

I. PROCEDURAL HISTORY

1. Disagreements between the Co-Investigating Judges (“CIJs”) in this case were registered on 7 and 22 February 2013.
2. On 28 October 2013, the Defence filed a motion opposing the application of JCE III in Case 003 (“JCE III Motion”).¹
3. On 14 December 2015, Meas Muth was charged for the alleged commission of a number of crimes in seven locations in the period between 17 April 1975 and 6 January 1979. With regard to his alleged criminal responsibility, Meas Muth was charged with the commission of crimes via, *inter alia*, the first form of Joint Criminal Enterprise (JCE I). The third form of Joint Criminal Enterprise (“JCE III”) did not form part of the charges.²

II. SUBMISSIONS

4. The Defence submit that while responsibility through JCE III is alleged in the Case 003 Introductory Submission, at the time the Introductory Submission was filed the applicability of JCE III at the ECCC had not yet been ruled upon by the PTC and Trial Chamber.³
5. On 20 May 2010, the PTC found that JCE III cannot be applied at the ECCC, as it was not reflective of customary international law in the period between 1975 and 1979.⁴ The Defence submit that the PTC decision is binding for the CIJs.⁵ The Defence also note that the PTC decision was upheld by the Trial Chamber.⁶
6. The Defence submit that it is in the interests of justice, judicial economy, and expediency that the CIJs follow the PTC and Trial Chamber’s jurisprudence on the applicability of JCE III, and that any inclusion of JCE III in the Case 003 closing order would constitute an abuse of process.⁷ The application of JCE III in Case 003 would also violate Meas Muth’s right to equal treatment, since this mode of liability was not applied in Case 002.⁸
7. For these reasons, the Defence request the CIJs to reject the application of JCE III against Meas Muth.⁹

III. DISCUSSION

8. Both the PTC¹⁰ and the Trial Chamber¹¹ have found that JCE III as an international mode of criminal liability did not exist under customary international law in the period between 1975 and 1979. Considering the uniform and consistent

¹ Case File No. 003-D87/2/1.15, *Meas Muth’s Motion against the Application of JCE III*, 28 October 2013.

² Case File No. 003-D174, *Written Record of Initial Appearance of MEAS Muth*, 14 December 2015.

³ JCE III Motion, para. 15.

⁴ *Ibid.*, para. 10.

⁵ *Ibid.*, paras 15-17.

⁶ *Ibid.*, paras 14, 18.

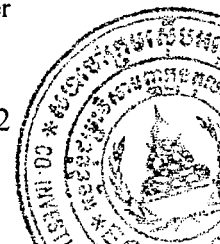
⁷ *Ibid.*, paras 19-20.

⁸ *Ibid.*, paras 21-26.

⁹ *Ibid.*, p. 11.

¹⁰ Case File No. 002-D97/17/6, *Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise*, 20 May 2010, paras 75-89.

¹¹ Case File No. 002-E100/6, *Decision on the Applicability of Joint Criminal Enterprise*, 12 September 2011, paras 26-38.



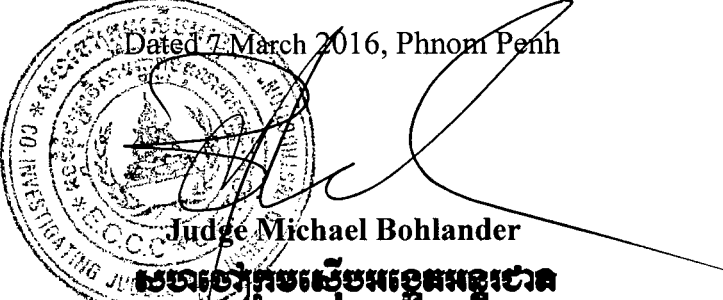
ECCC jurisprudence on this issue, at present I do not intend to apply JCE III in Case 003.

9. I note, however, that the applicability of JCE III is the subject of an appeal pending before the Supreme Court Chamber (“JCE III Appeal”).¹² Should the Supreme Court Chamber grant the Co-Prosecutors’ appeal and find that JCE III is applicable at the ECCC, I will inform all parties of the consequences, if any, that such decision will have in Case 003.
10. This decision is filed in English, with a Khmer translation to follow.

FOR THE FOREGOING REASONS, I:

11. **INFORM** the Defence that I will not apply JCE III in Case 003, but that this determination may change subject to the outcome of the JCE III Appeal.

Dated 7 March 2016, Phnom Penh



Judge Michael Bohlander
សមាជិកក្រុមស៊ើបអង្កេតអន្តរជាតិ
 International Co-Investigating Judge
 Co-juge d’instruction international

¹² Case File No. 002-F11, *Co-Prosecutors’ Appeal against the Judgment of the Trial Chamber in Case 002/1*, 28 November 2014.