdiction and by virtue of the principle of non-retroactivity of criminal law, the Chamber cannot consider this crime even by characterizing it as "other inhumane acts".

[30] ILC's Draft Code, p. 51.
[31] ILC's Draft Code, p. 51.
[32] *Idem*.

II. Law applicable to forms of responsibility recognized in Case 002/01

A. Individual criminal responsibility for participation in a joint criminal enterprise ("JCE")

33. This section considers the scope of the law applicable to the basic form of joint criminal enterprise. In fact, the Co-Investigating Judges and Co-Prosecutors stretch this form of responsibility to the extent of presenting the Democratic Kampuchea ("DK") government as a huge joint criminal enterprise. Such a characterization is contrary to the applicable law. It is submitted here that the policies adopted by the DK government and charged as part of the present trial should be specifically identified by the Co-Prosecutors who must establish the inherently criminal nature of each of the policies. The Co-Prosecutors must also establish the participation of the accused in the drafting and implementation of each of the said policies

a. Elements of joint criminal enterprise

34. In its decision on JCE, the Chamber pointed out that it would not consider JCE III because it was not a general principle of law between 1975 and 1979.[33] Consequently, only the basic and systemic forms of JCE are applicable before the Chamber.

35. The ICTY and ICTR identified, in a relatively uniform manner, the *actus reus* on which the theory of joint criminal enterprise is based. This jurisprudence shows that the *actus reus* is the same for the three categories of JCE. In the *Duch* Judgment, the Chamber defined the scope of the case law applicable to JCE. It held that there must be a common purpose that "involves the commission" of a crime within the jurisdiction of the ECCC.[34] The Chamber held that it is not necessary for this purpose to have been previously arranged or formulated: "*It may materialize*

[33] Decision on the Applicability of Joint Criminal Enterprise ("Trial Chamber Decision on JCE"), **E100/6**, 12 September 2011, para. 29.
[34] *Duch* Judgment, para. 508 ; *The Prosecutor v. Brđanin*, IT-99-36-A, Appeal Judgment, 3 April 2007, para. 364.

extemporaneously and be inferred from the facts."[35] Lastly, the Chamber inferred that the participation of the accused in the common purpose is required: "*[t]his participation need not involve the commission of a specific crime but may take the form of assistance to, or contribution, to the execution of the common purpose*."[36]

36. The *mens rea* varies according to the category of JCE involved. For the basic form (JCE I), the Chamber laid down that it suffices to establish that all the co-perpetrators had a common intent to commit a specific crime.[37] In the case of the systemic form (JCE II), it must be established that the accused had personal knowledge of the system of ill-treatment and that he had the intent to contribute to the functioning of the system. Lastly, as regards the broad form (JCE III), the accused must have had the intent to contribute to the implementation of the criminal purpose aimed at by the group, it being understood that "*the accused must be aware that the crimes outside of the common plan are a natural and foreseeable consequence of the plan and must have willingly taken this risk*."[38]

b. <u>Strengthening the distinction between the basic, systemic and extended forms of JCE</u>

37. The distinction between the *mens rea* for the basic and extended forms of JCE is similar to the distinction made in domestic legal systems between the different forms of *mens rea*. Thus, in French criminal law, there is a distinction between willful misconduct and potential misconduct (*dol direct* and *dol éventuel).* In the first case, "[TRANSLATION] *to act with willful intent or malice is to gear one's action towards a given purpose*."[39] However, "[TRANSLATION] *when the agent –without seeking in*

[35] *Duch* Judgment, para. 508.
[36] *Duch* Judgment, para. 508.
[37] See *Duch* Judgment, para. 508, para. 509 and the Trial Chamber Decision on JCE, para. 15. See also *The Prosecutor v. Vasiljević*, IT-98-32-A, Appeal Judgment, 25 February 2004, ("*Vasiljević* Appeal Judgment"), para. 101 ; *The Prosecutor v. Ntakirutimana et Ntakirutimana*, ICTR-96-10-A and ICTR 96-17-A, Appeal Judgment, 13 December 2004, para. 467 ;
The Prosecutor v. Kvočka et al, IT-98-30-/1-A, Appeal Judgment, 28 February 2005, ("*Kvočka* Appeal Judgement"), para. 82 ; *The Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgment, 22 March 2006, para. 65.
[38] *Duch* Judgment, para. 509: citing the *Vasiljević* Appeal Judgment, para. 101.
[39] Yves Mayaud, *Droit Pénal Général*, Presses Universitaires de France, (2004), p. 179.

any way the harmful results of the acts -simply foresaw the results as a possibility, this is called potential misconduct."[40]

38. The criminal intent of a participant in a basic form of JCE is inferred from the criminal nature of the purpose sought by the participant. Hence, when the common purpose is to commit a crime, the proof of intent is inferred from the accused's participation in the enterprise.[41]

39. As an example of how the basic form of JCE operates, in its *Duch* Judgement the Chamber took the example of a plan to kill others conceived by a group of people, each of whom enacts a different role, but each of whom has the intent to kill.[42] In this example, it is clear that the purpose – the plan – and the crime falling under the jurisdiction of the ECCC converge: in both cases it is a question of murder. In this case, the intent to participate in the common plan is criminal because the common plan is intrinsically criminal. In other words, it is because the common plan is criminal, that a criminal intent can be inferred from any act seeking to implement this plan. Hence, with regard to the first form of JCE, the murderous intent of the participant can be logically inferred from any act aiming to materialise the plan to kill.

40. The mental element of the second form of JCE also appertains to the notion of willful misconduct: it is necessary to demonstrate that the accused person had personal knowledge of the system of ill-treatment as well as the intent to further this system. This mode of participation is used in accounting for the direct participation of an accused person in a system of ill-treatment, a camp for instance, in which crimes falling under the jurisdiction of the relevant court are committed in a regular and systematic manner. This mode of participation, which

[40] Bernard Bouloc, *Droit Pénal Général*, Edition Dalloz, (2007), p. 246.
[41] *Blagojević* Judgment, para. 703. In this case, the Trial Chamber held that: "*[t]he first category of joint criminal enterprise requires proof that all participants shared the same criminal intent. It is necessary to establish that* ***the accused voluntarily participated in the enterprise and intended the criminal result***."
[42] *Duch* Judgment, para. 507

would amount to considering the entire DK regime as a "system of ill-treatment", does not apply to the current case.

41. The third form of JCE makes it possible to ascribe to the participant the harmful consequences of effecting the common purpose which, though outside the common design, were foreseeable. There is hence no equivalence between the common purpose and the crimes charged. Subsequently, and contrary to the first form of JCE, we cannot logically infer from the accused person's participation in the plan a criminal intent to commit crimes outside the common design since the participant specifically does not intend to commit these crimes. Hence, if there is no equivalence between the purpose and the crimes committed, the characterisation of the mental element can only be potential misconduct [*dol éventuel*]. In other words, if the purpose does not consist in committing crimes, the third form of JCE is the only one that applies.

42. Yet in its Decision relative to the applicability of JCE the Chamber found, as the Pre-Trial Chamber[43] did, that the third form of JCE (extended form) "*cannot be considered to have been a general principle of law between 1975 and 1979.*"[44] Hence solely the first form of *mens rea* [*dol direct*] can be used to characterise the criminal intent of a participant in a JCE within the framework of Case 002/01. Yet, for the reasons explained prior, in order to infer a criminal intent [*dol direct*] from the participation in a common plan it is necessary for that plan to have been intrinsically criminal. It is therefore necessary to define the confines of the plans(s) of the alleged JCE in Case 002/001.

[43] **D97/15/9**, Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 87
[44] Decision on the Applicability of Joint Criminal Enterprise, para. 29

c. Characterisation of the criminal purpose in Case 002/01

43. With regard to the nature of the common purpose, the Closing Order states that "*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 falling within the jurisdiction of the ECCC.*"[45]

44. Hence, "*[t]o 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 [...].*"[46] Within the framework of Case 002, these policies are the following: 1) Repeated movements of the population from towns and cities to rural areas; 2) Establishment and operation of cooperative and worksites; 3) Reeducation of "bad elements" and "enemies", both inside and outside the Party ranks; 4) The targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families; 5) Regulation of marriage.[47]

45. In its Decision on the Applicability of Joint Criminal Enterprise, the Trial Chamber noted that: *"[a]lthough the plain language of this paragraph asserts that the purpose of the plan was not* ***entirely*** *criminal, it clarifies that its implementation involved the commission of crimes within the jurisdiction of the ECCC.*" [48] The Decision states that: "*[i]n this regard, it is sufficient to show that the Accused participated in some way in the JCE, and that this participation*

[45] **D427,** Closing Order, 15 September 2010, para. 1524
[46] *Ibid.*
[47] *Ibid.*, para. 1525
[48] Decision on the Applicability of Joint Criminal Enterprise, para. 19

either amounts to or involves the commission of a crime but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."[49]

46. Relying on the *Prosecutor vs. Brima, Kamara and Kanu*[50] and on *Prosecutor vs. Kvočka*[51] cases, the Chamber stated that "*[t]he case law of other international tribunals has consistently found that the common plan forming part of the joint criminal enterprise need not be criminal in nature so long as crimes* ***are contemplated*** *as a means of bringing the common plan to fruition.*"[52]

47. The Court's reasoning may appear unclear and should be clarified. Indeed, two eventualities come to mind: either the purpose **implies**[53] the commission of crimes, in which case the purpose is **intrinsically** criminal, or the commission of crimes is **contemplated**[54] in the process of the implementation of a political plan that is lawful *per se*.

48. In the first case, saying that the purpose of the DK leaders to establish a communist state in Cambodia *implied* the commission of crimes would signify that participation in the enterprise was intrinsically criminal. Indeed, this approach supposes equivalence between the purpose and the crimes committed: it would thus have been necessary for the purpose of this political project *to be* the commission of crimes. In this case, if the project to create a communist state in Cambodia was criminal *per se*, any act on the part of any participant geared at establishing the DK regime would have justified the assumption of intent to commit the crimes committed between 1975 and 1979. It is clear that such an approach is not satisfactory; it short-circuits the debate by inferring criminal

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[49] *Ibid.*
[50] *Prosecutor vs. Brima, Kamara and Kanu* , SCSL-2004-16-A, Appeal Judgment, 3 March 2008, ("*Brima*" Appeal Judgment)
[51] Kvočka Appeal Judgment, 28 February 2005
[52] Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), para. 17.
[53] The French dictionary *Larousse* defines the verb "impliquer" [to imply] as "supposing and necessarily containing the existence of something else, having something else as a necessary and logical outcome."
[54] The French dictionary *Larousse* defines the verb "envisager" [to contemplate] as: "planning a project, examining something, considering something, taking something into account."

intent from the mere fact of having been a member of the DK government. It criminalises the mere fact of having been part of the DK regime and, hence, runs the risk of being equated with what was referred to in Nuremberg as an "organisational crime", which consists in linking an individual to an organization or a criminal group.[55] This notion, which appears in none of the statutes of *ad hoc* tribunals, has been entirely discarded in contemporary international criminal law.

49. In the second case, if we consider that the purpose to create a communist state in Cambodia (the establishment of DK) is lawful *per se*, two legal solutions could have been envisaged.

50. The first approach is as follows: although the common purpose was not criminal *per se*, it was **foreseeable** that crimes were **likely** to be committed during the establishment of the DK regime and the accused persons nonetheless **deliberately** took the risk of participating in the establishment of this regime. This solution is not legally unsound but it pertains to the extended form of JCE. Since this mode of responsibility cannot be considered as having constituted a general principle of law between 1975 and 1979, the Chamber has dismissed it and can no longer accept this solution without violating the principle of legality.

51. The second approach would consist in considering the founding of a communist state in Cambodia, by establishing DK, as a lawful aim, although certain policies implemented by the ensuing regime may be considered criminal. In this particular case, since the aim of establishing DK is not criminal, criminal intent cannot be inferred by virtue of mere participation in the regime. To the contrary, such intent can logically be inferred from direct participation in each one of the alleged criminal policies taken individually.

52. In reality, contrary to the biased reading of the issue the Chamber has demonstrated in its Decision on the Applicability of Joint Criminal Enterprise, the

[55] See Articles 9-11 of the Nuremberg IMT-Statute

second approach was the one adopted by the Appeals Chambers of the ICTY and of the SCSL.

53. Hence, in the appeal phase of *Brima, Kamara and Kanu*, the Prosecutor challenged the judgment which mistook the **ultimate aim** of the enterprise for the **criminal purpose** itself.[56] The Appeals Chamber admitted the challenge of the Prosecutor and amended the judgement. In so doing, the Appeals Chamber confirmed that the criminal intent was not to be inferred from the "ultimate aim" but from the "criminal means" to achieve it: "*[a]lthough the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute,* ***the actions contemplated as a means to achieve that objective are crimes within the Statute***."[57] Astonishingly, the last part of this sentence does not appear in the reference made to it by the Chamber in its Decision on the Applicability of Joint Criminal Enterprise.

54. In the same manner, in the Kvočka Appeals Judgement, the ICTY Appeals Chamber upheld the Prosecution's claim that "*the common design that united the accused was the creation of a Serbian state within the former Yugoslavia and that* ***they worked to achieve this goal by participating in the persecution of Muslims and Croats***." Once again, the last part of the quote has disappeared from the reference made to it by the Chamber in its Decision on the Applicability of Joint Criminal Enterprise.

55. We may add that the same approach prevailed in the *Haradinaj* case. The defendants were accused of having participated in an enterprise whose objective was to "*consolidate the total control of the KLA over the Dukagjin Operational Zone by the* ***unlawful removal and mistreatment of Serbian civilians and by the mistreatment*** *of Kosovar Albanian and Kosovar Roma/Egyptian civilians, and*

[56] *Brima* Appeal Judgment, para. 84 [*sic*]
[57] *Ibid.*, para. 70 [*sic*]

other civilians, who were, or perceived to have been collaborators with the Serbian Forces or otherwise not supporting the KLA."[58]

56. In these three cases, there exists a clear distinction between the "ultimate aim" and the common criminal aim. Intellectual support for the ultimate purpose does not imply criminal intent on the part of a participant in a JCE; significant participation in the criminal means used to achieve that purpose does. Any other approach would have led to absurd results: any act on the part of any individual geared to "the creation of a Serbian state", or "exercising [...] control over the territory of Sierra Leone" or to "consolidate the total control [...] over the Dukagjin Operational Zone", would have justified the identification of criminal intent and a consequent criminalisation of objectives recognized as lawful under international public law. Insofar that international law does not criminalise any internal political organisation as such, the solution supported by the SCSL and the ICTY should not be any different in Case 002/01.

d. The burden of the proof on the Prosecution in Case 002/01

57. For the aforementioned reasons, the presence of a criminal intent (in the legal sense of the term, that is to say the intent to commit crimes set down in the Law on the ECCC) cannot be inferred from the sole intent to foster a socialist political revolution in Cambodia. This is why it falls to the Co-Prosecutors to demonstrate the significant participation of the accused persons in the elaboration and implementation of each one of the policies noted in paragraph 1525 of the Closing Order.

B. Individual criminal responsibility for complicity (aiding and abetting)

a. The *actus reus* of aiding and abetting

[58] *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj,* IT-04-84, Judgment, 3 April 2008, para. 470

58. The *actus reus* of aiding and abetting comprises two elements: on the one hand, the accused person must have provided assistance or encouragement the perpetration of the crime by the physical perpetrator [59] and on the other, the contribution must have had a substantial effect on the perpetration of the crime.[60]

i. The first material element: a positive action

59. In the *Duch* Judgement the Chamber found that the acts signified by the common law mode of responsibility of "*aiding and abetting*" more clearly reflect the "nature" of this form of responsibility than does the civil law notion of "*complicité*", which may encompass broader conduct.[61] However the principle of legality requires that the Chamber interpret the provisions of the ECCC Law in light of the provisions in effect at the time of the events, that is to say the provisions inspired from French law contained in the Cambodian Penal Code of 1956.

60. However, in the civil law system, acts of complicity are positive actions. With respect to complicity, Article 83 of the Cambodian Penal Code of 1956 and Article 121-7 of the new French Penal Code only consider acts of commission. This is why, in the civil law concept of this mode of participation, a spectator of a crime who did not prevent it from occurring cannot be considered an accomplice.[62] Simple awareness of a criminal offence does not constitute in itself a punishable act of complicity. Mere tolerance does not warrant being charged for complicity: *"one is not an accomplice by abstention."*[63]

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[59] See *Prosecutor v. Blagoje Simić*, IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Judgement"), para. 85; *Blaskić* Appeal Judgement, para. 46; *Vasiljević* Appeal Judgement, para. 102
[60] See *Simić* Judgement, para. 85; *Blaskić* Appeal Judgement, para. 46; *Vasiljević* Appeal Judgement, para. 102
[61] *Duch* Judgment, para. 532
[62] Bouloc, *op. cit.*, pp. 292, 300 and 301
[63] *Ibid.*

61. *Ad hoc* tribunals have discussed whether omission may be considered evidence of aiding and abetting. Some of the Chambers at the ICTY and the ICTR have conceived the idea that an accused person may be held liable if he or she had an obligation to act and failed to do so.[64] Criticized by legal opinion,[65] this jurisprudence is in complete opposition to the civil law concept and should not be entertained by the Trial Chamber in the case at hand, pursuant to the principle of legality.

ii. Second material element: causal link

62. Because of the causal link, by which acts of complicity must have a substantial effect on the commission of the crime, this/these act(s) occur, generally speaking, prior to or concomitantly with the principal act. Some *ad hoc* tribunal chambers have accepted that acts that follow the perpetration of a crime may be considered acts of aiding or abetting. However, the legal characterisation of these acts remains subject to the analysis of the substantial effect they have had on the commission of the crime. Yet it is difficult, even impossible, to establish a causal link *a posteriori*.[66] This is the reason why under French law, *ex post facto* acts of aiding and abetting the perpetration of a crime are simply excluded and/or considered separate offences.[67]

b. The *mens rea* of aiding and abetting

[64] *Blaskić* Judgement, par. 284; *The Prosecutor v. Mpambara*, ICTR-01-65-T, Judgement, 11 September 2006, ("*Mpambara* Judgement"), para. 22; *Prosecutor v. Rutaganira*, ICTR-95-IC-T, Judgment, 14 March 2005, para. 64; *Prosecutor v. Strugar,* IT-01-42-T, Judgment, 31 January 2005, ("*Strugar* Judgment"), para. 249

[65] See Boas, Bischoff and Reid, *International Criminal Law Practitioner Library, Vol. I – Forms of Responsibility in International Criminal Law,* Cambridge University Press (2007), pp. 310-314. They stress that this interpretation implies reliance on elements of criminal responsibility founded on the obligation to act by virtue of superior responsibility. Complicity by omission therefore only weakens this distinction and makes related jurisprudence even less legible.

[66] See in this regard: *Strugar* Judgement, para. 355 and *The Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, 17 January 2005, paras 731 and 745. In fact, in these cases, the causal link is established by the demonstration of **a prior act** (an agreement) that has abetted the commission of the crime through the promise of aid following the crime.

[67] See Mayaud, *op. cit.*, p. 337. See as well Crim., 6 August 1945, *Gaz. Pal.*, 1945.2.143; *Rev. sc. crim*, 1946.67, obs. Hugueney; 4 déc. 1947, *Bull. crim.*, No. 239; 20 mars 1997, *D.*, 1999. 28, note by Boccara; *Dr. penal*, 1997, obs. J.-H. Robert. (Jurisprudence mentioned in Mayaud, *op. cit.*, p.337).

63. The *mens rea* of aiding and abetting is made up of two sub-elements: on the one hand, the aider and abettor must act in the knowledge that he thereby supports the commission of the crime.[68] On the other, the aider and abettor must have been aware of the essential elements of the crime, including the relevant *mens rea* on the part of the principal.[69] Hence, aiding and abetting are clearly intentional acts: the aiding must have been provided knowingly and not unwillingly.[70]

64. This is the reason why the aider and abettor's awareness of participating in the commission of a crime must be concomitant with the provision of assistance. Hence, the French *Cour de Cassation* requires that the aider and abettor acted in knowledge at the very moment he or she provided assistance.[71] Nonetheless, the fact of having known later that the assistance had made possible or facilitated the commission of a crime is not a punishable act of aiding and abetting, due to lack of intent on the part of the aider and abettor.[72]

65. Since aiding and abetting is only punishable if there is intent on the part of the aider and abettor, it is incumbent on the Co-Prosecutors to provide the evidence that the aider and abettor clearly knew, and at the moment he acted, that the aid and assistance he provided was going to serve the purpose of the crime.

B. Individual criminal responsibility for instigating, planning and/or superior responsibility on the part of the Accused

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[68] *Kunarac* Judgement, pars. 392
[69] *The Prosecutor v. Simić*, IT-95-9-A, Appeal Judgement, 28 November 2006, para. 86; *Mpambara* Judgement, para. 17; *The Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 162
[70] Mayaud, *op. cit.*, pp. 335-338
[71] Crim. 5 November 1943, DA 1944, 29; Paris 30 June 1977, *RJ Com.*, 1978, p. 419, note by Bernard Bouloc; Crim. 28 juin 1995, *Bull.* nº 241; Crim. 15 November 1990, Bull. nº 388. Gaz. Pal., 28 March 1991, note by J.-P. Doucet **asserting that the intent must be assessed in respect to the moment the facts were committed.** (Jurisprudence quoted in Bouloc, *op. cit.*, p. 301).
[72] Bouloc, *op. cit.*, p. 301

66. The definition of the constituent elements of these modes of responsibility is relatively uniform in the jurisprudence of international tribunals. This is why it is not necessary at this point to revisit it.[73]

67. It is, however, crucial to recall that, just as in the case of aiding and abetting, the constituent elements of these modes of participation are rooted in the causal link between the acts of the accused person and those of the physical perpetrator. Hence, any *ex post facto* participation of the accused person in the commission of the crime is excluded, because one can only instigate, plan or fail to prevent future acts. In the same manner, the required *mens rea* for these modes of responsibility can only be assessed concomitantly with the act or omission charged against the accused person.

68. **WHEREFORE**, the KHIEU Samphan Defence requests that the Trial Chamber:

- **RULE** that the *actus reus* of a crime against humanity shall require the existence of a state plan and policy **and** that the *mens rea* of this crime shall require a sufficiently tight and direct nexus between the awareness of the accused person of the context of the attack and the committing of the criminal offence by the physical perpetrator;

- **RULE** that the *actus reus* of a crime of persecution shall require a nexus between the acts of persecution and any other crime falling under the jurisdiction of the ECCC;

[73] Yet, regarding crimes against humanity, the responsibility of the accused person – who is not the physical perpetrator – cannot be recognized by virtue of these modes of responsibility. See para. 18 and *Milutinović* Judgment, para. 158, *op. cit.*, footnote 21.

- **RULE** that the crime of "forced disappearance" is not applicable to the present case;

- **RULE** that the legal characterisation of the basic form of joint criminal enterprise requires proof by the Prosecution of the existence of a specific criminal plan, known to the accused person, and in which the accused person participated in a significant manner;

- **RULE** that the law applicable to aiding and abetting shall be interpreted in light of the civil law system which requires that the Prosecution demonstrate the existence of positive material actions that can be ascribed to the accused person as having had a substantial effect on the commission of the crime(s) falling under the jurisdiction of the ECCC.

	Mr KONG Sam Onn	Phnom Penh	[*Signed*]
	Ms Anta GUISSÉ	Paris	[*Signed*]
	Mr Arthur VERCKEN	Paris	[*Signed*]
	Mr Jacques VERGÈS	Paris	[*Signed*]