BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S RESPONSE TO THE CO-PROSECUTORS' REQUEST FOR THE TRIAL CHAMBER TO CONSIDER JCE III AS AN ALTERNATIVE MODE OF LIABILITY
&
REQUEST FOR AN ORAL HEARING

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby responds to the Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability ("Request").[1] The Request should be dismissed because it is an untimely preliminary objection to the Pre-Trial Chamber's Decision against the applicability of JCE III at the ECCC. In the alternative, the Request should be dismissed for lack of merit. All of the OCP's assertions have been raised before the Pre-Trial Chamber.[2] The Request fails to show any discernible errors in the Pre-Trial Chamber's decision that JCE III is inapplicable at the ECCC which would warrant a reversal by the Trial Chamber. The Defence incorporates all previous submissions related to JCE.[3] A public, oral hearing is requested.

I. PROCEDURAL RESPONSE: THE REQUEST IS UNTIMELY AND SHOULD BE DISMISSED

1. The Trial Chamber is being requested to reverse the Pre-Trial Chamber's jurisdictional decision concerning the applicability of JCE III.[4] This is a preliminary objection concerning the jurisdiction of the ECCC. In seeking re-characterization of the facts, the OCP is effectively requesting a determination of the contours of an existing and applicable form of liability. This can not be done without first overturning the Pre-Trial Chamber's decision that JCE III is not applicable at the ECCC: it neither existed in customary international law in 1975-79, nor in Cambodian domestic law.
2. In Case 002, the OCIJ issued an order confirming the jurisdiction of the ECCC to apply all three forms of JCE liability.[5] Pursuant to Rule 74(3)(a) of the Internal Rules ("Rules"), the Defence appealed the OCIJ order "confirming the jurisdiction of the ECCC." Confirming the appeal based on Rule 74(3)(a), the Pre-Trial Chamber held that JCE III cannot apply at the ECCC because it was not customary international law in 1975-79 and would not have been foreseeable to the Accused.[6]
3. The Pre-Trial Chamber, considering whether the applicability of JCE at the ECCC amounted to a jurisdictional challenge, found that the ECCC is in a position comparable to the *ad hoc* tribunals where "a challenge to the very existence of a form of responsibility or its recognition under customary law at the time relevant to the indictment are

[1] Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 17 June 2011, E100.
[2] *See* Annex 1 which lists the OCP's arguments in a chart format, demonstrating where each of these issues has been raised before the Pre-Trial Chamber.
[3] *See* Annex 2 which lists all past Defence filings on the issue of the applicability of JCE at the ECCC.
[4] Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15 ("PTC JCE Decision"), paras. 51-88.
[5] Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13.
[6] PTC JCE Decision, paras. 75-88.

considered as jurisdictional challenges."[7] Jurisdictional challenges are envisaged by the Rules, which were specifically adopted for the ECCC[8] and have precedence over the Cambodian Criminal Procedure Code.[9] Rule 89(1) provides that a preliminary objection concerning the jurisdiction of the Trial Chamber "shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible." The Closing Order became final on 14 January 2011: the deadline for filing objections to the Pre-Trial Chamber's decision concerning JCE III was 15 February 2011.[10]

4. The OCP did not file any Rule 89 preliminary objections. It *now* asserts that it did not need to do so because it does not object to the jurisdiction of the ECCC as set out in the Agreement and Establishment Law.[11] This assertion is wanting. While the Agreement and Establishment Law establish the jurisdiction of the ECCC, its jurisdiction is delimited by the Closing Order which excluded JCE III in accordance with the Pre-Trial Chamber's decision.[12] The OCP *now* objects to this jurisdictional delimitation, approximately four months past the deadline for Rule 89 preliminary objections. Having opted – either for tactical reasons or due to its lack of due diligence – not to file a preliminary objection, the OCP *now* requests "that the Trial Chamber find that JCE III is a valid mode of liability at the ECCC"[13] as a Rule 98 request for "re-characterization," as was done in Case 001.[14] Just as re-characterization under Rule 98 is not a vehicle to circumvent Rule 89, the application of Rule 98 in Case 001 is not material; the two cases are not analogous.

[7] *Id.*, paras. 23-24. At the ICTY, in *Prosecutor v. Milutinović*, the Appeals Chamber found that Ojdanić's submissions regarding whether JCE came within the ICTY's jurisdiction amounted to a jurisdictional challenge. *Prosecutor v. Milutinović*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003. In *Prosecutor v. Karadžić*, the Trial Chamber found that Karadžić's submissions concerning the pleading of JCE III in the indictment and whether JCE III may apply to strict liability offenses did not amount to a jurisdictional challenge. JCE III *per se* was never challenged. *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009.

[8] The Rules were changed to shorten the time period for raising preliminary objections – these issues must now be resolved well in advance of trial. In this way, the ECCC is similar to the *ad hoc* tribunals, which all require jurisdictional issues – such as the jurisdiction of the tribunal over certain crimes and forms of liability – to be raised within a specified time period well in advance of the start of trial. *See* ICTY Rules of Procedure and Evidence, Rule 72(A); ICTR Rules of Procedure and Evidence, Rule 72(A).

[9] Decision on NUON Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 14.

[10] Order to File Materials in Preparation for Trial, 17 January 2011, E9.

[11] Request, n. 12. The OCP's assertion that JCE III liability is applicable rests on its interpretation of Article 29 of the Establishment Law, as can be seen from the first argument in the Request. This demonstrates the actual purpose of the Request: to challenge the jurisdiction of the Trial Chamber.

[12] *See* Closing Order, 15 September 2010, D427, Part 2, I (entitled: ECCC Jurisdiction). The Pre-Trial Chamber considers JCE's applicability to be a Rule 89 rather than a Rule 98 issue. Concerning JCE, it stated: "The Pre-Trial Chamber is cognizant of the fact that Internal Rules 74(3)(a) and 89(1) open the possibility of raising jurisdictional challenges before the Pre-Trial Chamber and before the Trial Chamber." PTC JCE Decision, para. 35.

[13] Request, para. 41.

[14] *Id.*, para. 8.

5. The present situation differs entirely from Case 001. In Case 001, the existence in law of JCE was never challenged by Duch. JCE was omitted from the Closing Order by the OCIJ. The Pre-Trial Chamber determined that it could not add JCE because Duch had insufficient notice during the investigation that it could be applied. The issue of whether JCE existed in customary international law was never considered by the Pre-Trial Chamber in Case 001.[15] At trial, the OCP requested the Trial Chamber to apply JCE I and II, and alternatively JCE III, based on a re-characterization of the facts set out in the Closing Order pursuant to Rule 98.[16] The *Duch* Defence objected, but did not challenge the applicability of JCE at the ECCC; it "defer[red] to the wisdom of the Trial Chamber to determine whether or not this theory is applicable before the ECCC."[17] The Trial Chamber found that JCE I and II may be applied without violating Duch's rights since he had been put on notice and been given an opportunity to respond.[18] Thus, in Case 001 the Trial Chamber was merely requested to find – based on the facts of the case – whether JCE I and II should be reflected in the judgement.[19]
6. Unlike Duch, Mr. IENG Sary has challenged the existence and applicability of JCE in law before the ECCC. This matter was timely raised and extensively litigated at the pre-trial stage.[20] The Pre-Trial Chamber pursuant to Rule 74(3)(a) made a legal determination to a jurisdictional challenge. The OCP did not object. The Request should thus be denied.

II. SUBSTANTIVE RESPONSE: JCE III LIABILITY IS NOT APPLICABLE AT THE ECCC

7. The Pre-Trial Chamber decision that JCE III could not be applied at the ECCC, as it did not exist in domestic or customary international law in 1975-79 and such liability would not have been foreseeable, has been heralded as a landmark decision.[21] Former

[15] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias "Duch", 5 December 2008, D99/3/42, paras. 141-42.
[16] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 8 June 2009, E73.
[17] Duch specifically objected that: **a.** the OCP's request was inadmissible in light of the Pre-Trial Chamber's decision to exclude JCE from the Amended Closing Order; **b.** the request should be denied on the grounds that there was an insufficient factual basis in the Amended Closing Order for a finding of JCE; and **c.** JCE had not been pleaded with sufficient specificity by the OCP. *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case, 17 September 2009, E73/2.
[18] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188 ("*Duch* Judgement"), paras. 501-03.
[19] Even if the OCP's request to include JCE in Case 001 was considered a jurisdictional challenge, that request may have been admissible because the Rules at that time only required preliminary objections to be raised at the Initial Hearing. *See* Rev. 3 of the Rules, Rule 89. At the Initial Hearing, the OCP did notify the Trial Chamber and the parties of its intention to file written submissions later to request the Trial Chamber to apply JCE, and none of the parties objected. *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript, 17 February 2009, E1/3.1, p. 9-13.
[20] *See* Annex 2.
[21] Kevin Jon Heller, *The ECCC Issues a Landmark Decision on JCE III*, OPINIO JURIS, 23 May 2010.

ICTY/ICTR Appeals Chamber Judge Wolfgang Schomburg found it "admirable in its thorough analysis of some post WW II decisions,"[22] while Professor Jens David Ohlin of Cornell University Law School noted that it was "well-crafted and tightly argued."[23] The OCP, for the most part, disregards the Pre-Trial Chamber's findings. It asserts that: **a.** Article 29 of the Establishment Law provides for the application of JCE III, **b.** JCE III existed in customary international law in 1975-79,[24] **c.** application of JCE III was foreseeable and accessible, and **d.** JCE III is consistent with the object and purpose of international criminal law. None of these assertions are novel; they were all thoroughly litigated – as jurisdictional issues – before the Pre-Trial Chamber.[25]

A. JCE III liability is not provided for in the Establishment Law

8. The Pre-Trial Chamber and Trial Chamber have determined that JCE liability may fall within Article 29 under the term "committed."[26] Neither Chamber specifically considered JCE III when generally determining that JCE liability is included in Article 29. The Pre-Trial Chamber found that JCE I and II have an underpinning in Cambodian law as these forms of liability are similar to co-perpetration, a form of commission.[27] The Pre-Trial Chamber did not reach the same conclusion concerning JCE III.[28] This demonstrates that JCE III, unlike JCE I and II, is not a form of commission within Article 29.[29] This view is held by Professor Kai Ambos,[30] Judge Schomburg[31] and other scholars.[32] The OCP

[22] Wolfgang Schomburg, *Jurisprudence on JCE – Revisiting a Never Ending Story*, CAMBODIA TRIBUNAL MONITOR, 3 June 2010, p. 1.

[23] Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 748 (2011) ("Ohlin, *Joint Intentions*"). Professor Ohlin also noted that the Pre-Trial Chamber "examined all of the historical precedents in the post-World War II era and went well beyond the cases cited by the ICTY in *Tadic*." *Id.* Indeed, since *Tadić*, the Pre-Trial Chamber was the only Chamber to thoroughly analyze the case law cited in *Tadić*. David Scheffer & Anthony Dinh, *The Pre-Trial Chamber's Significant Decision on Joint Criminal Enterprise for Individual Responsibility*, CAMBODIA TRIBUNAL MONITOR, 3 June 2010, p. 3.

[24] The Defence disagrees that it is sufficient that JCE III be found to have existed under customary international law at the relevant time and maintains that it is necessary that JCE III also have existed in domestic Cambodian law. However, this issue will not be addressed herein as it is pending determination by the Trial Chamber. *See* Summary of IENG Sary's Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011, E51/4, which set out Mr. IENG Sary's Rule 89 preliminary objection that the ECCC does not have jurisdiction to apply international crimes and forms of liability against Mr. IENG Sary.

[25] *See* Annex 1.

[26] PTC JCE Decision, para. 49; *Duch* Judgement, para. 511.

[27] PTC JCE Decision, para. 41.

[28] *Id.*, para. 87.

[29] Note that Article 29 is not identical to the pertinent articles of the ICTY, ICTR and SCSL statutes. The phrase '*or otherwise* aided and abetted' in these statutes would allow room to consider JCE III as falling within the statutes even if it were not considered to be a form of commission. Unlike these statutes, however, Article 29 makes a clear separation between "committed" and "aided and abetted." It states that a person who "planned, instigated, ordered, aided and abetted, or committed the crimes" may be liable. JCE III thus may not be applied at the ECCC unless the Trial Chamber determines that it falls undoubtedly within the meaning of "committed."

[30] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC-OCIJ (PTC02), *Amicus Curiae* concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 27 October 2008, D99/3/27 ("Ambos Brief"), Part I.3-I.4.

raises no new arguments[33] to support its assertion that JCE III is included in Article 29 of the Establishment Law under the term "committed." In response, the Defence incorporates by reference its previous legal submissions on this issue.[34]

B. JCE III did not exist in customary international law in 1975-79

i. The Trial Chamber should not follow the *Tadić* Appeals Chamber

9. The Pre-Trial Chamber found that the "authorities relied on by *Tadić* in relation to [JCE III] ... do not provide sufficient evidence of consistent state practice or *opinio juris* at the time relevant to Case 002."[35] The OCP does not address this finding when asserting that the Trial Chamber should follow the approach of the *Tadić* Appeals Chamber because there were no major developments in international humanitarian law between 1975 and the establishment of the ICTY in 1993.[36] Developments in customary international law between 1975 and 1993 are not relevant. The issue to determine is whether widespread and consistent State practice coupled with *opinio juris* concerning JCE III liability existed

[31] Wolfgang Schomburg, *Jurisprudence on JCE – Revisiting a Never Ending Story*, CAMBODIA TRIBUNAL MONITOR, 3 June 2010, p. 3-4.

[32] According to Dr. Shane Darcy of the Irish Centre for Human Rights, National University of Ireland Galway, the view that JCE is akin to "committing" a crime "conflicts with the ordinary meaning of 'committing' as the physical perpetration of a crime or a culpable omission contrary to the criminal law and, therefore, the general principle that penal statutes should be interpreted strictly." Shane Darcy, *Imputed Criminal Liability and the Goals of International Justice*, 20 LEIDEN J. INT'L L. 377, 384 (2007) ("Darcy"). Steven Powles explains: "It is easy to understand how someone guilty of participating in [JCE I] could be said to have 'committed' the crime... However, ... it is harder to see how someone guilty of participating in [JCE III], i.e. where the crime falls *beyond* the object of the criminal enterprise, can be said to have actually 'committed' the crime in question, where they do not possess the intention to actually commit the crime in question and may not even be aware of that crime before, during or even after the crime has actually been committed." Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606, 611 (2004) ("Powles").

[33] Specifically, the OCP asserts: **1.** the wording of Article 29 is "virtually identical" to the wording of analogous provisions at the ECCC's "sister tribunals" the ICTY, ICTR and SCSL which have interpreted "committed" to include participation in a common design; **2.** the Establishment Law's drafters were aware of the *Tadić* Appeals Chamber Decision and would have framed Article 29 in different terms had they meant to exclude JCE III liability; and **3.** inclusion of JCE III liability conforms to the object and purpose of the Establishment Law. Request, paras. 14-16. These arguments were raised before the Pre-Trial Chamber; *see* Annex 1.

[34] *See* IENG Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 22 January 2010, D97/4/5 ("JCE Appeal"), paras. 66-71, and Annex A, Section II.B; IENG Sary's Reply to the Co-Prosecutors' Response to IENG Sary, IENG Thirith and KHIEU Samphan's Appeals on Joint Criminal Enterprise, 18 March 2010, D97/14/14 ("JCE Reply"), paras. 40-50; IENG Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC, 24 November 2008, D97/7 ("Supplementary Observations"), paras. 11-19; IENG Sary's Motion Against the Application at the ECCC of the Form of Liability known as *Joint Criminal Enterprise*, 28 July 2008, D97 ("Motion Against JCE"), para. 6.

[35] PTC JCE Decision, para. 77.

[36] Request, para. 20. The OCP asserts in a footnote that "The ICTY's position on JCE has been affirmed in subsequent cases at the ICTY and at the ICTR, SCSL, and the Special Tribunal for Lebanon ('STL')." *Id.*, n. 26. None of these tribunals considered the status of JCE III liability in customary international law in 1975-79. The Pre-Trial Chamber is the only Chamber to have undertaken a systematic analysis of the World War II jurisprudence. For the most part, these other tribunals did not consider whether JCE III existed at all, but merely followed the *Tadić* Appeals Chamber decision without question. The STL in particular cannot be relied upon for support because its President is Judge Cassese, the architect of JCE in the *Tadić* Appeals Judgement. This provides no support for the OCP's assertion that JCE III existed in customary international law in 1975-79.

in 1975-79.[37] The Pre-Trial Chamber concluded that it did not,[38] as is also demonstrated by a Max Planck study.[39] The deliberate exclusion of JCE III from the ICC Statute despite lengthy and thorough drafting exercises and the ICC's subsequent jurisprudence rejecting JCE III is evidence that JCE III is not customary international law, even today. The Defence incorporates by reference its previous legal submissions on these issues.[40]

ii. A "Grotian moment" did not occur with respect to JCE III following World War II

10. The Pre-Trial Chamber implicitly rejected[41] the OCP's assertion that a "Grotian Moment," where customary international law emerges with unusual rapidity, occurred with respect to JCE III following World War II.[42] While customary international law may emerge from a "Grotian moment," there is no evidence to support that a such moment occurred with JCE III liability. The Defence incorporates by reference its previous legal submissions on this issue.[43]

iii. JCE III is not contained in the International Military Tribunal ("IMT") Charter, the International Military Tribunal for the Far East ("IMTFE") Charter or Control Council Law Number 10

11. The Pre-Trial Chamber found that the notion of common plan liability contained in the IMT Charter and Control Council Law Number 10 "constitutes undeniable support" for the existence of JCE I and II under customary international law.[44] Concerning JCE III liability, however, the Pre-Trial Chamber found that "the Nuremberg Charter and Control Council Law No. 10 do not specifically offer support for the extended form of JCE (JCE III)."[45] Even the *Tadić* Appeals Chamber did not refer to these instruments when assessing the existence of JCE III liability in customary international law. The OCP ignores the Pre-Trial Chamber's finding, opting instead to conflate JCE I or II with JCE III, asserting that JCE III liability is encompassed in the notion of common plan contained

[37] *Fisheries Jurisdiction Case*, Merits, 1974 ICJ Rep. 3, at 50; *North Sea Continental Shelf*, Merits, 20 February 1969, ICJ Rep. 3, para. 77.
[38] PTC JCE Decision, para. 77.
[39] *See infra* para. 21 discussing a Max Planck study commissioned by the ICTY Office of the Prosecutor.
[40] *See* JCE Appeal, paras. 43, 49-58; JCE Reply, paras. 20, 23, 43, 45; IENG Sary's Reply to the Co-Prosecutors' Response to IENG Sary's Application for Sanctions Against the Co-Prosecutors for Misleading the Court in their Supplementary Observations on Joint Criminal Enterprise, 30 July 2009, D97/9/4; Supplementary Observations, paras. 30-54; Motion Against JCE, paras. 18-23.
[41] The OCP put this argument before the Pre-Trial Chamber in Co-Prosecutors' Joint Response to IENG Sary, IENG Thirith and KHIEU Samphan's Appeals on Joint Criminal Enterprise, 19 February 2010, D97/16/5, para. 34. The Pre-Trial Chamber did not address this argument, indicating that it found it unpersuasive.
[42] Request, para. 21.
[43] *See* JCE Reply, para. 21.
[44] PTC JCE Decision, paras. 57-58.
[45] *Id.*, para. 78. *See also* Darcy, at 384: "It is doubtful that the employment by a few states of this expanded form of common plan liability at that time gave it the status of customary law, particularly seeing that none of the treaties adopted in the postwar period recognized the concept."

in the IMT Charter, the IMTFE Charter and Control Council Law Number 10.[46] These instruments lend no support to the OCP's assertion that JCE III liability existed in customary international law.

iv. JCE III was not employed in post World War II international jurisprudence

12. The Pre-Trial Chamber found that the *Borkum Island* case and the *Essen Lynching* case – which the OCP heavily relies upon – "do not provide sufficient evidence of consistent state practice or *opinio juris*" to conclude that JCE III existed in customary international law in 1975-49.[47] A careful analysis of these cases supports this finding.

13. The Pre-Trial Chamber considered the facts of *Borkum Island*.[48] In *Borkum Island* the accused were all charged with war crimes, "in particular both with 'wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in the killing' of ... airmen and with 'wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in assaults upon the airmen'."[49] The Pre-Trial Chamber found that the *Tadić* Appeals Chamber, in the absence of a reasoned verdict, inferred that all the accused who were found guilty were held responsible for pursuing a criminal common design (the intent being to assault the airmen), but that some of them were also found guilty of murder – even where there was no evidence that they had actually killed the prisoners – because they were in a position to have predicted that the assault would lead to the killing of the airmen by some of those participating in the assault.[50] The Pre-Trial Chamber disagreed with the *Tadić* Appeals Chamber's inference that JCE III was applied: "[i]n light of the fact that the Prosecution pleaded that all accused shared the intent that the airmen be killed, the court may as well have been satisfied that these six individuals possessed such intent rather than having merely foreseen this possible outcome."[51]

14. Considering *Essen Lynching*, the Pre-Trial Chamber again examined the facts of the case, the charges and the parties' arguments. It found that "there is no indication in the case

[46] Request, para. 23.
[47] PTC JCE Decision, para. 77 (emphasis added).
[48] *Id.*, n. 227.
[49] *Id.*, para. 79.
[50] *Id.*
[51] *Id.*, para. 80 (emphasis added). Professor Ohlin explains that "[a]lthough the facts of the case are directly relevant to a discussion of joint criminal enterprise, the military court issued only a simple guilty verdict and made no extensive legal findings on the issue of common criminal plans or mob beatings. Consequently, the *Tadić* court is left to quote the words of the US military prosecutor and *infer* that the judges adopted the prosecutor's reasoning. These types of cases are of negligible value for precisely this reason. Indeed, the prosecutor's discussion of the issue is internally contradictory." Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 75, n. 10 (2007) ("Ohlin, *Three Conceptual Problems*").

that the Prosecutor even explicitly relied on the concept of common design and this case alone would not warrant a finding that JCE III exists in customary international law."[52]

15. Many scholars have agreed that these cases do not support the existence of JCE III in customary international law.[53] As Professor Ohlin poignantly explains:

> The first problem with these cases is that neither case produced a written decision from the judges, and so the written material consists only of submissions from the prosecutor and defense counsel. One is left to infer agreement with the prosecutor's doctrine on the basis of the judges' decision to issue convictions. This is problematic purely as a matter of legal reasoning. Second, and more importantly, neither case involved a situation where a defendant explicitly agreed to a criminal plan but was convicted for the actions of confederates that extended beyond the scope of the criminal plan. Rather, these were lynchings where the deaths were attributed to the defendants by the judicial system, even though the prosecutors could not prove who had killed whom (by delivering the fatal blows). Indeed, there is not a single *international* case cited in the *Tadic* opinion that includes the language of liability for actions that were reasonably foreseeable.[54]

16. Although not specifically considered by the Pre-Trial Chamber, there are also examples of post World War II cases in which JCE III liability was not employed. The fact that JCE III was not consistently applied in these cases demonstrates that it was not established as customary international law. The Defence incorporates by reference its previous legal submissions on this issue.[55]

17. The Pre-Trial Chamber found that the *Tadić* Appeals Chamber incorrectly relied upon some unpublished Italian cases as additional support for concluding that JCE III liability existed in customary international law. It found that these cases are not "proper precedents for the purpose of determining the status of customary international law..."[56] The Defence agrees and incorporates by reference its previous legal submissions on this

[52] PTC JCE Decision, para. 81. Powles explains: "[t]he prosecution in *Essen Lynching*, as the Appeals Chamber noted, specifically stated that is the accused had the *intent* to kill, then they would be guilty of murder; if they had no such intent, then they could still be convicted of manslaughter. The accused were convicted of murder, implying that the court concluded that they all indeed intended the airmen to die. Thus, there is possibly a question mark over whether the court in *Essen Lynching* actually held anyone who did not posses[s] an actual intention to kill guilty of murder." Powles, at 615-16.

[53] *See Case of Kaing Guek Eav*, 001/18-07-2007-ECCC-OCIJ (PTC02), Amicus Curiae Brief Submitted by the Centre for Human Rights and Legal Pluralism, McGill University, 27 October 2008, D99/3/25 ("McGill Brief"), paras. 22-24; Ambos Brief, section II.3.3. Dr. Kevin Jon Heller, who recently published a book entitled THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW, has exclaimed in the *Opinio Juris* blog, "No wonder the ECCC recently rejected the entire concept of JCE III after revisiting the cases that *Tadic* cited in defense of the concept! With errors like this one, how can we trust anything the decision has to say?" Dr. Heller was referring to the fact that the *Tadić* Appeals Chamber quoted the prosecution's closing argument as the tribunal's judgement in discussing the *Einsatzgruppen* case. Kevin Jon Heller, *An Egregious Error in Tadic*, OPINIO JURIS, 8 July 2010.

[54] Ohlin, *Joint Intentions*, at 708.

[55] *See* JCE Appeal, para. 46; Supplementary Observations, paras. 45-53; Motion Against JCE, para. 24.

[56] PTC JCE Decision, para. 82.

issue.[57] The OCP appears to agree as well; it did not rely upon these sources to show customary international law, but only as purported evidence of a general principle of law.[58] Simply, the OCP's assertion that common plan liability encompassing JCE III was employed in international jurisprudence following World War II[59] is misplaced.

v. The object and purpose of the IMT Charter and the post World War II trials do not support the application of JCE III

18. The OCP asserts that its conclusion that JCE III is part of customary international law is reasonable based on the object and purpose of the IMT Charter and the post World War II trials.[60] The OCP has not demonstrated that this is the case – particularly since the post-World War II trials the OCP relies upon do not show JCE III liability was applied. Furthermore, the object and purpose, even if they did support JCE III, are inappropriate considerations in lieu of consistent State practice coupled with *opinio juris*.[61]

C. JCE III did not exist as a general principle of law in 1975-79

19. The Pre-Trial Chamber found that "the exact status of general principles of criminal law as primary or auxiliary sources of international law is unclear."[62] It observed that the *Tadić* Appeals Chamber found that the "domestic sources [it reviewed] could not be relied on as irrefutable evidence" that JCE III constituted a general principle of law.[63] The OCP does not explain why or how it considers this source of law to be applicable at

[57] *See* JCE Appeal, para. 40; Supplementary Observations, para. 59.
[58] Request, para. 29.
[59] *Id.*, para. 23.
[60] *Id.*
[61] For a critical explanation of the *Tadić* Appeals Chamber's flawed reasoning in considering the object and purpose of the ICTY Statute, *see* Ohlin, *Three Conceptual Problems*, at 72. This argument can be equally applied to a consideration of the object and purpose of the international instruments relied upon by the OCP.
[62] PTC JCE Decision, para. 84. *See also* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 2-4 (Cambridge University Press 2006): "The mention of 'general principles of law recognised by civilised nations' ... at once provoked considerable discussion among writers, in which the most divergent views on the character of such principles were expressed. Some writers consider that the expression refers primarily to general principles of international law.... Others hold that it would have been redundant for the Statute to require the Court to apply general principles of international law, and that, therefore, this provision can only refer to principles obtaining in municipal law.... Nor do authors agree as to whether 'general principles of law' are part of the international legal order, simply because it is a legal order, or because there exists a rule of customary international law according to which such principles are applicable in international relations. Moreover, some writers maintain that 'general principles of law' do not form part of existing international law at all, but only form part of the law to be applied by the World Court, by virtue of the enabling provision in its Statute. The greatest conflict of views concerns the part played in international law by these 'general principles.'" (Emphasis added).
[63] PTC JCE Decision, para. 85, *citing Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeals Judgement"), para. 225, which states: "It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law **cannot** be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case" (emphasis added).

the ECCC, or how the Pre-Trial Chamber erred by finding the status of general principles of law to be unclear. Although "general principles of law recognized by civilized nations" are a source of international law recognized by the International Court of Justice,[64] it is not at all clear that this is an appropriate source of law for a domestic court (or even an "internationalized" court) to apply directly. The Defence submits that the *Duch* Trial Chamber erred when it concluded that this source of law may be relied upon.[65] Specifically, general principles of law are not applicable as a primary or auxiliary source of law at the ECCC. While the Pre-Trial Chamber found that the Establishment Law's reference to international custom allows for the application of customary international law at the ECCC,[66] it did not find that it allows or encompasses the application of general principles of law. Thus, general principles of law should not be applied, especially as a means to justify the application of a form of liability that is otherwise prohibited.

20. The Pre-Trial Chamber concluded that it did "not need to decide" whether JCE III constituted a general principle of law, finding that "even if this were the case" it was "not satisfied that such liability was foreseeable..."[67] The statement "even if this were the case" demonstrates that a lack of foreseeability was not the basis for the Pre-Trial Chamber's view that it need not decide whether JCE III was a general principle of law, as the OCP asserts.[68] The Pre-Trial Chamber had already concluded that it was unnecessary to survey the world's major legal systems because "[v]arious legal systems differ as to the *mens rea* required to attach criminal responsibility to an accused for a crime carried out by another individual who acted in concert, but went beyond what the accused intended."[69] The Pre-Trial Chamber found (and even the *Tadić* Appeals Chamber held[70]) that the various legal systems differ as to the *mens rea* required to attach criminal responsibility to an accused for a crime carried out by another individual who acted in concert, but went beyond what the accused intended.[71] This has also been demonstrated by the Max Planck study commissioned by the ICTY Office of the Prosecutor ("OTP") to answer the question of

[64] ICJ Statute, Art. 38(1)(c).
[65] *Duch* Judgement, para. 30.
[66] PTC JCE Decision, para. 48.
[67] *Id.*, para. 87.
[68] Request, para. 30.
[69] PTC JCE Decision, para. 84. *See also* Luke Marsh & Michael Ramsden, *Joint Criminal Enterprise: Cambodia's Reply to* Tadić, 11 INT'L CRIM. L. REV. 137, 151 (2011): "the PTC was of the view that 'it does not need to decide whether a number of national legal systems, which can be regarded as representative of the world's major legal systems, recognise that a standard of *mens rea* lower than the direct intent may apply in relation to crimes committed outside the common criminal purpose …'. This conclusion was drawn because of the lack of consistency and uniformity in the application of an extended form of JCE in major legal systems."
[70] *Tadić* Appeals Judgement, para. 225.
[71] PTC JCE Decision, para. 84.

under what circumstances leaders who operate "behind the scenes" and do not physically commit crimes may be punished.[72] The Max Planck study – which the OTP has consistently ignored – concretely shows that the predominant form of liability the world over is perpetration – co-perpetration and not JCE as established by *Tadić*.[73] JCE III is not objectively accepted and universally applied in the world's major legal systems.[74] The OCP asserts that there is "substantial reason" to believe that JCE III may have been established in international law by virtue of its status as a general principle of law;[75] that in 1975-79 "many domestic jurisdictions recognized forms of co-perpetration similar to JCE III liability."[76] The Pre-Trial Chamber found that the crimes referred to by the OCP (inchoate offenses rather than forms of liability) were "of little assistance in relation to determining the issue at stake."[77] The examples provided by the OCP do not establish the existence of JCE III as a general principle of law. The Pre-Trial Chamber recognized that various legal systems differ as to the *mens rea* required in relation to these forms of liability.[78] The Defence incorporates by reference its previous legal submissions concerning existing forms of liability and how they do not equate to JCE.[79]

21. The OCP requests *amicus* briefs on whether JCE III may be applied as a general principle of law or in the alternative to file supplemental submissions on this issue, should the Trial Chamber uphold the Pre-Trial Chamber's decision concerning JCE III.[80] The Trial Chamber should reject this request. There is no "substantial reason" to believe JCE III existed as a general principle of law. This request is dilatory and unjustifiable.

D. JCE III was not foreseeable or accessible to Mr. IENG Sary

i. Foreseeability

22. The Pre-Trial Chamber found that JCE III liability would not have been foreseeable. It stated that although it found that JCE I and II had an underpinning in Cambodian law it:

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[72] *See* Max Planck Institute for Foreign and International Criminal Law, Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks. *See especially* introduction and project design sections and Part 1: Comparative Analysis of Legal Systems. *See also* JCE Appeal, para. 48.

[73] *See* Ambos Brief, n. 41 where Professor Ambos criticizes the absurdity of the ICTY Appeals Chamber's decision in *Stakić*, for claiming that applying perpetration-co-perpetration-*in lieu* of JCE is *ultra vires*.

[74] General principles of law "must be objectively found in the national legal systems of the world's major legal systems." M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 288-89 (Kluwer 1999). *See* Ambos Brief, section I.3-I.4, explaining that JCE III was not found in the national legal systems of the world's major legal systems.

[75] Request, para. 29.

[76] Note that the OCP provides the examples of conspiracy and *association de malfaiteurs*, which are inchoate offenses rather than forms of liability. *See id.*

[77] PTC JCE Decision, n. 250 (emphasis added).

[78] *Id.*, para. 84. *See also* McGill Brief, para. 48: "several domestic criminal systems ... reject [JCE III liability]."

[79] *See* JCE Appeal, paras. 47-48, 63-65; JCE Appeal Annex A, paras. 19-24; JCE Reply, para. 20.

[80] Request, para. 31.

> has not been able to identify in the Cambodian law, applicable at the relevant time, any provision that could have given notice to the Charged Persons that such extended form of responsibility was punishable as well.[81]

23. Despite this finding, the OCP asserts that the requirement of the foreseeability of JCE III has been met, claiming that the Pre-Trial Chamber erred in relying on Cambodian law to determine whether JCE III would have been foreseeable.[82] The Pre-Trial Chamber, contrary to the OCP's assertion, did not determine that JCE III was not foreseeable *solely* because JCE III did not exist in domestic law. This can be seen by reviewing the Pre-Trial Chamber's analysis of the foreseeability of JCE I and II. The Pre-Trial Chamber found that those forms of liability were foreseeable in light of the fact that they were recognized in customary international law and had an underpinning in Cambodian law.[83] The Pre-Trial Chamber concluded the JCE III did not exist in customary international law; it thus considered foreseeability based on domestic law. It found that JCE III has no underpinning in Cambodian law, thus it was not foreseeable. The OCP asserts that if there must be a domestic underpinning for a form of liability to be foreseeable, the 1956 Penal Code's inclusion of complicity liability would have "generally support[ed] the concepts underlying JCE III."[84] Complicity, as set out in the 1956 Penal Code, differs from JCE III liability; it would not provide notice to Mr. IENG Sary that he could be held liable via JCE III.[85] The OCP raises no other new arguments concerning foreseeability.[86] The Defence incorporates by reference its previous legal submissions on this issue.[87]

ii. Accessibility

24. The OCP asserts that the requirement of accessibility has been met based on: **1.** the general approach of "other international tribunals" to presume foreseeability and accessibility if conduct was punishable under customary international law at the relevant time; and **2.** an assertion that material necessary to conclude that JCE III was a valid form of liability was accessible at the relevant time.[88] **First**, JCE III did not exist in customary international law, so it cannot be presumed to have been accessible. **Second**, as explained *supra*, there were only two international cases which could possibly provide support for

[81] PTC JCE Decision, para. 87.
[82] Request, para. 35.
[83] PTC JCE Decision, para. 72. *See also* Kitti Jayangakula, *Is the Doctrine of Joint Criminal Enterprise a Legitimate Mode of Individual Criminal Liability? – A Study of the Khmer Rouge Trials*, (2010) master thesis *available at* http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1693741&fileOId=1693742.
[84] Request, para. 35.
[85] *See* Ambos Brief, p. 29-30.
[86] Specifically, the OCP asserts that JCE III would have been foreseeable based on international jurisprudence, recognition by certain States of forms of co-perpetration similar to JCE III and the nature of the alleged crimes. Request, paras. 33, 36.
[87] *See* JCE Appeal, paras. 74-79; JCE Reply, paras. 32-38; Supplementary Observations, paras. 55-57.
[88] Request, para. 37.

JCE III in 1975-79. These cases lacked reasoned judgements from which to conclude that JCE III liability was actually applied. It is extremely unlikely that Mr. IENG Sary would have had a copy of these two cases in a language he could understand, especially considering the circumstances at the time. The IMT Charter and decisions arising from it do not support JCE III.[89] Their availability does not demonstrate accessibility.

E. JCE III is not consistent with the object and purpose of international criminal law

25. The Pre-Trial Chamber correctly did not consider the object and purpose of international criminal law[90] when determining whether JCE III is applicable at the ECCC. This is not a prerequisite which must be met before a form of liability may be applied;[91] it is not a valid consideration.[92] The OCP has neither asserted nor shown that the Pre-Trial Chamber erred. Even if the object and purpose of international criminal law were valid considerations, they would not lead to the conclusion that JCE III should be applied.

26. The OCP asserts that JCE III is consistent with the object and purpose of international criminal law; it "protects society"[93] and is a "reasonable and necessary" mechanism for organized criminality and the challenges of prosecuting such perpetrators.[94] This objective does not justify applying JCE III when it conflicts with the fundamental precept that an accused should only be held liable for conduct which he is personally culpable. The Defence incorporates by reference its previous legal submissions on this issue.[95] Moreover, it is not in the interest of the Cambodian legal system to apply a foreign legal concept when there are adequate domestic forms of liability, or other forms of liability with roots in Cambodian domestic law.[96]

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[89] *See supra* para. 11.

[90] *See* Request, para. 38.

[91] As set out by the Pre-Trial Chamber, based on ICTY jurisprudence, the pre-requisites are: 1. it must be provided for in the [Establishment Law], explicitly or implicitly; 2. it must have existed under customary international law at the relevant time; 3. the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and 4. such person must have been able to foresee that he could be held liable for his actions if apprehended. PTC JCE Decision, paras. 40-41, *citing Ojdanić* JCE Decision, para. 21.

[92] *See Prosecutor v. Brđanin* IT-99-36-A, Judgement, 3 April 2007, para. 421. "[T]he Appeals Chamber rejects the teleological argument by the Prosecution that the Tribunal should endorse the doctrine of joint criminal enterprise because it would allow the Tribunal 'to prosecute and punish those who participate in international crimes as leaders and not only as subordinates.' Such policy considerations are inapposite as a basis for a theory of individual criminal responsibility."

[93] Request, para. 38.

[94] *Id.*, para. 39.

[95] *See* JCE Appeal, paras. 61-62, and fn. 89. *See also* Annex 3: lists scholars critical of either JCE or JCE III.

[96] For a discussion of the problems that arise when a form of liability which does not exist in domestic law is imported and applied, *see* Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 Nw. U.L. Rev. 539 (2005). "Disconnects arise when the pursuit of accountability arises through a process that is distant from or alien to local populations." *Id.*, at 602 (emphasis added). *See also* Luke

27. The OCP quotes a STL interlocutory decision which states that a JCE can expand to embrace other criminal offenses that were not agreed to at the beginning of the enterprise, as long as the evidence shows that the JCE members agreed on this expansion.[97] This quote does not support the OCP's assertions. It merely demonstrates that JCE III may not be as "necessary" as the OCP would lead the Trial Chamber to believe.[98] The fact that JCE III is not "necessary" is further demonstrated by the OCP's own assertion that JCE I "best reflects the nature of the liability of the Accused" and that there is only a "remote" possibility that the crimes alleged would not fall within JCE I.[99]

28. The OCP finally asserts that any difference in culpability is more properly taken into account at sentencing.[100] This assertion fails to account for the fact that there are other forms of liability, such as aiding and abetting, which may appropriately describe an accused's liability while respecting the principle of legality.[101] It further fails to take into account the possibility that punishing an accused qualified on his membership in a group may actually trivialize his guilt in some situations.[102] In considering whether JCE III may apply, the Trial Chamber should bear in mind Professor Schabas's warning that applying

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Marsh & Michael Ramsden, *Joint Criminal Enterprise: Cambodia's Reply to* Tadić, 11 INT'L CRIM. L. REV. 137, 154 (2011), where the authors, in comprehensively analyzing of the Pre-Trial Chamber's decision, observe:

> It speaks volumes when civil party victims in both *Case No.* 1 and 2 have argued against the application of JCE III at the ECCC. This is a people seeking genuine legitimacy in their delayed pursuit of justice through a tribunal with its stated goal of acting as a role model for the courts of Cambodia. The ECCC was set up to enable Cambodia to come to terms with the unimaginable suffering endured by its people during Pol Pot's brutal regime. However, the Khmer Rouge's brutality should not provide justification for applying highly elastic concepts of criminal responsibility. JCE III may facilitate the conviction of those who participated in serious human rights violations, but at the same time it diminishes respect for international justice, weakens the significance of a tribunal's finding of guilt and compromises the tribunal's historical legacy.

[97] Request, para. 39.

[98] "Thus, alleged authors of crimes can originally incur individual criminal responsibility via JCE III but, depending on the circumstances and the evidence presented, their liability can instead result in a conviction via JCE I. One of the main differences between JCE I and JCE III, while theoretically important, may not thus be so pivotal..." STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 247.

[99] Request, para. 2.

[100] *Id.*, para. 40.

[101] "Instead of moulding legal concepts to fit reality, one might better realize that the JCE doctrine is simply not always the appropriate instrument to tackle state bureaucracies and large organizations that engage in international crimes." Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. INT'L CRIM. JUST. 91, 93 (2007). Professor Weigend notes "[t]he problem, of course, is whether the (understandable) wish to bring all 'perpetrators' to justice is a sufficient basis for determining who is a 'perpetrator.' In other words, JCE, in throwing its net very broadly may have a difficulty in explaining why each fish caught deserves punishment for international wrongdoing." Thomas Weigend, *Intent, Mistake of Law and Co-perpetration in the* Lubanga *Decision on Confirmation of Charges*, 6 J. INT'L CRIM. JUST. 471, 477 (2008).

[102] *See Prosecutor v. Martić*, IT-95-11-A, Judgement on Appeal – Separate Judgement of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, 8 October 2008, para. 2.

JCE III results in "discounted convictions that inevitably diminish the didactic significance of the Tribunal's judgements and that compromise its historical legacy."[103]

III. CONCLUSION AND RELIEF REQUESTED

The issue before the Trial Chamber is a Rule 89(1) preliminary objection; an issue of pure law. Hearing the facts prior to determining what law is applicable would be inappropriate: it raises the perception that the Trial Chamber must have a pre-determined result it wishes to achieve; hence the need to first hear the facts in order to figure out what jurisprudence may be useful (as opposed to applicable) to achieve that result. Further briefs by *amici* or the OCP on any issues related to JCE III liability are unwarranted. The Pre-Trial Chamber addressed all issues related to JCE, holding that JCE III liability is inapplicable at the ECCC. The OCP ignored Rule 89(1) and filed no objections. It cannot now seek relief in the form of re-characterization of facts as a means of circumventing the rules or curing its lack of due diligence. Apropos are the findings of the ICTR Appeals Chamber in *Karemera*:

> To the extent that it suggests that the Trial Chamber can avoid deciding the Appellant's challenge now, the Prosecution is mistaken. Under Rule 72(A) all motions challenging jurisdiction must be 'disposed of' within 60 days and before the commencement of opening statements. Here, both the Trial Chamber and the Appeals Chamber have ruled that the Appellant's motion was jurisdictional. And while it is certainly possible that a jurisdictional motion might raise within it certain nonjurisdictional questions that the Trial Chamber could legitimately defer, this is not such a case: the question that the Appellant faults the Trial Chamber for deferring is a pure question of law concerning the limits of the Tribunal's jurisdiction to employ a mode of liability.[104]

WHEREFORE, for all the reasons stated herein, the Trial Chamber should:

a. REJECT the Request as untimely; or in the alternative

b. HOLD a public, oral hearing; and

c. FIND that JCE III liability is inapplicable at the ECCC.

Respectfully submitted,

ANG Udom — Michael G. KARNAVAS

Co-Lawyers for Mr IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **22nd** day of **July, 2011**

[103] William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENGLAND L. REV. 1015, 1033-34. (2002-2003).

[104] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, para. 22.