ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

លេខ/No: D97/15/9

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N° **002/19-09-2007-ECCC/OCIJ (PTC38)**

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge PEN Pichsaly

Date: **20 May 2010**

PUBLIC

DECISION ON THE APPEALS AGAINST THE CO-INVESTIGATIVE JUDGES ORDER ON JOINT CRIMINAL ENTERPRISE (JCE)

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Mr SAM Sokong
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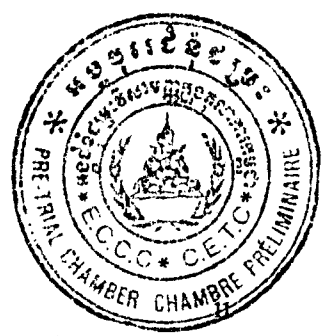

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seized of "Ieng Thirith Defense Appeal Against 'Order on the Application at the ECCC of the form of Liability Known as Joint Criminal Enterprise' of 8 December 2009", filed on 18 January 2010 ("Ieng Thirith Appeal"); "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", filed on 22 January 2010 ("Ieng Sary Appeal"); "Appeal Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise" filed by Khieu Samphan on 3 February 2010 ("Khieu Samphan Appeal"); and "Appeal Brief Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Responsibility", filed by Co-Lawyers for Civil Parties on 8 January 2010 ("Civil Party Appeal").

I. PROCEDURAL BACKGROUND

1. These Appeals are filed in the context of the ongoing judicial investigation against NUON Chea, IENG Sary, IENG Thirith, KHIEU Samphan and KAING Guek Eav alias "Duch" relating to charges of crimes against humanity and grave breaches of the Geneva Conventions dated 12 August 1949, offences defined and punishable under Articles 5, 6, 29(new) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 ("ECCC Law").

2. On 28 July 2008, the Defence for IENG Sary filed before the Co-Investigating Judges ("OCIJ") a Motion Against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise ("JCE") ("IENG Sary Motion"), requesting the OCIJ to declare JCE inapplicable before the ECCC[1] on the basis that

[1] IENG Sary's Motion against the Application at the ECCC of the form of Liability Known as Joint Criminal Enterprise, 28 July 2008, D97 ("IENG Sary Motion"). The Office of the Co-Prosecutors ("OCP") filed its response on 11 August 2008. Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise, 11 August 2008, D97/II ("Co-Prosecutors' Joint Response").

1) such application would violate the principle of legality because JCE was not acknowledged as customary international law before or during the period of 1975-1979, nor is it presently recognized as such[2] and 2) JCE is not specified in the ECCC Establishment Law, nor is it part of Cambodian law or recognized by any international convention enforceable before the ECCC.[3] Upon invitation by the OCIJ, the Defence for IENG Sary filed Supplementary Observations on 24 November 2008[4] while the Defence for IENG Thirith did so on 30 December 2008,[5] concurring with the arguments raised by the Defence for IENG Sary in its original Motion and Supplementary Observations.[6] It alternatively argued that the ECCC only has jurisdiction to apply the first form of JCE and that it was inadequately pleaded by the OCP in its Introductory Submissions.[7] On the same day, the Defence for NUON Chea filed its Supplementary Observations,[8] supporting the positions of the above-mentioned defences. The Defence for KAING Guek Eav declined the OCIJ's invitation to file Supplementary Observations on 24 December 2008.[9] Co-Lawyers for Civil Parties also filed their Supplementary Observations on 30 December 2008,[10] submitting that JCE III is not applicable before the ECCC as it was neither codified in the Cambodian Penal Code of 1956 nor in the ECCC Law

[2] IENG Sary Motion, para. 29; IENG Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC, 24 November 2008, D97/7 ("IENG Sary's Supplementary Observations"), Section I(A).
[3] IENG Sary Motion, p. 1; IENG Sary's Supplementary Observations, Section I(B-F), p. 2.
[4] IENG Sary's Supplementary Observations. The Defence for IENG Sary summarizes its Supplementary Observations as follows: 1) JCE is not applicable at the ECCC because it is barred by the principle *nullem crimen sine lege*; 2) it is not a form of liability over which the ECCC has jurisdiction by virtue of Article 29 of the Establishment Law as it is neither found explicitly in Article 29, nor can it be considered a form of "commission"; 3) it is not recognized by Cambodian Law applicable in 1975-1979; 4) it is not currently established in customary international law, nor was it recognized in customary international law during 1975-1979; 5) it was neither foreseeable not accessible in 1975-1979; and 6) customary law is not applicable in Cambodian courts, and is likewise inapplicable at the ECCC. IENG Sary's Supplementary Observations, Section I..
[5] IENG Thirith Submissions on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise Pursuant to the order of the Co-Investigating Judges of 16 September 2008, 30 December 2008, D97/3/2 ("IENG Thirith's Submissions").
[6] IENG Thirith's Submissions, para. 28.
[7] IENG Thirith's Submissions, paras 29, 31.
[8] Submissions on Applicability at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, 30 December 2008, D97/3/3 ("NUON Chea's Submissions").
[9] Defence's Submissions Concerning Application of the Form of Responsibility Known as Joint Criminal Enterprise (filed by the Defence for KAING Guek Eav alias Duch), 24 December 2008, D97/3/1, para. 2.
[10] Response of Co-Lawyers for the Civil Parties on Joint Criminal Enterprise, 30 December 2008, D97/3/4 ("Civil Parties' Submissions").

and therefore was not part of International Customary Law at the relevant time, i.e. between 1975 and 1979, and that applying JCE III at the ECCC would amount to a violation of the general principle of *nullum crimen nulla poena sine lege.*[11]

3. On 9 March 2010, the Pre-Trial Chamber decided to determine the said Appeals on the basis of the written submissions alone.[12]

4. In the Impugned Order, the OCIJ made the following legal findings concerning the Appeals:

   a) Although Article 29 of the ECCC Law does not expressly refer to JCE, it is a mode of liability articulated as a form of commission in the ICTY *Tadić* Appeal Judgement,[13] which defines three categories of JCE, all of which have the same *actus reus* but a different *mens rea*;[14]

   b) The principle of legality requires an assessment of whether JCE was applicable law at the time of the crimes charged.[15] The applicable test is whether "the criminal liability in question was sufficiently foreseeable" and "the law providing for such liability [was] sufficiently accessible at the relevant time [...]".[16] This test can be satisfied "when the alleged conduct was criminalised under national law or under international law";[17]

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[11] Civil Parties' Submissions, para. 34.
[12] Decision to Determine the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE) on Written Submissions and Direction for Reply, 9 March 2010, D97/14/11.
[13] *Prosecutor v. Duško Tadić*, IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999 ("*Tadić* Appeal Judgement" or "*Tadić*").
[14] Impugned Order, paras 13-17, according to which, the *actus reus* includes a plurality of persons, the existence of a common purpose or plan which amounts to or involves the commission of a crime within the law and the contribution of the accused to the common plan. The second category of JCE (systemic) is a variation of the first one (basic), both of which require proof of shared intent to perpetrate the crime(s) which form part of the common plan between the accused and other persons involved in the JCE, while in the third category of JCE (extended), the accused can also be found responsible for crimes outside of the common plan which are a natural and foreseeable consequence of the common plan if the accused was aware of and willingly took the risk that such other crimes could occur in pursuance of the plan.
[15] Impugned Order, para. 18.
[16] Impugned Order, para. 19 quoting *Prosecutor v. Milutinović et al.*, IT-05-98, Decision on Dragoljob Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Appeals Chamber, 21 May 2003 ("*Ojdanić* JCE Decision"), para. 37.
[17] Impugned Order, para. 20.

c) "[T]he application of international customary law before the ECCC is a corollary from the finding that the ECCC holds indicia of an international court applying international law";[18]

d) "Considering the international aspects of the ECCC" and the fact that "the jurisprudence relied upon in articulating JCE pre-existed the events under investigation at the ECCC, [...] there is a basis under international law for applying JCE" before the ECCC;[19] and

e) "[P]ursuant to principles of interpretation of autonomous legal '*regimes*' [...], the modes of liability for international crimes can only be applied to the international crimes".[20]

5. The OCIJ therefore decided that JCE does not apply to national crimes, and regarding international crimes, it rejected "the request insofar as the *actus reus* and *mens rea*" for JCE I and II and the *actus reus* for JCE III, confirming the applicability of those principles before the ECCC.[21] It partially granted "the request insofar as the only *mens rea* for JCE III applicable before the ECCC is the subjective acceptance of the natural and foreseeable consequences of the implementation of the common plan".[22]

II. BRIEF OVERVIEW OF THE APPEAL

6. The Ieng Thirith Appeal relies on the following seven grounds of appeal in requesting that the Pre-Trial Chamber "quash the Impugned Order and find that the ECCC has no jurisdiction over JCE as a form of liability".[23] In the alternative, they request a finding that the ECCC has no jurisdiction over the second and third forms of JCE on the basis that the Co-Prosecutors have insufficiently pleaded these modes

[18] Impugned Order, para. 21.
[19] Impugned Order, para. 21 (internal citations omitted).
[20] Impugned Order, paras 22-23.
[21] Impugned Order, Enacting Clause.
[22] Impugned Order, Enacting Clause.
[23] Ieng Thirith Appeal, para. 1.

of responsibility in the Introductory Submission, and as a result they cannot be applied to Case 002. Ground 1 alleges that the Impugned Order "lacks clarity and is ambiguous" in its formulation of the third form of JCE.[24] Ground 2 alleges that the OCIJ failed to reason why they dismissed the Defence argument that the *Tadić* Appeal Judgment "forms an insufficient precedent in international criminal law to rely on JCE".[25] Ground 3 alleges that the OCIJ failed to address the argument made on behalf of IENG Thirith that JCE was improperly pleaded in the Introductory Submission.[26] Ground 4 alleges that "there was no basis for JCE III in Cambodia in 1975-1979, and that the basis for the second form of JCE was ambiguous".[27] Ground 5 alleges that the OCIJ erroneously found that JCE II and III apply before the ECCC, because "JCE III was not enacted in Cambodian law [before or during the period of] 1975-1979, [and] JCE II's basis was ambiguous".[28] Ground 6 alleges that the OCIJ failed "to conclude that the three forms of JCE were part of customary international law at the relevant time".[29] Ground 7 alleges that the Impugned Order implicitly concluded that the "three forms of JCE formed part of customary international law at the relevant time", and there is actually no basis for such conclusion.[30]

7. The Ieng Sary Appeal alleges that the OCIJ erred in five respects when it determined that JCE liability is applicable at the ECCC in finding or concluding that: a) "the ECCC holds indicia of an international court" because it is a domestic Cambodian court;[31] b) the ECCC could directly apply customary international law in the absence of specific directives in the Constitution, legislation or national jurisprudence incorporating customary law into domestic law;[32] c) "JCE liability was indeed customary international law in 1975-79" without undertaking an independent analysis thereof;[33] d) accepting that "JCE liability as formulated by the *Tadić*

[24] Ieng Thirith Appeal, para. 9.
[25] Ieng Thirith Appeal, paras 22-24.
[26] Ieng Thirith Appeal, para. 28.
[27] Ieng Thirith Appeal, para. 38.
[28] Ieng Thirith Appeal, para. 44.
[29] Ieng Thirith Appeal, para. 52.
[30] Ieng Thirith Appeal, para. 60.
[31] Ieng Sary Appeal, para. 2 a).
[32] Ieng Sary Appeal, para. 2 b). The Ieng Thirith Appeal raises similar arguments in its Ground 5.
[33] Ieng Sary Appeal, para. 2 c).

Appeals Chamber could fall under 'committing' in Article 29" of the ECCC Law; [34] and e) "holding that the application of JCE liability would not violate the principle of legality".[35]

8. In his Appeal, KHIEU Samphan alleges firstly that the Impugned Order was filed out of time[36] and did not properly inform the Appellant of the charges brought against him.[37] He also alleges that JCE is not applicable before the ECCC.[38] He finally alleges that the Impugned Order institutes a two-tiered criminal justice system: while the 1956 Penal Code and Article 29 of the ECCC Law make no reference to an autonomous legal regime for international crimes, the laws should be interpreted consistently and in favour of the Charged Person.[39]

9. Co-Lawyers for Civil Parties submit that all three forms of JCE are applicable before the ECCC to crimes under international law and the 1956 Cambodian Penal Code. They assert that "JCE liability existed under Cambodian Law in 1956, where it was referred to as '*coaction and complicité*' [co-perpetration and complicity], and included, at a minimum, the first two forms of JCE".[40] On this basis, they seek reversal of the Order on the issue of JCE under Cambodian national law.[41]

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[34] Ieng Sary Appeal, para. 2 d).
[35] Ieng Sary Appeal, para. 2 e).
[36] Khieu Samphan Appeal, paras 45-51.
[37] Khieu Samphan Appeal, paras 52-55.
[38] Khieu Samphan Appeal, paras 56-59 (endorsing the submissions made by the other Defence Lawyers and stressing that the Impugned Order is in this respect is devoid of legal basis, is a "decision of convenience aimed at satisfying penal objectives", constitutes a violation of "the most basic criminal law principles" including the principle of legality, as well as of "the spirit and the letter of the ECCC Law and the ECCC Agreement").
[39] Khieu Samphan Appeal, paras 60-71.
[40] Appeal Brief against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Responsibility, 8 January 2010, D97/17/1 ("Civil Party Co-Lawyers' Appeal"), para 10.
[41] The remainder of the Civil Party Co-Lawyers' Appeal does not amount to an appeal, but rather supports the Impugned Order.

10. In their Joint Response,[42] the Co-Prosecutors "request that the Pre-Trial Chamber dismiss the Appeals as being both procedurally barred and substantively devoid of merit" because: 1) "JCE has been part of customary international law since the 1940s"; 2) "it is applicable before the ECCC [which] is mandated to prosecute international crimes and [...] has the indicia of an international tribunal"; and 3) "as a criminal mode of liability under customary international law, JCE is directly applicable in Cambodia regardless of whether there was a national incorporating legislation".[43]

11. On 9 March 2010, the Pre-Trial Chamber issued a Decision to Determine the Appeals on Written Submissions and Directions for Reply,[44] directing the Co-Lawyers for the Charged Persons to file their Replies to the Co-Prosecutors' Joint Response within 5 days.

12. On 15 March 2010, the Defence for Ieng Thirith filed its Reply to Co-Prosecutors' Joint Response.[45]

13. On 18 March 2010, the Defence for Ieng Sary filed "Ieng Sary's Reply to the Co-Prosecutors'Response to Ieng Sary, Ieng Thirith and Kieu Samphan's Appeals on Joint Criminal Enterprise" ("Ieng Sary Reply").[46]

14. On 25 March 2010, the Defence for Kieu Samphan filed "Joint Response on Joint Criminal Enterprise" ("Kieu Samphan Reply").[47]

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[42] By decision of 9 February 2010, the Pre-Trial Chamber granted the Co-Prosecutors' application for extension of time and page limits (26 January 2010, D97/15/2), allowing a 40-page Response to be filed by to 19 February. Decision on the Co-Prosecutors' Applications for Extension of Time and Page Limits to File a Joint Response to Ieng Thirith, Khieu Samphan, Ieng Sary and Certain Civil Parties' Appeals against the Order on Joint Criminal Enterprise, 9 February 2010, D97/16/4.

[43] Co-Prosecutors' Joint Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise, 19 February 2010, D97/16/5 ("Co-Prosecutors' Joint Response"), para. 3.

[44] Decision to Determine the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE) on Written Submissions & Directions for Reply, 9 March 2010, D97/14/11.

[45] Defence Reply to Co-Prosecutors' Response to Defence Appeal on the Application of Joint Criminal Enterprise, 15 March 2010, D97/15/8 ("Ieng Thirith's Reply").

[46] See, Decision on the Defence Application for Extension of Time Limit to Reply to Co-Prosecutors Joint Response to the Appeals, 12 March 2010, D97/14/13, granting the extension of time requested by Ieng Sary.

15. Pursuant to a Decision on an Request for extension of time,[48] On 18 March 2010, the Defence for Ieng Sary filed its Reply.[49]

III. ADMISSIBILITY OF THE APPEALS

16. As a preliminary matter, the Pre-Trial Chamber notes that while the Appeals filed by IENG Sary, IENG Thirith and KHIEU Samphan are based on Internal Rule 74(3)(a), according to which a charged person may appeal orders of the OCIJ confirming the jurisdiction of the ECCC, the grounds of appeal brought by the IENG Thirith Appeal also raise arguments which cannot possibly pertain to a jurisdictional issue. Firstly, in Grounds of Appeal 2 and 4-6, the Co-Lawyers for IENG Thirith allege that the ECCC has no jurisdiction over JCE as a form of liability in Case 002 or, in the alternative, that it has no jurisdiction to apply the third form of JCE in that case.[50] Secondly, Grounds of Appeal 1 and 3 allege that the OCP has insufficiently pleaded the first and third form of JCE in the Introductory Submission, or that the formulation of JCE III in the Impugned Order is inadequate and, as a result, those forms of JCE cannot be applied to Case 002. The Pre-Trial Chamber is of the view that Grounds of Appeal 1 and 3 are not challenges to jurisdiction, but instead raise the issue of whether the Charged Person received sufficient notice of the charges.

17. The OCP raises five preliminary objections to the Appeals,[51] which the Pre-Trial Chamber will examine in turn.[52]

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[47] Joint Response on Joint Criminal Enterprise, 25 March 2010, D97/19/9. See, Decision on the Defence Application for extension of Time Limit to Reply to Co-Prosecutors' Joint Response to the Appeals on Joint Criminal Enterprise, 23 March 2010, D97/16/8, granting the extension of time requested by Kieu Samphan.
[48] Decision on the Defence Application for Extension of Time Limit to Reply to Co-Prosecutors' Joint Response to the Appeal, 12 March 2010, D97/14/13.
[49] 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 (Ieng Sary's Reply), D97/14/14.
[50] Ieng Thirith Appeal, para. 1.
[51] Co-Prosecutors' Joint Response, paras 4-22, raising the following objections to the admissibility of the appeals: even if the JCE declaration is considered an order, 1) "it did not confirm the jurisdiction of the ECCC and is, as such, non-appealable" under Rule 74(3)(a); 2) "it did not reject a request for investigative

A. Does the Impugned Order amount to an "order" or a "decision" or is it a mere "declaration"?

18. Pursuant to Internal Rule 74(3), a charged person may appeal against nine categories of orders or decisions made by the OCIJ. In this regard, the OCP firstly object that the Impugned Order is not an "order" or "decision". Instead, they submit that it is a mere "declaration" of the applicable law made in response to an application by the Defence for IENG Sary that the OCIJ declare that JCE liability is inapplicable before the ECCC.[53] The "declaration", according to the OCP, is provided to ensure "sufficient notice" to the parties and is not appealable.[54] The Pre-Trial Chamber does not find this objection persuasive. Indeed, not only does the title of the Impugned Order indicate that it is an "order", its content is directed at addressing the applicability of JCE as a form of liability before the ECCC.[55] Accordingly, the form and substance of the Impugned Order indicate that it is more than a mere "declaration", and amounts to an "order" or "decision" for the purpose of Internal Rule 74.

B. Is the Impugned Order appealable pursuant to Internal Rule 74(3)(a)?

19. According to Internal Rule 74(3)(a) a charged person may appeal orders or decision of the OCIJ confirming the jurisdiction of the ECCC.

20. Grounds of Appeal 2 and 4-6, in essence, allege that the OCIJ erred in deciding that all three forms of JCE can be applied at the ECCC, because it has no jurisdiction to apply JCE as a form of liability and, alternatively, cannot apply its *systemic* and

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action and is, as such, non-appealable"; 3) "it did not violate any fair trial right and is, as such, non-appealable pursuant to Rule 21"; and; 4) "dismissal of the appeals shall advance procedural economy".

[52] The Pre-Trial Chamber has considered the points of Reply in relation to the OCP Joint Response made in Ieng Thirith's Reply.

[53] The Pre-Trial Chamber dismisses the application made on behalf of Ieng Thirith that the OCP be estopped from raising this argument. Ieng Thirith's Reply, para 6.

[54] Co-Prosecutors' Joint Response, paras 5-6.

[55] *See*, in particular, Impugned Order, paras 18-21.

extended forms (JCE II and III). According to the Appellant, Internal Rule 74(3)(a), which provides that a charged person may appeal orders of the OCIJ confirming the jurisdiction of the ECCC, provides a legal basis for the present Appeal. The Pre-Trial Chamber understands that the Appellant considers the Impugned Order to have "confirm[ed] the jurisdiction of the ECCC" by finding JCE applies in its three forms to the international crimes charged.

21. The OCP do not argue that the applicability of JCE as a form of liability before the ECCC would not, as such, amount to a jurisdictional challenge. On the contrary, the OCP consider that, "[i]f indicted with JCE liability, the Appellants will have a valid cause of action to bring a jurisdictional challenge before the Trial Chamber", pursuant to Rule 89(1).[56] However, the OCP *do* object to the Appeals on the basis that the Impugned Order did not "confirm the jurisdiction of the ECCC" in respect of any matter.[57] Before turning to this argument, the Pre-Trial Chamber must determine whether the present challenges to the applicability of JCE before the ECCC indeed amount to jurisdictional challenges. If they do not, the grounds of appeal in question are not appealable under Internal Rule 74(3)(a), irrespective of the OCP objection.

22. The Pre-Trial Chamber notes that challenges to jurisdiction in domestic civil law systems do not generally include the very existence and applicability of a specific form of responsibility. This is the case as the forms of responsibility are well-established and defined. They are either listed in criminal codes, and to the extent that such codes do not provide a detailed definition, a long-evolving jurisprudence has articulated the elements of the form of responsibility. In Cambodian Law, as in French Law for instance, a court must ascertain whether it has temporal and territorial jurisdiction over facts brought before it as well as material jurisdiction for the crimes charged. A court must declare itself incompetent when seized of crimes over which only a higher court has jurisdiction. By contrast, issues of jurisdiction do not include disputes or challenges to the applicability of forms of liability which are

[56] Co-Prosecutors' Joint Response, para. 16.
[57] Co-Prosecutor's Joint Response, paras 7-9.

usually considered at a later stage by the trial court. The judicial organs of the International Criminal Court ("ICC") do not appear to have yet considered challenges against the very existence of a form of liability to be a jurisdictional issue. This is again understandable given how comprehensively Article 25 of Rome Statute defines the forms of responsibility and also the fact that the Statute only applies to crimes committed after its entry into force.

23. As mentioned above, the situation is different at the *ad hoc* tribunals. In such bodies, challenges relating to the specific contours of a substantive crime,[58] or to a form of responsibility, are matters to be addressed at trial.[59] However, 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 considered as jurisdictional challenges and can be brought in a preliminary motion during the pre-trial phase of proceedings, giving rise to a right of appeal. Indeed the current respective Rules of Procedure and Evidence of the *ad hoc* tribunals expressly find that challenges to an indictment on the ground that it does not relate to any of the forms of individual criminal responsibilities listed in Article 7 of the ICTY Statute and Article 6 of the ICTR Statute are challenges to jurisdiction.[60] Accordingly, the jurisprudence of both *ad hoc* tribunals is clear that an appeal by an accused claiming a form of responsibility, including the accused participation in a JCE, does not fall within the Tribunal's jurisdiction or within customary international law, is properly characterized as a motion challenging

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[58] *Cf. Prosecutor v. Delalic, Mucić, Delić, and Landžo*, IT-96-21-AR72.5, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Appeals Chamber, 6 December 1996, para. 27 (holding that any dispute as to the substance of the crimes enumerated in Articles 2, 3, 4, and 5 of the Statute "is a matter for trial, not for pre-trial objections"); *Prosecutor v. Furundžija*, Case No. IT-05-17/1-T, Judgement, Trial Chamber, 10 December 1998, paras 172–186, *Prosecutor v. Kunarac, Kovač, and Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, Trial Chamber, 22 February 2001 ("*Kunarac* Trial Judgement"), paras 436–460 (Trial Judgements ascertaining the contours of rape as a crime against humanity under Article 5(g) of the Statute).

[59] *Cf. Prosecutor v. Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004 ("*Blaškić* Appeal Judgement"), paras 32–42 (Appeal Judgement ascertaining the contours of the mental element of "ordering" under Article 7(1) of the Statute). *See also Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction – Indirect Co-Perpetration, Trial Chamber, 22 March 2006 ("*Ojdanić* Co-Perpetration Decision"), para. 23.

[60] *See* ICTY Rules of Procedure and Evidence, Rule 72(D)(iv) ("For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to: [...] (iv) any of the violations indicated in Article[...] 7 of the Statute."). Rule 72(D)(iv) of the ICTR Rules of Procedure and Evidence contains a similar provision.

jurisdiction. Therefore, such a challenge may be brought as a preliminary motion during the pre-trial phase of the proceedings.[61] This is the case, not only because of the very broad terms used in Article 7 of the ICTY Statute and Article 6 of the ICTR Statute but also because, as held by the ICTY Appeals Chamber:

> [a]s far as the jurisdiction *rationae personae* of the Tribunal is concerned, the Secretary-General's Report does not contain any explicit limitation as to the nature of the law which the Tribunal may apply, other than a statement apparently of general application to the effect that 'the International Tribunal would have the task of applying existing international humanitarian law' [...] However, the principal of legality demands that the Tribunal apply the law which was binding at the time of the acts for which an accused is charged. As is the case in respect of the Tribunal's jurisdiction *rationae materiae,* that body of law must be reflected in customary international law.[62]

There have been numerous challenges to the ICTY's jurisdiction by accused charged with war crimes, crimes against humanity or genocide over modes of responsibility such as JCE and superior responsibility. Such appeals are often based on an argument that these modes of responsibility were not established in customary international law at the relevant time or were not applicable to a specific crime, and that their application would infringe upon the principle of legality. The ICTY jurisprudence has accepted these as jurisdictional challenges.

24. With respect to whether the applicability of JCE before the ECCC amounts to a jurisdictional challenge, the Pre-Trial Chamber finds that the ECCC is in a situation comparable to that of the *ad hoc* tribunals. The Pre-Trial Chamber turns now to the OCP objection that the Impugned Order did not "'confirm the jurisdiction of the ECCC' in respect of any matter".[63] While it is correct that the Impugned Order does not expressly confirm that the ECCC has jurisdiction to apply the JCE forms of

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[61] *Ojdanić* JCE Decision, para. 5, referring to *Prosecutor v. Milutinović, Šainović, and Ojdanić*, IT-99-37-AR72, Bench Decision pursuant to Rule 72(E) as to Validity of Appeal, Appeals Chamber, 25 March 2003, p. 3 (Appeals Bench holding that Ojdanić's appeal had been validly filed insofar as it challenged the jurisdiction of the Tribunal in relation to his individual criminal responsibility for allegedly participating in a JCE). *Accord Ojdanić* Co-Perpetration Decision, para. 23. *See also Rwamakuba v. Prosecutor*, ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, Appeals Chamber, 22 October 2004 ("*Rwamakuba* JCE Decision"), paras 3, 5, 31.
[62] *Ojdanić* JCE Decision, para. 10.
[63] Co-Prosecutors' Joint Response, paras 7-9.

responsibility, the Pre-Trial Chamber considers that it does so implicitly, in that it expressly relies on the ICTY case law treating as jurisdictional the question of whether a form of liability is recognized in customary international law.[64]

25. The Pre-Trial Chamber considers that, insofar as Grounds of Appeal 2 and 4-7 are concerned, the Impugned Order is appealable pursuant to Internal Rule 74(3)(a).[65] It turns next to the Co-Prosecutors' objection that the Impugned Order is not appealable under Internal Rule 74(3)(b).

C. Is the Impugned Order appealable under Internal Rule 74(3)(b)?

26. The OCP objects to the admissibility of the Appeal against the Impugned Order under Internal Rule 74(3)(b) as the Order did not refuse any request for investigative action (under Internal Rule 55(10)),[66] but that it is a request "for action to be performed by the Co-Investigating Judges or their delegates with the purpose of collecting information conducive to ascertaining the truth about facts mentioned in the Introductory Submission".[67]

27. The Pre-Trial Chamber is of the view that Internal Rule 74(3)(a), referred to by the Appellant IENG Thirith as the legal basis for the present Appeal is inadequate with respect to grounds of appeal 1 and 3 because the issue they raise, being whether the Introductory Submission and the Impugned Order provide sufficient notice of the charges against the Appellant in relation to JCE I and III, is clearly not a jurisdictional issue.

28. The Pre-Trial Chamber notes that while the motion on which the Impugned Order has been rendered was erroneously filed by the Defence for IENG Sary under

[64] Impugned Order, paras 19-21, referring to *Ojdanić* Co-Perpetration Decision, para. 37.
[65] The Pre-Trial Chamber notes Ieng Thirith's Reply, paras 8-12.
[66] Co-Prosecutors' Joint Response, paras 10-13.
[67] Co-Prosecutors' Joint Response, para. 12, referring to Decision on Khieu Samphan's Appeal against the Order on the Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20 ("Translation Appeal Decision"), para. 28

Internal Rule 53(1), the OCIJ decided "*proprio motu* to consider the motion under the correct provision of the Internal Rules, namely [Internal] Rule 55(10)".[68] This provision provides that the parties may request the OCIJ to make "such orders or undertake such investigative action as they consider necessary for the conduct of the investigation". The Pre-Trial Chamber notes that IENG Thirith's initial submissions on JCE argue that the first and third forms of JCE are insufficiently pleaded in the Introductory Submission, which resulted in a violation of her right to be informed of the charges against her and accordingly should be excluded from the Introductory Submission.[69] The Pre-Trial Chambers considers this submission to amount to a request that the OCIJ make an order which the Defence for IENG Thirith considers necessary for the conduct of the investigation, insofar as it purports to provide the Charged Persons with sufficient notice of the modes of liability relied upon. Whilst finding it necessary to respond to the requests before them (which the Pre-Trial Chamber understands to include the above-mentioned submission from IENG Thirith), the purpose of the OCIJ response in this respect was to provide sufficient notice relating to a mode of liability not expressly articulated in the Law or the Agreement. The OCIJ only partially granted the requests insofar as it clarified that the only *mens rea* for JCE III applicable before the ECCC is the subjective acceptance of the natural and foreseeable consequences of the implementation of the common plan.[70]

29. The Pre-Trial Chamber has already ruled, in the context of an Appeal by the Defence for KHIEU Samphan, on a possible inconsistency between Internal Rule 74(3)(b)[71] and Internal Rule 55(10) which, according to the then-Appellant, would provide a charged person with the right to appeal both orders of the OCIJ refusing requests for investigative action and those rejecting requests to make such orders necessary for

[68] Impugned Order, para. 8, noting that Internal Rule 53(1) deals with the filing of Introductory Submissions by the OCP.
[69] IENG Thirith's Submissions, paras. 30-31.
[70] Impugned Order, Enacting Clause, expressly rejecting the Request insofar as the *actus reus* and *mens rea* for JCE I and II and the *actus reus* for JCE III.
[71] Limiting the possibility for the Charged Person to appeal orders from the OCIJ refusing requests for investigative action before the Pre-Trial Chamber.

the conduct of the investigation.[72] It ruled that "[a]ny inconsistency that may derive from a suggested general possibility to appeal under Internal Rule 55(10) and the limited possibility to appeal for the Charged Person under Internal Rule 74(3)(b) cannot lead to conclusions as drawn by the Co-Lawyers on the admissibility of this Appeal."[73] Having reviewed the grounds for pre-trial appeals provided by Internal Rules 55(10) and 74(3), the Pre-Trial Chamber is of the view that none of them actually provide a legal basis for a pre-trial appeal for lack of notice. The Pre-Trial Chamber therefore grants the Co-Prosecutors' third objection and turns to their fourth objection, that the Impugned Order does not violate any fair trial rights and that "the facts and circumstances of the current Appeals do not require the Pre-Trial Chamber to adopt a broad interpretation of Rule 74(3)" in light of Internal Rule 21.[74]

D. Do the facts and circumstances of the present Appeal require the adoption of a broad interpretation of Internal Rule 74(3) in order to ensure that the proceedings against the Charged Person are fair?

30. Internal Rule 21(1)(d) reads (in part), "[a]ny [suspected or prosecuted] person has the right to be informed of any charges brought against him/her [...]". The Pre-Trial Chamber will consider whether the facts and circumstances of the present Appeal require the adoption of a broader interpretation of a charged person's right to appeal in order to ensure that the proceedings are fair.

31. The Pre-Trial Chamber notes that Internal Rules 53 and 67 provide the legal framework for informing a charged person of the charges against him/her. Indeed, Internal Rule 53 requires the Co-Prosecutors to include in their Introductory Submission a summary of the facts, the type of offence(s) alleged and the relevant provisions of the law that define and punish the crimes and to submit the case file

[72] Decision on Admissibility of the Appeal Against Co-Investigating Judges' Order on Use of Statements Which Were or May Have Been Obtained by Torture, 27 January 2010, D130/10/12, paras 14-17.
[73] *Ibid.*, para. 17.
[74] Co-Prosecutors' Joint Response, paras 14-15. They argue in particular that determining now the matter raised by the Appeals may be "purely academic" as the Closing Order may not even include JCE liability, and that the Defence will in any event still have the opportunity to bring a jurisdictional challenge before the Trial Chamber pursuant to Internal Rule 89(1). Co-Prosecutors' Joint Response, paras 15-16.

and any other material of evidentiary value in their possession.[75] The Cambodian Criminal Procedural Code ("CPC") contains a similar provision in Article 44. Further, Internal Rule 67(2) prescribes that the indictment shall describe the material facts and their legal characterization by the OCIJ, including the relevant criminal provisions and the nature of the criminal responsibility. The CPC contains a similar provision in Article 247. The Internal Rules and the CPC provide no further guidance for the way in which the Closing Order should be reasoned. In these circumstances, the Pre-Trial Chamber will apply international standards.

32. International standards provide that, in the determination of charges against him/her, the accused shall be entitled to a fair hearing and, more specifically, to be informed of the nature and cause of the charges against him/her and to have adequate time and facilities for the preparation of his/her defence.[76] This right "translates into an obligation on the Prosecution to plead in the indictment the material facts underpinning the charges".[77] "The pleadings in an indictment will therefore be sufficiently particular when [they] concisely [set] out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the nature and cause of the charges against him/her to enable him/her to prepare a defence" effectively and efficiently.[78] The Prosecution is, of course, not required to plead the evidence by which it intends to prove the material facts,[79] and the materiality of a particular fact is dependent upon the nature of the Prosecution case.[80]

33. Where the indictment, as the primary accusatory instrument, fails to plead with sufficient specificity the material aspects of the Prosecution case, it suffers from a

[75] Further, according to Internal Rule 57, at the time of the initial appearance, the OCIJ has to *inter alia* inform the charged person of the charges. The Cambodian Criminal Procedural Code ("CPC") contains a similar provision in Article 143.
[76] *See*, in particular, Articles 14 and 15 of the International Covenant on Civil and Political Rights ("ICCPR"), expressly embedded in Article 13(1) of the ECCC Agreement.
[77] *Prosecutor v. Kupreškić*. IT-95-16-A, Appeal Judgment, Appeals Chamber, 23 October 2001 ("*Kupreškić* Appeal Judgement"), para. 88; *Prosecutor v. Hadžihasanović, Alagić and Kubura*, IT-01-47-PT, Decision on Form of Indictment, Trial Chamber II, 7 December 2001 ("*Hadžihasanović* Indictment Decision"), para. 8.
[78] *Hadžihasanović* Indictment Decision, para. 8.
[79] *Kupreškić* Appeal Judgement, para. 88.
[80] *Kupreškić* Appeal Judgement, para. 89.

material defect.[81] In applying that principle to challenges of indictments based on the vagueness of their terms, the ICTY and ICTR Appeals Chambers have taken a strict approach on the degree of specificity of material facts which should be pleaded in an indictment. These Chambers have applied that strict approach to the averment of the acts and conduct of the accused on which the Prosecution rely as indicating the accused's criminal responsibility.[82] In *Kvočka et al.*, the Appeals Chamber took the view that "whether or not a fact is material depends upon the proximity of the accused person to the events for which that person is alleged to be criminally responsible".[83] Furthermore:

> As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him.[84]

34. Considering that both international standards and Article 35(new) of the ECCC Law require specificity in the indictment, the Pre-Trial Chamber is of the view that it is in the interest of fairness to declare admissible the grounds of appeal that raise the issue of notice of the charges in relation to the modes of liability alleged against the charged persons. The Pre-Trial Chamber will finally turn to the fifth OCP objection to the Appeal which is based on its contention that dismissing the Appeal would advance procedural economy.[85]

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[81] *Kupreškić* Appeal Judgement, para. 114.
[82] *See Prosecutor v. Milan Milutinović, Nikola Sainović, Dragoljug Ojdanić, Nebojsa Pavković, Vladimir Lazarević, Vlastimir Djordjević and Sreten Lukić*, Case No. IT-05-87-PT.(" *Milutinović, et al.")* Decision on *Vladimir Lazarević's* Preliminary Motion on Form of Indictment, 8 July 2005 ("*Milutinović, et al* Decision on Form of Indictment") , para. 6.
[83] *Prosecutor v. Kvočka et al.*,IT-98-30/1-A, Judgement, Appeals Chamber, 28 February 2005 ("*Kvočka* Appeal Judgement"), para. 65.
[84] *Kvočka* Appeal Judgement, para. 65 citing *Prosecutor v. Galic*, IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, Appeals Chamber, 30 November 2001 (*"Galic* Decision on Leave to Appeal"), para. 15.
[85] Co-Prosecutors' Joint Response, paras 18-22.

E. Would dismissal of the Appeal advance procedural economy and if so, is it a valid ground to rule on the admissibility of the present Appeals?

35. 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. It is also aware that the Trial Chamber determined in Case 001 that it is not bound by decisions of the Pre-Trial Chamber.[86] Thus, disposing of the jurisdictional issues raised by the present Appeal at this stage will not necessarily preserve judicial time and resources. However, the interests in preservation of judicial resources and acceleration of legal and procedural processes do not outweigh the reasons cited above to reject the second and fourth preliminary objections raised by the OCP.[87]

IV. MERIT OF THE APPEAL

36. As to the standard of review applicable to the errors alleged by the Appeals, the Ieng Thirith Appeal refers to the criteria for overturning a discretionary decision by the OCIJ set forth by the Pre-Trial Chamber in its Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive of 18 November 2009.[88] The Pre-Trial Chamber notes that insofar as the Impugned Order addresses jurisdictional matters, it involves no discretion for the OCIJ. However, the criteria applicable to alleged errors of law, that is alleging an "incorrect interpretation of governing law", applies as well to the errors of law alleged by the present Appeals.[89]

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[86] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on Group I Civil Parties' Co-Lawyers' Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, 23 September 2009, E65/9, para. 12.
[87] The Pre-Trial Chamber dismisses the application made on behalf of Ieng Thirith seeking that the OCP be estopped from raising the argument of judicial economy. *See* Ieng Thirith's Reply, para. 24.
[88] Ieng Thirith Appeal, para. 6, citing Decision on the Appeal From the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13 ("SMD Decision"), para. 26
[89] SMD Decision, para. 26.

37. The Pre-Trial Chamber recalls that its finding in Case 001, that JCE is one "mode of liability to describe a factual situation where crimes are committed jointly by two or more perpetrators [... is] relevant to determining whether this mode of liability can be applied before the ECCC".[90] In the same decision, the Pre-Trial Chamber stated that three categories of JCE[91] are distinguished and derive from the ICTY Appeals Chamber's interpretation of the post-Second World War jurisprudence on "common plan" liability. The basic form of JCE (JCE I) exists where the participants act on the basis of a common design or enterprise, sharing the same intent to commit a crime.[92] The systemic form (JCE II) exists where the participants are involved in a criminal plan that is implemented in an institutional framework, such as an internment camp,[93] involving an organized system of ill-treatment.[94] The Pre-Trial Chamber notes that JCE II is a variant of JCE I.[95] The extended form (JCE III) exists where one of the participants engages in acts that go beyond the common plan but those acts constitute a natural and foreseeable consequence of the realisation of the common plan.[96]

38. The objective elements (*actus reus*) are the same for all three forms of JCE, namely: (i) a common plan (The Pre-Trial Chamber notes that the plan in question must amount to or involve the commission of a crime within the jurisdiction of the court),

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[90] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/PTC, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav Alias "Duch", 5 December 2008, D99/3/42 ("Decision on Appeal Against Closing Order"), para. 114.

[91] The *Tadić* Appeals Chamber used interchangeably the expressions "joint criminal enterprise", "common purpose" and "criminal enterprise", although the concept is generally referred to as "joint criminal enterprise" as in the Impugned Order. *See also*, *Ojdanić* JCE Decision, para. 20, regarding joint criminal enterprise as a form of commission.

[92] Decision on Appeal Against Closing Order., para. 132 & fn.82, referring to the *Almelo Trial* case, one of the military court cases reviewed and quoted by the *Tadić* Appeals Judgement.

[93] *Ibid,* para. 202, referring to *Tadić* Appeals Judgement.

[94] *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, Appeals Chamber, 25 February 2004 ("*Vasiljević* Appeal Judgement"), para, 98.

[95] *Tadić* Appeal Judgement, paras 202-203. Although the participants in the joint criminal enterprises of this category were mostly members of criminal organisations, the *Tadić* case did not require an individual to belong to such an organisation in order to be considered a participant in the joint criminal enterprise. The *Krnojelac* Appeal Judgement found that this "systemic" category of joint criminal enterprise may be applied to other cases and especially to the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, Appeals Chamber, 17 September 2003 ("*Krnojelac* Appeal Judgement"), para. 89.

[96] Decision on Appeal Against Closing Order, para. 132, referring to *Kvočka* Appeal Judgement, para. 267.

(ii) involving a plurality of persons, and (iii) an individual contribution by the charged person or the accused to the execution of the common plan.[97] The Pre-Trial Chamber notes that although the accused need not have performed any part of the *actus reus* of the perpetrated crime,[98] it is required that he/she has "participated in furthering the common purpose at the core of the JCE".[99] Not every type of conduct would amount to a significant enough contribution to entail the individual criminal responsibility of the accused based on his/her participation in a JCE.[100]

39. The subjective element (*mens rea*) varies according to the form of JCE. JCE I requires a shared intent to perpetrate the crime(s).[101] JCE II requires personal knowledge of the system of ill-treatment[102] *and the intent to further it.*[103] JCE III requires an intention to participate in the criminal plan or purpose of the JCE and to contribute to its execution, "with responsibility arising for extraneous crimes where the accused could foresee their commission and willingly took that risk"[104]—in other words, "being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, [deciding] to participate in that enterprise".[105]

40. Review of a number of decisions from post-Second World War Military Tribunals, ICTY, ICTR, ICC and other relevant publications filed or referred to as authorities by the parties in this case,[106] shows that the concept of JCE as a form of criminal responsibility in international law is a unique concept. JCE combines features from

[97] *Tadić* Appeal Judgement, Judgement, para. 227.
[98] *Kvočka* Appeal Judgement, para. 99 ("A participant in a joint criminal enterprise need not physically participate in any element of any crime, so long as the requirements of joint criminal enterprise responsibility are met".); *Vasiljević* Appeal Judgement, paras 100, 119; *Tadić* Appeal Judgement, paras 196, 227.
[99] *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, Appeals Chamber, 3 April 2007 ("*Brđanin* Appeal Judgement"), para. 427.
[100] *Ibid.*
[101] Decision on Appeal Against Closing Order, para. 132.
[102] *Ibid.*
[103] *Vasiljević* Appeal Judgement, para, 101.
[104] Decision on Appeal Against Closing Order, para. 132, referring to *Tadić* Appeals Judgement, para.228.
[105] *Vasiljević* Appeals Judgement, para, 101. *See also Prosecutor v. Karadzic,* IT-95-5/18-AR72.4, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009, paras 15-18.
[106] A number of these decisions will be discussed in some detail *infra.*

different legal traditions and has been applied and shaped by actors from varying legal backgrounds. The Prosecutors and Judges at the military commissions and tribunals set up after the Second World War applied the concepts on responsibility established in the Nuremberg Charter and Control Council Law No. 10 not only to impose responsibility on those perpetrators who physically committed acts for their violations of humanitarian law, but also on those individuals who, pursuing a common design with others, participated in the commission of such crime(s). In some of these cases, and in particular those of Nazi supporters who had been involved in mob violence against the Allied military and resistance forces, the crimes were physically committed by individuals who shared a common intent with the person convicted and were not remote from the perpetration of the crime.[107] In other cases involving crimes perpetrated on a broader scale and involving state agents, the persons convicted were usually remote from the physical perpetration of the crimes and no consideration was given to the criminal responsibility or even state of mind of the physical perpetrators.[108]

41. In spite of its unique nature, the concept of JCE, at least in its basic and systemic forms (JCE I & II), resembles accountability in traditional civil law in that it treats as co-perpetrators not only those who physically perform the *actus reus* of the crime, but also those who possess the *mens rea* for the crime and participate or contribute to

[107] *See*, in particular, the six cases referred to by the *Tadić* Appeal Judgement, paras 197-200, in support of the basic form of JCE.

[108] *See, e.g.*, two Control Council Law No. 10 cases, *United States. v. Altstoetter et al.* (1947), United States Military Tribunal III, Opinion and Judgment, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. III (U.S. Government Printing Office 1951) ("*Justice Case*"), and *United States v. Greifelt et al.* (1948), United States Military Tribunal I, Opinion and Judgment, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. V (U.S. Government Printing Office 1949) ("*RuSHA Case*"). These cases where relied upon, *inter alia*, by the ICTR Appeals Chamber to conclude that, as of 1992, customary international law permitted the imposition of criminal liability on a participant in a common plan to commit genocide. *See Rwamakuba* JCE Decision, paras 14-23. They are respectively concerned with 1) a pattern and plan of racial persecution to enforce the criminal laws against Poles and Jews, involving Prosecutors who prosecuted and Justices who convicted, and even sentenced to death, Poles and Jews in conformity with the policy of the Nazi State of persecution, torture, and extermination of the Jewish and Polish races and 2) individuals who participated in a two-fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations. This "Germanisation" plan involved the commission of abortions on foreigners impregnated by Germans, punishment for sexual intercourse between Germans and non-Germans, the slave labour of Poles and other Easterners, the persecution of Jews and Poles, and the kidnapping of foreign children.

its commission. In this sense, JCE has an underpinning in Cambodian law. The applicable criminal law at the relevant time is the Cambodian Penal Code of 1956. As noted by one of the amicus briefs:

> according to the *Commentary on the "Projet de Nouveau Code Penal"*, coordinated by Michel Bonnieu, traditional Cambodian law distinguished between dangerous and not dangerous perpetrators ("*malfaiteur dangereux*" and "*non dangereux*") and [Article] 76 of the Codes of 1929 and 1955 (1956) defined the "*auteur*" (perpetrator) as the person who commits crimes ("*infractions qu'elle commet ...*"). Co-perpetration was defined as "co-action" (*coaction*) in the Codes of 1929 and 1956, and its most important requirement was a common agreement between the co-perpetrators. Accordingly, by its wording, the provision did not encompass acts outside the agreement; these could only be punished as complicity. In fact, [...] [Article] 82 distinguishes between a direct and indirect participation and qualifies only the former as co-perpetration and the latter as complicity. According to [Article] 87, aiding or abetting requires "assistance with full knowledge". An aider or abettor can only be considered a co-perpetrator "when he/she makes the offenses realized," i.e., when he/she him-/herself realizes the offence.[109]

The same amicus brief notes that in Case 001: the Co-Prosecutors' Appeal Brief against the Closing Order referred to Article 145 of the same code as providing a definition of "co-authorship" as between:

> a plurality of persons who "confer or consult" with a view to the commission of a crime. [...] Apart from the reference to [Article] 145, which is not mentioned in any of the other available sources, the Appeals Brief correctly reproduces the applicable law at the time of commission. Given the influence of French Criminal Law in Cambodia, it is worth noting that the applicable French *Code Pénal* of the time (the *Code Pénal* of 1810,[110] [Articles] 59, 60), while it does not define different forms of perpetration, distinguishes between "*auteur*" (perpetrator) and "*complice*" (aider and abettor, accomplice) and thus confirms, at least, the model of participation followed by the Cambodian Code.[111]

This is not to say that "participation in a JCE" and "co-perpetration" under the 1956 Cambodian Penal Code are exactly the same. While both require the shared intent by

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[109] Kai Ambos Amicus Brief, p. 29, referring to M. Bonnieu et al., *Projet de Nouveau Code Penal. Commenté et comparé* (2008), at 13, 14 (according to which the new Art. L. 1121-2 requires a '*commun accord*'"), 15 (Comment on Art. L.1121-5.

[110] Accessible at http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_penal_de_1810.htm (visited 20th October, 2008).

[111] Kai Ambos Amicus Brief, p. 30.

participants that the crime be committed, participation in a JCE, even if it has to be significant, would appear to embrace situations where the accused may be more remote from the actual perpetration of the *actus reus* of the crime than the direct participation required under domestic law. This is also not to say, contrary to what one of the Appellants alleges that participation in a JCE is a 'more severe' form of liability than the domestic form of 'co-perpetration'.[112]

42. The Pre-Trial Chamber also notes that the question of the status of JCE in customary international law at the time of the offenses, raised in the present Appeals, was also raised in Case 001. However, in that case, because it was found that the Charged Person was not informed of the allegation related to his participation in the "S-21 JCE" and it "did not form part of the factual basis for the investigation", the Pre-Trial Chamber refrained from deciding on the matter.[113]

43. Article 33(2)(new) of the ECCC Law provides that the ECCC shall exercise its jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant for Civil and Political Rights ("ICCPR"). Article 15(1) of the ICCPR sets out the principle of *nullum crimen sine lege* as follows: "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." The Pre-Trial Chamber notes that the ICTY Appeals Chamber identified four pre-conditions that any form of responsibility must satisfy in order for it to come within the International Tribunal's jurisdiction, which can be summarised as follows for the purpose of the ECCC proceedings:

(i) it must be provided for in the [ECCC Law], explicitly or implicitly;
(ii) it must have existed under customary international law at the relevant time;

[112] Khieu Samphan Reply, para. 26.
[113] Decision on Appeal Against Closing Order, paras 141-142.

(iii) 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;

(iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.[114]

44. The Pre-Trial Chamber is not convinced by IENG Sary's argument that the OCIJ should have applied a stricter test than the one applied at the international level and required that JCE liability be established in Cambodian law because the ECCC "is a domestic court".[115] It finds that the above test, which was referred to by the OCIJ,[116] is the correct one.

45. The Pre-Trial Chamber considers that some ICTY decisions seem to imply that if a form of responsibility existed in customary international law at the relevant time, foreseeability and accessibility can be presumed.[117] However, the Pre-Trial Chamber considers it safer to ascertain not only whether JCE existed under customary international law at the relevant time, thus being punishable under international criminal law, but also whether it was sufficiently accessible and foreseeable to the Charged Persons. As to the requirement of foreseeability, a charged person must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, reliance can be placed on a law which is based on custom.[118] Contrary to what some of the Appellants assert, the question of whether JCE is a form of responsibility recognized

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[114] *Ojdanić* JCE Appeal Decision, para. 21. *Accord Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgement, Trial Chamber I, 17 January 2005 ("*Blagojević and Jokić* Trial Judgement"), para. 695, n.2145; Prosecutor v. *Stakić*, IT-97-24-T, Judgement, Trial Chamber II, 31 July 2003 ("*Stakić* Trial Judgement"), para. 431.

[115] Ieng Sary Appeal, para. 2a).

[116] Impugned Order, para. 19.

[117] *See* McGill Amicus Brief, para. 13 & n.6, referring to *Prosecutor v. Martić*, IT-95-11-A, Judgement--Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, 8 October 2008. *See also Ojdanić* Co-Perpetration Decision, para. 15, according to which, "as long as it is clear that the form of responsibility in question existed in customary international law at the time of the commission of the substantive crime, a conviction pursuant to that form of responsibility necessarily complies with *nullum crimen sine lege*; as a consequence, pre-conditions (iii) and (iv) are absorbed into the analysis of whether pre-condition (ii) exists, referring to *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, 16 July 2003, para. 44.

[118] *See Ojdanić* JCE Appeal Decision, paras 37-39.

in domestic law may be relevant when determining whether it was foreseeable to the Charged Person that his/her alleged conduct may entail criminal responsibility. However, it is not necessary that JCE also be punishable in domestic law in addition to being a recognized form of liability under customary international law for it to apply before the ECCC.[119]

46. The Pre-Trial Chamber will now turn to several errors alleged by the Ieng Sary Appeal and the Khieu Samphan Appeal which, in the Appellants' views, would bar the application of JCE at the ECCC irrespective of whether it was a form of liability recognized in customary international before or during the period of 1975-1979.

47. As to the allegation that the OCIJ erred when, citing the Pre-Trial Chamber in Case 001,[120] it found that "the application of international customary law before the ECCC is a corollary from the finding that ECCC holds indicia of an international court applying international law",[121] the Pre-Trial Chamber considers this immaterial to the issue of whether the ECCC can apply JCE. The OCIJ indeed referred both to the "international aspects of the ECCC, and [to the fact that] the jurisprudence relied upon in articulating JCE pre-dated the events under investigation at the ECCC [to conclude] that there is a basis under international law for applying JCE before the ECCC".[122] However, whether the ECCC "holds indicia of an international court applying international law", "[f]or all practical and legal purposes, [...] is, and operates as, an independent entity within the Cambodian court structure [...]" as found by the Pre-Trial Chamber in Case 001,[123] is "a separately constituted, independent and internationalised court" as found by the Trial Chamber in the same case,[124] or rather is a domestic, Cambodian court as alleged by the Appellant does

[119] *See also* paras 43, 44 infra.
[120] Ieng Sary Appeal, para. 7, referring to Impugned Order, para. 21 quoting *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/PTC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", 3 December 2007 ("Decision on Appeal against Duch Detention Order"), para. 20.
[121] Impugned Order, para. 21.
[122] Impugned Order, para. 21.
[123] Ieng Sary Appeal, para. 7; Decision on Appeal Against Duch Detention Order, para. 19.
[124] Case of Kaing Guek Eav alias "Duch"001/18-07-2007-ECCC/TC, Decision on Request for Release, 15 June 2009, E39/5 , para 10

not, in the view of the Pre-Trial Chamber, impact the Impugned Order's finding that JCE is applicable before the ECCC. This is the case, in light of the clear terms of Articles 1 and 2 of the ECCC Law whose purpose is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. In this regard, the ECCC Law also makes clear that the Extraordinary Chambers shall be established within the existing court structure for this purpose.

48. The allegation that the OCIJ erred in concluding that the ECCC could directly apply customary international law and no exception allows the direct application of customary international law to autonomous legal regimes is equally dismissed.[125] The argument that the ECCC could not apply customary international law because it is a domestic court from a country adhering to a dualist system and lacks specific directives in the Constitution, legislation or national jurisprudence incorporating customary law into domestic law must fail. This claim runs contrary to the clear terms of Article 2 of the ECCC Law, which can only lead to the conclusion that the ECCC has jurisdiction to apply forms of responsibility recognized under customary international law at the relevant time. For the same reason, even if the OCIJ finding on an autonomous legal regime was in error, it would be superfluous and would not invalidate the finding on the applicability of the JCE before the ECCC.

[125] Ieng Sary Appeal, paras 25-32, referring to the finding in the Impugned Order, para. 22, that "the 1956 Penal Code was inspired from French Law and under French law, international crimes such as those falling under the jurisdiction of the ECCC constitute specific categories of crimes under autonomous legal '*regimes*', distinct from domestic criminal law, and characterized by a coherent set of rules of procedure and substance". Khieu Samphan raises a similar challenge, arguing that the French law relied upon by the OCIJ to support its finding of the existence of autonomous legal *regimes* was not in existence during the period 1975-1979 but only in 2002 and, contrary to what the Co-Investigating Judges seem to be suggesting, it is because, with respect to [crimes against humanity], the applicable [French law] provides for rules which represent a departure from ordinary law that academic writings consider them as a special category of offences [... and] not the other way around; finally, the autonomous legal regime for such crimes under the 2002 law does not contain specific rules on individual responsibility, such crimes are governed by ordinary rules of procedure and jurisdiction. Khieu Samphan Appeal, paras 60-66 and Khieu Samphan Reply, paras. 17-21.

49. As to the allegation that "the OCIJ erred in accepting that JCE liability as formulated by the *Tadić* Appeals Chamber could fall under "committing" in Article 29 of the [ECCC Law]",[126] the Pre-Trial Chamber notes that the article in question mirrors Article 6 of the ICTR Statute and Article 7 of the ICTY Statute. The *ad hoc* tribunals have consistently held that they regarded participation in a JCE as a form of "commission".[127] The Pre-Trial Chamber is of the view that in light of this consistent and precedential case law, had the drafters of the ECCC Law intended to limit the "commission" envisaged in Article 29 to persons who physically and directly carry out the *actus reus* of the crime(s), they would have made such restriction explicit.

50. The Pre-Trial Chamber turns now to the core of the Appeals, that is whether there was in 1975-1979 a customary law basis for JCE and, in the alternative, its systemic and extended forms, and if so, whether these form of responsibility were sufficiently accessible and foreseeable to the Charged Persons.

A. Whether the concept of JCE was recognized as a form of responsibility under international customary law prior to 1975?

1. Submissions

51. Ground 7 of the Ieng Thirith Appeal and the third error alleged by the Ieng Sary Appeal contain the following related arguments: i) there was no basis for the conclusion in the Impugned Order that the three forms of JCE formed part of customary international law at the relevant time;[128] and ii) the OCIJ erred in failing

[126] Ieng Sary Appeal, para. 2d); Ieng Sary's Reply, paras 40-50.
[127] *See*, in particular, *Ojdanić* JCE Appeal Decision, paras 12-18, referring to *Tadić* and subsequent relevant case law.
[128] Ieng Thirith Appeal, paras 60, 72, 73(a). The Appellant does not elaborate much on the reasons why such basis is lacking—she essentially contends that the customary basis of JCE "for the ICTY" is highly controversial and should not be transposed to Cambodia in the 1970s, supporting this contention with a reference to M. Sassoli & L. M. Olson, *the Judgement of the ICTY Appeals Chamber on the Merits in the Tadić Case*, INT'L REV. RED CROSS 839, p. 7 (loc. cit. 60-62), addressing the controversy as to why the ICTY Appeals Chamber described the Italian case law, in support of the JCE theory, in detail, while mostly

to undertake an independent analysis as to whether JCE liability formed part of customary international law in 1975-1979.[129] The Appeals allege that the OCIJ came to the erroneous conclusion that JCE formed part of customary international law during the relevant period for the numerous reasons. Firstly, the *Tadić* Appeals Chamber wrongly determined that JCE liability existed under customary international law[130] as it relied on too few cases,[131] and the treaties it relied upon do not actually provide support for JCE liability as claimed because they were not in existence in 1975-79.[132] In addition, the ICC later "rejected the JCE jurisprudence of the *ad hoc* tribunals, [...] preferring the 'control over the crime' approach to distinguishing principals and accessories", while "the *travaux préparatoires* of the [International Convention for the Suppression of Terrorist Bombing] do not explain why the particular wording found in Article 2 was adopted".[133] Secondly, JCE liability has never been a form of liability in general and consistent State use. Nuremberg case law does not support the existence of JCE liability,[134] and most legal systems opt for a model of co-perpetration distinct from JCE which distinguishes between principal and accessory liability.[135] The ICC Statute does not codify JCE liability and its case law has rejected the application of JCE liability.[136]

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ignoring Dutch and German case law, which are not in its support. She also refers to A. M. Danner & J. S. Martinez, "Guilty by Association: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law", March 2004. See also, Ieng Sary's Reply, paras 19-30.

[129] Ieng Sary Appeal, para. 2c).

[130] Ieng Sary Appeal, paras 36-37.

[131] Ieng Sary Appeal, paras 38-40, stressing that the *Tadić* Appeals Chamber only relied on six cases to establish the first form of JCE and on only two further cases to establish the second and two cases to establish the third forms of JCE. It also contends that customary international law can only be determined with reference to consistent, wide-spread State practice and *opinio juris*, that normative statements in judicial decisions should be considered only as emerging customary law and not as positive legal rules. To subsequently transform into genuine customary law, there needs to be a majority of States to confirm them in practice coupled with *opinio juris*.

[132] Ieng Sary Appeal, para. 37.

[133] Ieng Sary Appeal, paras 41-42.

[134] Ieng Sary Appeal, para. 44, according to which at Nuremberg, following the common law approach, "defendants were not classified as 'perpetrators' or 'accomplices'", the verdicts were quite short, with very limited reasoning and the *Tadić* Appeals Chamber has to infer the form of liability applied based on the Prosecutors' statements. According to the Appellant, there are also examples of post-World War II cases, such as the *Justice* case, in which the extended form of JCE liability was clearly not employed. Ieng Sary Appeal, para. 46.

[135] Ieng Sary Appeal, paras 47-48.

[136] Ieng Sary Appeal, paras 49-58, referring to the position adopted the ICC Pre-Trial Chamber in *Lubanga*, preferring the "control over the crime approach", distinguishing principals and accessories to the JCE subjective approach. According to the Appellant, "the ECCC may not simply accept the *Stakić* Appeals

Thirdly, the inherent danger of JCE liability militates against the ECCC relying upon this doctrine.[137] Fourthly, if JCE is accepted as customary international law, its application must be limited to co-perpetration only, as laid out in Cambodian law.[138]

52. The OCP responded that the OCIJ "correctly declared that all three forms of JCE have been part of customary international law since well before 1975-1979".[139] The OCP referred to "the numerous international statutes, cases and authoritative pronouncements, as well as domestic cases, supporting the prior existence of JCE since Nuremberg [... as] evidence of the widespread state practice and *opinio juris* that establish customary international law".[140] The OCP responded to the challenge to the extended form of JCE by arguing that "many advanced jurisdictions recognized modes of co-perpetration similar to JCE III, [including] conspiracy, the

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Chamber's conclusion [that the 'control over the crime' form of co-perpetration applied by the Trial Chamber, has no support in customary international law] without explaining why it considers the *Stakić* Trial Chamber and the ICC to be in error." Ieng Sary Appeal, para. 57.

[137] Ieng Sary Appeal, paras 59-62, where the Appellant argues that the determination in *Tadić* relied upon in the Impugned order, that JCE II is a variation of JCE I is misleading and untrue, as "JCE II often equates with JCE III, rather than I" and, relying on Ambos Amicus Brief, that "there is no generally accepted *mens rea* for JCE III", a *vicarious* form of responsibility highly criticized by scholars, which conflicts with the principle of culpability, even if a subjective approach is used, since requiring that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him is "logically impossible. Knowledge is a standard for intent crimes [...], while foreseeability belongs to the theory of recklessness or negligence".

[138] Ieng Sary Appeal, paras 63-65, where the Appellant refers to Kai Ambos Amicus Brief, para. 11, according to which "the requirements of co-perpetration are only filled by JCE I, and only if it is construed as an objective-subjective structure, requiring, beyond the mere common purpose or will [...], the actual performance of the act(s) by the member(s) of the enterprise". The Appellant further argues that "[b]ecause co-perpetration is already a form of liability provided for in Cambodian law, there is no reason to apply JCE I as a separate form of liability, especially in light of the fact that "the ECCC is to act as a 'role model' for Cambodian courts" and "the Cambodian government has explicitly rejected JCE liability" when adopting its new penal code. See also, Ieng Sary's Reply, paras 32-39, asserting that JCE liability was not foreseeable in Cambodia during 1975-1979.

[139] Co-Prosecutors' Joint Response, para. 32, referring to Impugned Order, para. 21.

[140] Co-Prosecutors' Joint Response, para. 32, referring to the Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise, 11 August 2008, D97/II ("Co-Prosecutors' 11 August Response") and the Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise, 31 December 2008, D97/8 ("Co-Prosecutors' Supplementary Observations"). The Co-Prosecutors also refer to the "inclusion of the 'common plan' mode of liability in the Nuremberg Charter and in the allied Control Council Law No. 10, as well as to decisions of the post-World War II war crimes tribunals"–ten of which being cited in *Tadić,,* six in support of JCE I, two for JCE II and two for JCE III–which it contends "crystallized JCE as customary international law" (Co-Prosecutors' Supplementary Observations, para. 10). They also refer to the Report of the United Nations International Law Commission on the work of its Forty Eighth Session, 6 May-26 July 1996 according to which the above-mentioned international instruments "[gave] birth to the entire international paradigm of individual criminal responsibility" as well as to the fact that on 11 December 1946, "the [United Nations] General Assembly unanimously affirmed the principles from the Nuremberg Charter and judgments" (Co-Prosecutors' Joint Response, para. 35).

felony murder doctrine [and] the concept of *association de malfaiteurs*, [as well as] numerous other doctrines of co-perpetration" (these arguments are considered below).[141] According to the OCP, the argument that *Tadić* based its finding that JCE was part of customary international law on too few cases from too few jurisdictions ignores substantial evidence that supports the ICTY Appeals Chamber's finding.

2. Discussion

(i) General remarks

53. The Pre-Trial Chamber recalls that, when determining the state of customary international law in relation to the existence of a crime or a form of individual responsibility, a court shall assess existence of "common, consistent and concordant"[142] state practice, or *opinio juris*,[143] meaning that what States do and say represents the law. A wealth of state practice does not usually carry with it a presumption that *opinio juris* exists; "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[144] As it is, States by consent determine the content of international law, and judicial decisions clearly constitute "subsidiary means for the determination of rules of law".[145] The Pre-Trial Chamber notes that it is unclear whether the "general principles of the law recognized by civilized nations"[146] should be recognized as a principal or auxiliary source of international law. However, such general principles have been taken into account, notably by the ICTY, when defining

[141] Co-Prosecutors' Joint Response, para. 33, referring to Co-Prosecutors' Supplementary Observations, para. 10 & nn.22-26.
[142] *Fisheries Jurisdiction Case (United Kingdom v Iceland)*, Merits, 1974 ICJ Rep. 3, at 50.
[143] Article 38(1) of the 1946 Statute of the International Court of Justice, which is generally recognised as a definitive statement of the sources of international law, requires the Court to apply, among other things, "international custom, as evidence of a general practice accepted as law".
[144] *North Sea Continental Shelf (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)*, Merits, 20 February 1969, ICJ Rep. 3, para. 77.
[145] Sub-paragraph (d) of Article 38(1) of the 1946 Statute of the International Court of Justice.
[146] Sub-paragraph (c) of Article 38(1) of the 1946 Statute of the International Court of Justice.

the elements of an international crime[147] or the scope of a form of responsibility[148] otherwise recognized in customary international law.

54. The *Tadić* Appeals Judgement was the first decision of an International Tribunal to trace the existence and evolution of the doctrine of JCE in customary international law. It found that "the consistency and cogency of the case law and the treaties [it] referred to [...], as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law".[149] Therefore, the Impugned Order logically refers to the above ICTY seminal decision on JCE as persuasive authority for its conclusion that, "[c]onsidering the international aspects of the ECCC and the fact that the jurisprudence relied upon in articulating JCE pre-existed the events under investigation at the ECCC, there is a basis under international law for applying JCE before the ECCC".[150]

55. To reach its finding, the ICTY Appeals Chamber in *Tadić* interpreted the ICTY Statute on the basis of its purpose as set out in the report of the United Nations Secretary-General to the Security Council.[151] It also considered the specific characteristics of many crimes perpetrated in war. In this respect, the Pre-Trial Chamber concurs with the approach in *Tadić* that the development of the forms of responsibility applicable to violations of international criminal law has to be seen in light of the very nature of such crimes, often carried out by groups of individuals

[147] *E.g.*, the Trial Chamber in *Furundžija* held that, "to arrive at an accurate definition of rape based on the criminal law principle of specificity [...], it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws." *Furundžija* Trial Judgement, para. 177.
[148] *Blaškić* Appeal Judgement, paras 34–42
[149] *Tadić* Appeal Judgement, para. 226.
[150] Impugned Order, para. 21, referring to *Tadić* Appeals Judgement, paras 185 et seq. The Impugned Order elsewhere relies on other ICTY Appeals Chamber decisions, including the *Ojdanić* JCE Appeal Decision as to the application of the principle of legality to forms of responsibility in international criminal law and to *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, Appeals Chamber, 17 March 2009 ("*Krajišnik* Appeal Judgment") and the *Kvočka et al.* and *Brđanin* Appeal Judgements, with respect to specific material or mental elements of the various forms of JCE.
[151] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993.

acting in pursuance of a common criminal design.[152] In the words of *Tadić*, "although only some members of the group may physically perpetrate the criminal act [...], the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question".[153] These crimes differ from ordinary crimes not only in scale, but also due to the fact that they often take place during conflict. In contrast to ordinary crimes, which are usually perpetrated by an individual or a small group of individuals, these crimes are often only made possible by the involvement of state organs pursuing criminal policies and using all available means to those criminal ends.

56. In order to determine the status of customary law in this area, *Tadić* studied in detail the case law relating to ten war crimes cases tried after the Second World War.[154] It further considered the relevant provisions of two international Conventions which reflect the views of many States in legal matters (Article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings,[155] Article 25 of the Statute of the International Criminal Court[156]).[157] Moreover, the Appeals Chamber referred to national legislation and case law, noting that the notion of "common purpose", established in international criminal law, has foundations in many national systems, while acknowledging that it was not necessarily established that most of the countries actually have the same notion of common purpose.[158]

(ii) JCE I and II, basic and systemic forms of JCE

[152] *Tadić* Appeal Judgement, para. 191, according to which "most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design."
[153] *Tadić* Appeal Judgement, para. 191.
[154] Paras 197 et seq.
[155] Adopted by a consensus vote by the General Assembly in its Resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998.
[156] Adopted on 17 July 1998 by the Diplomatic Conference of Plenipotentiaries held in Rome.
[157] *Tadić* Appeal Judgement, paras 221-222.
[158] *Tadić* Appeal Judgement, paras 224-225.

57. Although the Impugned Order exclusively relies on *Tadić* in relation to the issue of JCE, as far as the basic and systemic forms of JCE (JCE I & II) are concerned, the Pre-Trial Chamber need not determine, as argued by one of the Appellants, whether the ICTY Appeals Chamber relied on too few cases in that case.[159] The Pre-Trial Chamber will not limit its assessment of whether *Tadić* incorrectly determined that JCE liability existed under customary international law (in 1992)[160] to a review of the authorities the ICTY Appeals Chamber relied upon. Indeed, as rightly noted by the ICTR Appeals Chamber, the statement in *Tadić* that customary international law permitted the application of the "notion of common purpose" to crimes within the jurisdiction of the Tribunal "is reinforced by the use made of the doctrine of common plan or enterprise in the [following] instruments of the post-World War II tribunals"[161]: 1) Article 6 of the London Charter of the International Military Tribunal[162] ("London Charter" or the "Nuremberg Charter"), providing that persons "participating in the formulation or execution of a Common Plan or Conspiracy to commit crimes against peace, war crimes, or crimes against humanity are responsible for all acts performed by any persons in execution of such plan";[163] and 2) the Control Council Law No. 10, which was a legislative act jointly passed in 1945 by the four Occupying Powers, reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the

[159] Ieng Sary Appeal, paras 38-40, stressing that the *Tadić* Appeals Chamber only relied on six cases to establish the first form of JCE and on only two further cases to establish the second and two cases to establish the third forms of JCE.
[160] Ieng Sary Appeal, paras 36-37.
[161] *Rwamakuba* JCE Decision, para. 18.
[162] Issued on 8 August 1945, the London Charter of the International Military Tribunal sets down the laws and procedures by which the Nuremberg Trials were conducted. The International Military Tribunal sitting at Nuremberg was established in pursuance of the Agreement signed on 8 August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, establishing an International Military Tribunal for the "just and prompt trial and punishment of the major war criminals of the European Axis". The Nuremberg Tribunal tried the 22 highest ranking surviving members of the Nazi regime.
[163] Charter of the International Military Tribunal, Article 6, in *Trial of the Major War Criminals Before the International Military Tribunal*, Vol. 1, p. 11 (emphasis added). Contrary to what the Ieng Sary's Reply asserts (para. 22, n. 45), common plan liability applies to "any of the foregoing crimes", which, in Article 6 of the Charter, clearly applies not only to crimes against peace, but also to crimes against humanity and war crimes.

military courts called upon to rule on such crimes,[164] providing that both the principal perpetrator and a person "connected with plans or enterprises involving" the commission of a crime were considered to have "committed" that crime.[165]

58. The States parties to these international instruments recognized that persons responsible for the commission of international crimes are not limited to those who physically perpetrate such crimes. Instead, individuals will also be responsible when they intentionally participate in the formulation or execution of a common plan or enterprise involving the commission of such crimes. This constitutes undeniable support of the basic and systemic forms (JCE I & II) of JCE liability.

59. Before turning to a review the post-World War II jurisprudence developed by the military tribunals, the Pre-Trial Chamber notes that the present Appeals question *Tadić's* reliance on case law to ascertain the state of customary international law.

60. The Pre-Trial Chamber considers that the case law from the above-mentioned military tribunals offer an authoritative interpretation of their constitutive instruments and can be relied upon to determine the state of customary international law with respect to the existence of JCE as a form of criminal responsibility at the time relevant for Case 002. Indeed, the ICTY Trial Chamber in *Kupreškić* made the following remarks, which the Pre-Trial Chamber finds persuasive, concerning the value to be given to judicial decisions of other international courts and tribunals in determining whether state practice and *opinio juris* support the existence of a given rule of customary international law:

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[164] Control Council Law No. 10 governs the Trials of the next level of German war criminals charged before U.S., British, Canadian and Australian military tribunals as well as German courts in occupied Germany. These military tribunals were to follow the Charter and jurisprudence of the Nuremberg Tribunal. Control Council Law Nr. 10, *Official Gazette of the Control Council for Germany* (1946), vol. 3, p. 50.

[165] *See* Control Council Law No. 10, Art. II(2), in *Official Gazette of the Control Council for Germany* (1946), vol. 3, p. 50, according to which "[a]ny person ... is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission."

> [J]udicial decisions may prove to be of invaluable importance for the determination of existing law. [...] It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law no. 10 [...]. These courts operated under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law.[166]

61. Further, as rightly pointed out by the OCP, the United Nations' International Law Commission ("ILC") described the principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg as the "cornerstone of international law".[167] The Resolution affirming the Nuremberg principles also directed the ILC to codify these principles in an international code of offences against the peace and security of mankind. The ILC's first draft of the Code in 1956 specifically included "the principle of individual criminal responsibility for formulating a plan or participating in a common plan or conspiracy to commit a crime".[168] When considering sources of international law, the ICTY Trial Chamber was correct when it observed that Draft Codes of the ILC do not constitute state practice relevant to the determination of a rule of customary international law, but merely represent a subsidiary means for the determination of rules of law. However, "they may reflect legal considerations largely shared by the international community, and they may expertly identify rules of international law".[169]

62. In support of the basic and systemic forms of JCE (JCE I & II), the Appeals Chamber in *Tadić* reviewed eight cases (including two concentration camp cases) which demonstrated that both modes of responsibility require that the accused

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[166] *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, Trial Chamber, 14 January 2000 ("*Kupreškić* Trial Judgement"), paras 540–541.

[167] Co-Prosecutors' Joint Response, n.56, referring to *Report of the International Law Commission on the Work of its Forty-Eighth Session,* 6 May-26 July 1996, Official Records of the General Assembly, Fifty First Session, Supplement No. 10, p. 19.

[168] Co-Prosecutors' Joint Response, n.57, referring to *Report of the International Law Commission on the Work of its Forty-Eighth Session,* 6 May-26 July 1996, Official Records of the General Assembly, Fifty First Session, Supplement No. 10, p. 21.

[169] *Prosecutor v. Vasiljević*, IT-98-32-T, Judgement, Trial Chamber II, 29 November 2002 ("*Vasiljević* Trial Judgement"), para. 200.

intended the commission of the crimes forming part of the common plan. These cases were as follows:

a) *Georg Otto Sandrock et al.* (also known as the *Almelo Trial*), involving a British military court which "found three Germans who had killed a British prisoner of war guilty under the doctrine of 'common enterprise'";[170]

b) *Hoelzer et al.*, before a Canadian military court, where "in his summing up the Judge Advocate spoke of a 'common enterprise' with regard to the murder of a Canadian prisoner of war by three Germans and emphasized that the three all knew that the purpose of taking him to a particular area was to kill him";[171]

c) *Jepsen and others*, where "a British court had to pronounce upon the responsibility of Jepsen (one of several accused) for the deaths of concentration camp internees who, in the few weeks leading up to the capitulation of Germany in 1945, were in transit to another concentration camp".[172] *Tadić* noted that:

> the Prosecutor submitted (and this was not rebutted by the Judge Advocate) that: "[I]f Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act";[173]

d) *Schonfeld*, where as *Tadić* noted, the Judge Advocate stated that "if several persons combine for an unlawful purpose or a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is

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[170] *Tadić* Appeal Judgement, para. 197, referring to *Trial of Otto Sandrock and three others*, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24th-26th November, 1945, UNWCC, vol. I, p. 35.
[171] *Tadić* Appeal Judgement, para. 197, referring to *Hoelzer et al.*, Canadian Military Court, Aurich, Germany, Record of Proceedings 25 March-6 April 1946, vol. I, pp. 341, 347, 349 (RCAF Binder 181.009 (D2474)).
[172] *Tadić* Appeal Judgement, para. 198, referring to *Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany* (13-23 August, 1946), Judgement of 24 August 1946 ("*Trial of Jepsen et al.*") (original transcripts in Public Record Office, Kew, Richmond).
[173] *Tadić* Appeal Judgement, para. 198, referring to *Trial of Jepsen et al.*, p. 241.

murder in all who are present [...] provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly";[174]

e) *Ponzano*,[175] concerning the killing of four British prisoners of war in violation of the rules of warfare. *Tadić* stresses that this case appears to broadly link the notion of common purpose to that of causation and quotes the words of the Judge Advocate, adopting the approach suggested by the Prosecutor,[176] emphasizing:

> the requirement that an accused, before he can be found guilty, must have been concerned in the offence. [... T]o be concerned in the commission of a criminal offence [...] does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation [.... I]n other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means [...].[177]

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[174] *Trial of Franz Schonfeld and others,* British Military Court, Essen, June 11th-26th, 1946, UNWCC, vol. XI, p. 68 (summing up of the Judge Advocate).

[175] *Trial of Feurstein and others*, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), Judgement of 24 August 1948 ("*Ponzano* Case") (original transcripts in Public Record Office, Kew, Richmond).

[176] "The Prosecutor stated the following:

> It is an opening principle of English law, and indeed of all law, that a man is responsible for his acts and is taken to intend the natural and normal consequences of his acts and if these men [...] set the machinery in motion by which the four men were shot, then they are guilty of the crime of killing these men. It does not – it never has been essential for any one of these men to have taken those soldiers out themselves and to have personally executed them or personally dispatched them. That is not at all necessary; all that is necessary to make them responsible is that they set the machinery in motion which ended in the volleys that killed the four men we are concerned with.

Ibid, p. 4."

[177] The Judge Advocate further submitted that "while the defendant's involvement in the criminal acts must form a link in the chain of causation, it was not necessary that his participation be a *sine qua non,* or that the offence would not have occurred but for his participation." *Tadić* Appeal Judgement, para. 199, However, knowledge on the part of the accused as to the intended purpose of the criminal enterprise was required (*Ibid*). The judge held in this regard: "[o]f course, it is quite possible that it [the criminal offence] might have taken place in the absence of all these accused here, but that does not mean the same thing as saying [...] that [the accused] could not be a chain in the link of causation [...]". *Tadić* Appeal Judgement, para. 199, n.242, referring to *Ponzano* Case, pp. 7-8.

f) *Einsatzgruppen*,[178] the last case reviewed by *Tadić* in support of the basic form of JCE (JCE I), where a United States Tribunal sitting at Nuremberg noted that:

> the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, paragraph 2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility [...];[179]

63. The Pre-Trial Chamber notes, as did the Appeals Chamber in *Tadić*, that in many post-World War II trials held in other countries, courts retained the responsibility of accused who had, with others, participated with a different degree of involvement in

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[178] *The United States of America v. Otto Ohlenforf et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, United States Government Printing Office, Washington, 1951, vol. IV ("*Einsatzgruppen* Case"), p. 3.

[179] "The tribunal went on to say:

> Even though these men [Radetsky, Ruehl, Schubert and Graf] were not in command, they cannot escape the fact that *they were members of Einsatz units whose express mission, well known to all the members, was to carry out a large scale program of murder.* Any member who assisted in enabling these units to function, knowing what was afoot, is guilty of the crimes committed by the unit. The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not brandish a cutlass. The man who stands at the door of a bank and scans the environs may appear to be the most peaceable of citizens, but if his purpose is to warn his robber confederates inside the bank of the approach of the police, his guilt is clear enough. And if we assume, for the purposes of argument, that the defendants such as Schubert and Graf have succeeded in establishing that their role was an auxiliary one, they are still in no better position than the cook or the robbers' watchman.

Ibid, p. 373 (emphasis added).

In this connection, the tribunal also addressed the contention that certain of the commanders did not participate directly in the crimes committed, noting that:

> [w]ith respect to the defendants such as Jost and Naumann, [...] it is [...] highly probable that these defendants did not, at least very often, participate personally in executions. And it would indeed be strange had they who were persons in authority done so. [...] Far from being a defense or even a circumstance in mitigation, the fact that these defendants did not personally shoot a great many people, but rather devoted themselves to directing the over-all operations of the *Einsatzgruppen*, only serves to establish their deeper responsibility for the crimes of the men under their command.

Ibid." *Tadić* Appeal Judgement, para. 200, n.245.

the commission of crimes. "However, they did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration. This applies in particular to Italian[180] and German[181] cases".[182]

a) The *Dachau Concentration Camp* case,[183] the first of the two such cases reviewed by *Tadić*. It was decided by a United States court sitting in Germany. In this case, the accused individuals held positions of authority within the hierarchy of the concentration camp. "Generally speaking, [they were charged for having] acted in pursuance of a common design to kill or mistreat prisoners and hence commit war crimes" in a camp where inmates were subjected to a systematic process of mistreatment and murder (most of whom were allied nationals).[184] This system was practised with the knowledge of the accused individuals, who were members of staff, and with their active participation. This conduct was held by the court to constitute "acting in pursuance of a common design to violate the laws and usages of war. Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary";[185]

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[180] Decisions of the Italian Court of Cassation relating to crimes committed by militias or forces of the "*Repubblica Sociale Italiana*" against Italian partisans or armed forces: *Annalberti et al.*, 18 June 1949, in *Giustizia penale* 1949, Part II, col. 732, no. 440; *Rigardo et al.*, 6 July 1949, *ibid.*, cols. 733 and 735, no. 443; *P.M. v. Castoldi*, 11 July 1949, *ibid.*, no. 444; *Imolesi et al.*, 5 May 1949, *ibid.*, col. 734, no. 445. *See also Ballestra*, 6 July 1949, *ibid.*, cols. 732-733, no. 442.

[181] Decision of 10 August 1948 of the German Supreme Court for the British Zone in *K. and A.*, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. I, pp. 53-56; the decision of 22 February 1949 in *J. and A.*, *ibid.*, pp. 310-315; the decision of the District Court (*Landgericht*) of Cologne of 22 and 23 January 1946 in *Hessmer et al.*, in *Justiz und NS-Verbrechen*, vol. I, pp. 13-23, at pp. 13, 20; the decision of 21 December 1946 of the District Court (*Landgericht*) of Frankfurt am Main in *M. et al.* (*ibid.*, pp. 135-165, 154) and the Judgement of the Court of Appeal (*Oberlandesgericht*) of 12 August 1947 in the same case (*ibid.*, pp. 166-186, 180); as well as the decision of the District Court of Braunschweig of 7 May 1947 in *Affeldt*, *ibid.*, p. 383-391, 389.

[182] *Tadić* Appeal Judgement, para. 201, referring to the cases mentioned in the two following footnotes.

[183] *Trial of Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau, Germany, 15th November-13th December, 1945, UNWCC, vol. XI ("*Dachau Concentration Camp* Case"), p. 5.

[184] *Tadić* Appeal Judgement, para. 202.

[185] *Dachau Concentration Camp* Case, p. 14.

b) The *Belsen* case[186] was decided by a British military court sitting in Germany. In his summing up, the Judge Advocate adopted the "three requirements identified by the Prosecution as necessary to establish guilt in each case:

> (i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged;
> (ii) the accused's awareness of the nature of the system; and
> (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided and abetted or in any case participated in the realisation of the common criminal design.[187]

Tadić stressed that the convictions of several of the accused "appear" to have been explicitly based upon these criteria. This was particularly the case involving the accused Kramer, for whom "the Judge Advocate reminded the Court that when they considered the question of guilt and responsibility, the strongest case must surely be against [him] due to his seniority, and then down the list of accused according to the positions they held".[188] "The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatment because of their objective 'position of authority' within the concentration camp system and because they had 'the power to look after the inmates and make their life satisfactory'[189] but failed to do so".[190]

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[186] *Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17th September-17th November, 1945, UNWCC, vol. II ("*Belsen* Case"), p. 1.

[187] *Tadić* Appeal Judgement, para. 202. "The Judge Advocate summarised with approval the legal argument of the Prosecutor in the following terms:

> The case for the Prosecution is that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened."

Tadić Appeal Judgement, para. 202, n.251, referring to *Belsen* Case, p. 121.

[188] *Tadić* Appeal Judgement, para. 202, n.252, referring to *Belsen* Case, p. 121.

[189] *Belsen* Case, p. 121..

[190] *Tadić* Appeal Judgement, para. 203. *Tadić* also refers to another case (para. 203, n.254) in a similar vein: *Case against R .Mulka et al.* ("*Auschwitz concentration camp* case"):

64. *Tadić* noted that it seemed the requisite intent in these two cases could be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common design and intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment of prisoners, although the penalty varied according to the degree of participation.

65. The OCP were correct in stating that there are more relevant post-World War II international military cases than the ones cited by *Tadić*.[191] The Pre-Trial Chamber

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> Although the court reached the same result, it nevertheless did not apply the doctrine of common design but instead tended to treat the defendants as aiders and abettors as long as they remained within the framework provided by their orders and as principal offenders if they acted outside this framework. This meant that if it could not be proved that the accused actually identified himself with the aims of the Nazi regime, then the court would treat him as an aider and abettor because he lacked the specific intent to "want the offence as his own".

"*See,* in particular, the *Bundesgerichtshof* in *Justiz und NS-Verbrechen,* vol. XXI, pp. 838 *ff.*, and especially pp. 881 *ff*). The BGH stated, p. 882:

> [The view] that everybody who had been involved in the destruction program of the [KZ] Auschwitz and acted in any manner whatsoever in connection with this program participated in the murders and is responsible for all that happened is not correct. It would mean that even acts which did not further the main offence in any concrete manner would be punishable. In consequence even the physician who was in charge of taking care of the guard personnel and who restricted himself to doing only that, would be guilty of aiding and abetting murder. The same would even apply to the doctor who treated prisoners in the camp and saved their lives. Not even those who in their place put little obstacles in the way of this program of murder, albeit in a subordinate position and without success, would escape punishment. That cannot be right.

(Unofficial translation)." *Tadić* Appeal Judgement, para. 203, n.254.

[191] *See* Co-Prosecutors' Joint Response, para. 40, n.72, referring to Co-Prosecutor's Supplementary Observations, n.47, listing and providing references of 16 additional cases published in the 1949 UN War Crimes Commission Report and the U.S. Nuremberg War Crimes Tribunal Report. The OCP also refer to ten cases from German Courts available at the ECCC. According to the OCP, in all these cases, the tribunals applied the common plan/JCE concept and in "[s]umming up this extensive case law and explaining the differences between common design and simple co-perpetration, the UN War Crimes Commission Report states:

> the prosecution has the additional task of proving the existence of a common design, and once that is proved the prosecution can rely upon the rule which exists in many systems of law that those who take part in a common design to commit an offence which is carried out by one of them are all fully responsible for that offence in the eyes of the criminal law.

Co-Prosecutors' Joint Response, para. 40. The OCP also refer to the *Ojdanić* JCE Appeal, which decided that JCE and common plan liability are the same. Co-Prosecutors' Joint Response, para. 40, referring to *Ojdanić* JCE Appeal Decision, para. 36.

finds two of the Control Council Law No. 10 cases, the *Justice* and *RuSHA* cases, to be particularly apposite to determining whether the basic and systemic forms of JCE (JCE I & II) formed part of customary international law at the time relevant for Case 002. These cases have been discussed extensively by the ICTR Appeals Chamber, who *inter alia* relied on these sources to conclude that, as of 1992, customary international law permitted the imposition of criminal liability on a participant in a common plan to commit genocide.[192] Similarly, the ICTY Appeals Chamber *inter alia* relied on the same sources to conclude that post-World War II jurisprudence recognized the imposition of liability upon an accused for his participation in a common criminal purpose where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose.[193] The *Justice* and *RuSHA* judgements do not speak in specific terms of "joint criminal enterprise". However, the Pre-Trial Chamber finds that the legal elements applied by the Military Tribunal to determine the liability of the accused are sufficiently similar to those of JCE (as described above) and constitute a valid illustration of the state of customary international law with respect to the basic form and systemic form of JCE (JCE I & II).

66. The Pre-Trial Chamber is of the view that, in the *Justice Case*, the Military Tribunal's conviction for war crimes and crimes against humanity by Lautz, the Chief Public Prosecutor of the People's Court, and for crimes against humanity by Rothaug, the former Chief Justice of the Special Court in Nuremberg, for their respective participation in the "plan of racial [persecution]" to enforce the criminal

[192] *See Rwamakuba* JCE Decision, paras 14-31. The ICTR Appeals Chamber decision cites, *inter alia*: *Justice* Judgement, pp. 1093 ("connected with the commission" of an offence), 1094 ("connected to some extent" with persecution), 1099 ("knowingly was connected" with an offence), 1120 (concluding that the evidence established the "connection of the defendant" to an illegal procedure), 1128 (stating that the Accused Lautz was "criminally implicated" in enforcing the law against Poles and Jews); *RuSHA* Judgement, p. 108 (stating that two Accused "are inculpated in crimes connected with the kidnapping of foreign children").
Ibid., para. 24, n.56.
[193] In its analysis, the Appeals Chamber extensively refers to the analysis of these cases conducted by Judge Bonomy's Separate Opinion in the case *Prosecutor v. Milutinović et al.* which it found to be instructive. Separate Opinion of Judge Iain Bonomy, *Ojdanić* Co-Perpetration Decision ("Bonomy Opinion, *Ojdanić* Co-Perpetration Decision"), in particular paras 18-22.

laws against Poles and Jews of which they were aware,[194] retains a form of individual criminal responsibility similar to JCE. This is so even if, as rightly pointed out by the ICTR jurisprudence in *Rwamakuba*:

> [t]he post-World War II materials do not always fit neatly into the so-called "three categories" of joint criminal enterprise discussed in *Tadić*, in part because the tribunals' judgements did not always dwell on the legal concepts of criminal responsibility, but simply concluded that, based on the evidence, the accused were "connected with," "concerned in," "inculpated in," or "implicated in" war crimes and crimes against humanity.[195]

67. Lautz's participation in the common plan was authorising indictments charging a number of Poles with high treason for "leaving their places of work and attempting to escape Germany by crossing the border into Switzerland", ultimately leading to death sentences and executions.[196] The Military Tribunal found that the accused had consciously participated in the national plan of racial discrimination "by means of the perversion of the law of high treason".[197] He enforced the law against Poles and Jews, which was deemed to be a part of the established governmental plan for the extermination of those races. He was an accessory to, and took a consenting part in, the crime of genocide.[198] Rothaug's participation in the common plan consisted of convicting and sentencing to death three Poles and a Jewish man in conformity with the national program of racial persecution of the Nazi State.[199] The Tribunal found that he had consciously participated in the plan, identified himself with this national program and gave himself utterly to its accomplishment, thus participating in the crime of genocide.[200]

68. The Pre-Trial Chamber also finds that the United States Military Tribunal applied a form of individual criminal responsibility similar to JCE, without using the term

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[194] Nn.36 & 37 in the original. *Justice* Judgement, pp. 1081, 1118-1128, in the case of Lautz; and n.42 in the original, *ibid.*, pp. 1155-1156], in the case of Rothaug.
[195] *Rwamakuba* JCE Decision, para. 24. See also footnote 194 infra.
[196] N.38 in the original, *Justice* Case, pp. 1120-1121.
[197] N.39 in the original, *ibid.*, p. 1123.
[198] N.41 in the original, *ibid.*, p. 1128.
[199] N.43 in the original, *ibid.*, p. 1155.
[200] N.44 in the original, *ibid.*, p. 1156.

JCE, when deciding on the criminal responsibility of the accused Hofmann and Hildebrandt, who where officials of the SS Race and Resettlement Main Office known as "RuSHA" (its German acronym). Hofmann and Hildebrandt were charged with war crimes and crimes against humanity by means of murder, extermination, enslavement, deportation, imprisonment, torture and persecutions for their participation in the implementation of the common plan known as the "Germanisation" plan. The Military Tribunal found that there existed among Hitler, Himmler (the leader of the SS) and other Nazi officials a "two-fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations".[201] It also found that Hofmann and Hildebrandt adhered to and enthusiastically participated in the execution of this "Germanisation" plan by effecting, through RuSHA agents, abortions on foreigners impregnated by Germans, punishment for sexual intercourse between Germans and non-Germans, the slave labour of Poles and other Easterners, the persecution of Jews and Poles and the kidnapping of foreign children.[202] It further found that Hofmann and Hildebrandt formulated the kidnapping programme in response to decrees and memoranda issued by Himmler. In accordance with this programme, RuSHA racial examiners determined which Polish children had sufficiently "good" racial characteristics to be "Germanised". These children were then taken from their families and sent to Germany to be placed in special institutions.[203] In the words of the Military Tribunal, "[t]hese examiners were working directly at different intervals under the control and supervision of Hofmann and Hildebrandt respectively, who had knowledge of their activities".[204] Based on their participation in the kidnapping programme and their knowledge of the deeds of the RuSHA examiners acting at their direction, the Military Tribunal concluded that Hofmann and Hildebrand bore "full responsibility"

[201] N.46 in the original, *see ibid.*, p. 90. *See also ibid.*, p. 96 (finding that "in the very beginning the Germanisation program envisioned certain drastic and oppressive measures, among them: [...] the separation of family groups and the kidnapping of children for the purpose of training them in Nazi ideology; [...] the destruction of the economic and cultural life of the Polish population; and the hampering of the reproduction of the Polish population".).

[202] N.47 in the original, *ibid.*, pp. 101, 160–161.

[203] *RuSHA* Case, pp. 102, 106.

[204] *RuSHA* Case, p. 106.

for the kidnappings.[205] As to the abortion programme, the Military Tribunal found that Hofmann and Hildebrandt had participated in that programme and had issued directives detailing how it was to be put into effect.[206] On the basis of their participation in the abortion programme and their knowledge of the conduct of the RuSHA racial examiners, the Military Tribunal concluded that Hofmann and Hildebrand were responsible for the forcible abortions.[207] The Military Tribunal concluded that, "[j]udged by any standard of proof, the record in this case clearly establishes crimes against humanity and war crimes, substantially as alleged in the indictment".[208] It held that "[t]he evidence establishes beyond any reasonable doubt [the accused's] guilt and criminal responsibility for the [...] criminal activities", including the kidnapping of children, forcible abortions, child-stealing, punishment for sexual intercourse with Germans, and the hampering of enemy nationals' reproduction.[209]

69. In the light of the London Charter, Control Council Law No. 10, international cases and authoritative pronouncements,[210] the Pre-Trial Chamber has no doubt that JCE I and JCE II were recognized forms of responsibility in customary international law at the time relevant for Case 002. This is the situation irrespective of whether it was appropriate for *Tadić* to rely on the ICC draft Statute and on the International Convention for the Suppression of Terrorist Bombing.

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[205] *RuSHA* Case, pp. 106, 160-161. *See also* Bonomy Opinion, *Ojdanić* Co-Perpetration Decision, para. 24.
[206] *RuSHA* Case, pp. 110-111.

> The role played by RuSHA was principally in conducting racial examinations of the pregnant worker as well as the suspected father to determine whether a racially inferior or satisfactory child might be expected; and upon the basis of this examination it was determined whether an abortion should or could be performed—orders being to the effect that no abortion could be performed where a child of good racial characteristics might be expected, and that an abortion should be performed where such a child was improbable.

RuSHA Case, p. 110.
[207] *RuSHA* Case, pp. 111-112, 160-161. In a secret memorandum, Hildebrandt described the ultimate objective of the abortions programme: "to [...] further all valuable racial strains for the strengthening of our people, and to accomplish a complete elimination of everything racially inferior". *Ibid.*, pp. 111-112.
[208] *RuSHA* Case, pp. 152-153.
[209] *RuSHA* Case, p. 160 (findings with respect to Hofmann); *see also ibid.*, pp. 160-161 (making identical findings with respect to Hildebrand). The Tribunal sentenced both men to 25 years' imprisonment for their conduct. *RuSHA* Case, p. 166.
[210] Co-Prosecutors' Joint Response, paras 32-33.

70. The Appeals raise a further argument that *Tadić* impermissibly relied on domestic legislation and case law to determine the state of customary international law in spite of its own finding:

> in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the general doctrine of the general principles of law recognized 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.[211]

Such was not supported by the survey it conducted. In light of the foregoing, the Pre-Trial Chamber need not address this argument.

71. Before turning to the third form of JCE, the Pre-Trial Chamber addresses the argument by Ieng Thirith, relying on the Kai Ambos Amicus Brief,[212] that the basis for the second form of JCE was ambiguous.[213] The argument is based on the consideration that JCE II could be either treated as a sub-category of JCE I if it is interpreted narrowly, or as an extension of liability akin to JCE III if interpreted in a broad sense.[214] JCE II rather resembles JCE III and thus the Pre-Trial Chamber is of the view that such ambiguity does not exist and that reference in *Tadić* to the *mens rea* requirement to prove knowledge by the accused of the nature of the system[215] does not mean that mere knowledge is sufficient. *Tadić* also requires "intent to further the common concerted design to ill-treat inmates".[216] Judge Hunt rightly noted in his separate opinion to the *Ojdanić* JCE Appeal Decision that:

> the second category does not differ substantially from the first. The position of the accused in the second category is exactly the same as the accused in the first category. Both carry out a role within the JCE to effect the object of that enterprise which is different to the role played by the person who physically executes the crime charged. The role of the accused in the second category is enforcing the plan by assisting the person who physically

[211] *Tadić* Appeal Judgement, para. 225.
[212] Kai Ambos Amicus Brief, Section II.4.
[213] Ieng Thirith Appeal, Grounds 4 and 5, paras. 38, 44 and 50.
[214] Kai Ambos Amicus Brief, pages 19 and 22, referring to V. Haan, *Joint Criminal Enterprise. Die Entwicklung einer mittäterschaftlichen Zurechnungsfigur im Völkerstrafrecht* (2008), 200, 274 et seq.
[215] *Tadić* Appeal Judgement, para. 203.
[216] *Ibid.*

> executes the crime charged. Both of them must intend that the crime charged is to take place. To accept anything less as sufficient would deny the existence of a "common purpose".[217]

72. In light of its finding that JCE I and II are forms of responsibility that were recognized in customary international law since the post-World War II international instruments and international military case law as discussed above, as well as its earlier finding that these forms of liability have an underpining in the Cambodian law concept of co-authorship applicable at the time, the Pre-Trial Chamber has no doubt that liability based on a common purpose, design or plan was sufficiently accessible and foreseeable to the defendants.

73. As to the allegation that the "Impugned Order fails to conclude that the three forms of JCE formed part of customary international law at the relevant time",[218] the Pre-Trial Chamber finds that this allegation is unsubstantiated and the Impugned Order implicitly made the correct finding. The Pre-Trial Chamber also finds without merit the allegation that because the international jurisprudence relied upon in *Tadić* essentially refers to crimes committed during World War II and is based on military case law from North American and European Courts and the legal systems of Australia and Zambia, it "cannot be transposed to the territory of Asia" and cannot apply *mutadis mutandis* to the ECCC and the Cambodian context.[219] Insofar as it relates to JCE I and II, the further argument that the Impugned Order fails to reason why it dismissed the argument that *Tadić* "forms an insufficient precedent in international criminal law to rely on JCE"[220] is substantiated, and the Impugned Order is indeed insufficiently reasoned in this respect. However, such deficiency is incapable of reversing the finding that JCE I and II are applicable before the ECCC, for the foregoing reasons.

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[217] Separate Opinion of Judge David Hunt, *Ojdanić* JCE Decision (Hunt Opinion, *Ojdanić* JCE Decision), para. 8 (emphasis added). *See also, Vasiljević* Appeal Judgement, para, 101; *Krnojelac* Appeal Judgement, para 84, providing that, "apart from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators' joint criminal intent".
[218] Ieng Thirith Appeal, para. 52.
[219] Ieng Thirith Appeal, para. 66.
[220] Ieng Thirith Appeal, paras. 22 and 24.

74. The Pre-Trial Chamber turns now to the third and, undeniably, more controversial form of JCE: its extended form (JCE III).

(iii) JCE III, extended form of JCE

75. The Appeals argue that the *Tadić* Appeals Chamber conclusion that JCE III is firmly based in customary international law is unsupported and does not comply with the requirement that customary international law can only be determined with reference to consistent, widespread state practice and *opinio juris*.[221] As a result, its application before the ECCC would violate the principle of legality.[222] The Appellant stresses that to reach the above conclusion, *Tadić* relied on cases such as the *Borkum Island Case* and the *Essen Lynching Case*. In these cases the military courts only issued a simple guilty verdict and made no extensive legal finding on the issue of common criminal plan or mob beatings. Thus, *Tadić* was "left to quote the words of the [...] military prosecutor and *infer* that the judges adopted [his] reasoning".[223] In addition, *Tadić* "relied in large part on unpublished cases, mostly from Italy [...] which has

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[221] Ieng Sary Appeal, para. 40 and n.105, where the Appellant refers to Shane Darcy, *Imputed Criminal Liability and the Goals of International Justice,* 20 LEIDEN J. INT'L L. 377, 384-85 (2007), according to which for the third category of JCE:

> the Appeals Chamber relied on a few Italian decisions and a small number of trials before the Allied military courts, mostly concerning instances of mob violence, which relied on such a doctrine. 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 post war period recognized the concept. The Appeals Chamber found some limited support for the third category in domestic criminal laws, but noted, however, that the major systems do not all treat the notion in the same way. Critics argue that a large number of jurisdictions do not support liability for crimes outside the scope of the agreed objective for those persons who participate in a common plan.

See also Ieng Thirith Appeal, para. 38, alleging that "there was no basis for JCE III in Cambodia in 1975-1979", as well as para. 44, alleging that the Impugned Order erroneously found that JCE III apply before the ECCC, because "JCE III was not enacted in Cambodian law in 1975-1979".

[222] Ieng Sary Appeal, para. 2 e)

[223] Ieng Sary Appeal, paras. 44-45, referring to Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,* 5 J. INT'L CRIM. JUST. 69, 75, n.10 (2007). The Appellant also refers to Powles, according to which the *Essen Lynching* and *Borkum Island* Cases on which *Tadić* relied do not "provide unambiguous support for the liability pursuant to the extended form of JCE" and in particular in the first case, "there is possibly a question mark as to whether the court held anyone who did not possess the intent to kill guilty of murder" because the Prosecution pleaded that the accused should be found guilty of murder as they had the intent to kill and they were indeed convicted for murder. Ieng Sary Appeal, para. 40, n.105, referring to Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606, 615-616 (2004).

adopted a unitary system whereby any person who intervenes in the commission of a crime is liable as a perpetrator, whereas most national criminal law systems have adopted an approach that makes a distinction between perpetrators or principals to the crime and accessories to the crime or secondary parties. Furthermore, only one of the Italian cases (*D'Ottavio et al.*) could provide support for JCE III".[224] The Appellant noted Ambos' argument on the Italian cases as follows:

> In this trial – in contrast to the trials before British and U.S. American military tribunals – no international law was relied upon, but exclusively the national law [...] was applied. In addition, this case law is not uniform since the Italian Supreme Court [...] has adopted two dissenting decisions.[225]

76. The OCP respond that "many advanced jurisdictions recognized modes of co-perpetration similar to JCE III, [including] conspiracy, the felony murder doctrine, the concept of *association de malfaiteurs* and numerous other doctrines of co-perpetration".[226] According to the OCP, the argument that the finding in *Tadić* on JCE forming part of customary international law was based on too few cases from too few jurisdictions ignores substantial evidence that supports the ICTY Appeals Chamber's finding.

77. Having reviewed the authorities relied upon by *Tadić* in relation to the extended form of JCE (JCE III), the Pre-Trial Chamber is of the view that they do not provide sufficient evidence of consistent state practice or *opinio juris* at the time relevant to Case 002. The Pre-Trial Chamber concludes that JCE III was not recognized as a form of responsibility applicable to violations of international humanitarian law for the following reasons.

78. The Pre-Trial Chamber notes that the Nuremberg Charter and Control Council Law No. 10 do not specifically offer support for the extended form of JCE (JCE III). The Pre-Trial Chamber does not find that the two additional international instruments

[224] Ieng Sary Appeal, para. 40.
[225] *Ibid.*, referring to Kai Ambos Amicus Brief, p. 29.
[226] Co-Prosecutors' Joint Response, para. 33, referring to Co-Prosecutors' Supplementary Observations, para. 10, nn.22-26.

referred to by *Tadić*, which were not in existence at the time relevant to Case 002, could serve as a basis for establishing the customary law status of JCE III in 1975-1979.

79. As to the international case law relied upon by *Tadić*, the Pre-Trial Chamber notes that facts of *Borkum Island* and *Essen Lynching* may indeed be directly relevant to JCE III. However, in the absence of a reasoned judgement in these cases, one cannot be certain of the basis of liability actually retained by the military courts. In the first case,[227] the accused included a number of senior officers, a number of privates, the mayor of Borkum, a number of policemen, a civilian and the leader of the Reich Labour Corps. All the accused "were 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 the airmen and with 'wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in assaults upon' the airmen".[228] Based on its review of the Prosecution's submissions, *Tadić* considered that "the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder".[229] Then, in the absence of a reasoned verdict, it assumed that "the court upheld the common design doctrine, but in a different form, for it found some defendants guilty of both the killing and assault charges[230] while others were only found guilty of assault".[231] In addition, the court inferred that:

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[227] In this case, seven crew members of a U.S. Flying Fortress, forced down on the German Island of Borkum, were taken prisoner and forced to march, beaten by members of the Reich Labour Corps, then by civilians on the street and, again beaten by civilians while the escorting guards, took part in the beating. This was after the Mayor of Borkum incited the mob to kill them and before the airmen were shot and killed by German soldiers when reaching the city hall.
[228] *Tadić* Appeal Judgement, para. 210, referring to Charge Sheet, in U.S. National Archives Microfilm Publications, I ("Charge Sheet").
[229] *Tadić* Appeal Judgement, para. 211.
[230] *Tadić* Appeal Judgement, para. 212, referring to Charge Sheet, pp. 1280-1286, n.268, where "[t]he accused Akkerman, Krolikovski, Schmitz, Wentzel, Seiler and Goebbel were all found guilty on both the killing and assault charges and were sentenced to death, with the exception of Krolikovski, who was sentenced to life imprisonment.

> all the accused found guilty were held responsible for pursuing a criminal common design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even where there was no evidence that they had actually killed the prisoners. Presumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault.[232]

80. The Pre-Trial Chamber does not infer from these circumstances that the mode of liability based on which the military court convicted Akkerman, Krolikovski, Schmitz, Wentzel, Seiler and Goebbel for murder was an extended form of JCE (JCE III). In 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.

81. In the second case,[233] *Tadić* "assumed"[234] that the court accepted the Prosecution's position. The Appeals Chamber inferred[235] from the arguments of the parties and the guilty verdict "that the court upheld the notion that the accused were found guilty took part, in various degrees, in the killing; not all of them intended to kill but all intended to participate in the unlawful treatment of the prisoners of war and were found guilty of murder, because they were 'concerned in the killing'".[236] It was also inferred that "the court assumed that the convicted persons who simply struck a blow or implicitly incited the murder would have foreseen that others would kill the prisoners".[237] This final inference seems safer than the previous one, although there is no indication in the case that the Prosecutor even explicitly relied on the concept

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[231] *Tadić* Appeal Judgement, para. 212, referring to Charge Sheet, pp. 1280-1286, n.269, where "[t]he accused Pointner, Witzke, Geyer, Albrecht, Weber, Rommel, Mammenga and Heinemann were found guilty only of assault and received terms of imprisonment ranging between 2 and 25 years.
[232] *Tadić* Appeal Judgement, para. 213.
[233] In this case, a crowd of people participated in the beating of three airmen, resulting in their deaths and it was not possible to determine who had struck the fatal blow in each case.
[234] *Tadić* Appeal Judgement, para. 208.
[235] *Tadić* Appeal Judgement, para. 209.
[236] *Ibid.*
[237] *Ibid.*

of common design and this case alone would not warrant a finding that JCE III exists in customary international law.

82. *Tadić* also relied on several cases brought before Italian courts after World War II concerning war crimes committed between 1943 and 1945. These crimes were committed by civilians or military personnel belonging to the armed forces of the so-called "*Repubblica Sociale Italiana*" ("RSI"). The RSI was a *de facto* government under German control established by the Fascist leadership in central and northern Italy following the declaration of war by Italy against Germany on 13 October 1943. The crimes were committed against prisoners of war, Italian partisans or members of the Italian army fighting against the Germans and the RSI. These cases, in which domestic courts applied domestic law, do not amount to international case law and the Pre-Trial Chamber does not consider them as proper precedents for the purpose of determining the status of customary law in this area.

83. For the foregoing reasons, the Pre-Trial Chamber does not find that the authorities relied upon in *Tadić*, and as a result those relied upon in the Impugned Order, constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law at the time relevant to Case 002.

84. The exact status of general principles of criminal law as primary or auxiliary sources of international law is unclear. However, a number of ICTY Appeals decisions state or imply that it is acceptable to have recourse to such principles in defining not only the elements of an international crime,[238] but also the scope of a form of responsibility for an international crime.[239] In *Tadić*, while considering that national legislation and case law cannot be relied upon as a source of international principles

[238] *E.g.*, the Trial Chamber in *Furundžija* held that, "to arrive at an accurate definition of rape based on the criminal law principle of specificity [...] , it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws." *Furundžija* Trial Judgement, para. 177.
[239] *See Blaškić* Appeal Judgement, paras 34–42.

or rules to establish the customary law status of JCE,[240] the Appeals Chamber did rely on national legislation and case law to conclude that the doctrine of JCE was rooted in the national law of many states.[241] 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. This may explain why *Tadić* itself used multiple expressions conveying different shades of meaning when defining the required state of mind for JCE III.[242]

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[240] For this reliance to be permissible, "it would be necessary to show that [...] the major legal systems of the world take the same approach to this notion", which it found was not the case. *Tadić* Appeal Judgement, para. 225.

[241] *Tadić* Appeal Judgement, para. 225. In particular, as to the scenario where one of the participants of a JCE commits a crime not envisaged in the common purpose or common design (relevant to JCE III), in some countries, that person alone will incur criminal responsibility for such a crime. *Tadić* Appeal Judgement, para.224, nn.283-284, referring to Germany and the Netherlands. *See also* Sassoli & Olson, , p. 7 (loc. cit. 47), according to which "the Chamber could have added Switzerland to that list". In other countries, if the crime perpetrated "that was outside the common plan but was nevertheless foreseeable", those who intended the common purpose are all fully liable for that crime as well. *Tadić* Appeal Judgement, para. 224, fn 285-291, referring to France and Italy as well as the common law jurisdictions of England and Wales, Canada, the United States, Australia and Zambia.

[242] "[T]he risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to it". *Tadić* Appeal Judgement, para. 204; the "person [...] was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called 'advertent recklessness' in some national legal systems)". *Ibid.*, para. 220; "responsibility for a crime other than the one agreed upon in the common plan arises only if [...] (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk. Ibid.,* para. 228. As noted by Judge Hunt in his Separate Opinion in the *Ojdanić* JCE Decision:

> there is a clear distinction between a perception that an event is possible and a perception that it is likely (a synonym for probable). The latter places a greater burden on the prosecution than the other. The word risk is equivocal, taking its meaning from its context [... and in the expression] "the risk of death occurring", it would seem that it is used in the sense of a possibility. In the second formulation, "most likely" means at least probable (if not more), but its stated equivalence to the civil notion of *dolus eventualis* would seem to reduce it once more to a possibility.

Hunt Opinion, *Ojdanić* JCE Decision, para. 10.Today's ICTY jurisprudence is arguably settled and retains the third of these expressions of the *mens rea* requirement. "The word "might" in the third formulation indicates again a possibility". *Ibid.* As stressed by Judge Hunt:

> [i]n many common law jurisdictions, where the crime charged goes beyond what was agreed in the [JCE], the prosecution must establish that the participant who did not himself carry out that crime nevertheless participated in that enterprise with the contemplation of the crime charged as a *possible* incident in the execution of that enterprise. According to the same Judge, this is very similar to the civil law notion of *dolus eventualis* or advertent recklessness,

Ibid. Such *dolus eventualis* "requires advertence to the possibility that a particular consequence will follow, and acting with either indifference or being reconciled to that possibility (in the sense of being prepared to take that risk). The extent to which the possibility must be perceived differs according to the particular country in which the civil law is adopted, but the highest would appear to be that there must be a concrete basis for supposing that the particular consequence will follow." *Ibid.*, n.44.

85. *Tadić* further emphasized that it only referred to national legislation and case law to show that the notion of common purpose upheld in international law has an underpinning in many national systems. However, in the area under discussion, these domestic sources could not be relied upon as irrefutable evidence of international principles or rules under the doctrine that general principles of law are recognised by the nations of the world; for this reliance to be permissible, most, if not all, countries must have adopted the same notion of common purpose. In *Tadić*, the court concluded that this was not the case.[243]

86. The appropriate process to assess the existence of the general principal of law is illustrated by the *Furundžija* and *Kunarac* Trial Judgements: "reference should not be made to one national legal system only, say that of common law or civil law" to the exclusion of the other,[244] although the distillation of a general principle does not require a comprehensive survey of all the legal systems of the world.[245] It is also important to avoid "mechanical importation or transposition from national law into international criminal proceedings".[246] For instance, when faced with the task of ascertaining whether a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute, and if so, how it should be defined, the ICTY Appeals Chamber in *Blaškić* reviewed national laws on recklessness and *dolus eventualis*. It reviewed the jurisdictions of the United States, the United Kingdom, Australia, France, Italy and Germany to ascertain the mental

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[243] *Tadić* Appeal Judgement, para. 225. One of the authorities relied upon by the Ieng Thirith Appeal takes issue with the fact that, despite such finding, *Tadić* considered that "the consistency and cogency of the case law and the treaties it referred to, as well as their consonance with *the general principles on criminal responsibility laid down* both in the Statute and general international criminal law *and in national legislation*, warrant the conclusion that case law reflects customary rules of international criminal law. *Tadić* Appeal Judgement, para. 226. *See* Sassoli & Olson, p. 7 (loc. cit. 58).

[244] *See Furundžija* Trial Judgement, para. 178; *Kunarac* Trial Judgement, para. 439. *See also*, Bonomy Opinion, *Ojdanić* Co-Perpetration Decision, para. 27.

[245] *See Prosecutor v. Erdemović*, IT-96-22-A, Judgement, Appeals Chamber, 7 October 1997, Separate Opinion of Judges McDonald and Vohrah ("McDonald and Vohrah Decision, *Erdemović* Judgement"), para. 57 ("[I]t is generally accepted that [... a] comprehensive survey of all legal systems of the world [is not required,] as this would involve a practical impossibility and has never been the practice of the International Court of Justice or other international tribunals which have had recourse to Article 38(1)(c) of the ICJ Statute."); *ibid.*, Separate Opinion of Judge Stephen ("Stephen Opinion, *Erdemović* Judgement"), para. 25 ("[N]o universal acceptance of a particular principle by every nation within the main systems of law is necessary before lacunae can be filled[.]").

[246] *See Furundžija* Trial Judgement, para. 178; *Kunarac* Trial Judgement, para. 439.

elements of "ordering" under Article 7(1) of the Statute.[247] Having examined the approach taken in these national systems as well as precedents from international tribunals, the Appeals Chamber considered that the "knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law".[248] In addition, it found that "an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard".[249]

87. The Pre-Trial Chamber is of the view that it does not need to decide whether a number of national systems, which can be regarded as representative of the world's major legal systems, recognise that a standard of *mens rea* lower than direct intent may apply in relation to crimes committed outside the common criminal purpose and amount to commission. Indeed, even if this were the case and the Chamber found that the third form of JCE was punishable in relation to international crimes, the Pre-Trial Chamber is not satisfied that such liability was foreseeable to the Charged Persons in 1975-1979, i.e., that crimes falling outside the common criminal purpose but which were natural consequences of the realization of that purpose and foreseeable to them could trigger their responsibility as co-perpetrators. The Pre-Trial Chambers notes in this respect that, although it found that the basic and systemic forms of JCE (JCE I & II) had an underpinning in Cambodian law at the time relevant to Case 002, the core of this doctrine is the common criminal purpose and the intent shared by the members of the JCE that the crime(s) forming part of it be committed. JCE III purports to attach liability for crimes falling outside the common criminal purpose but which were natural consequences of the realization of that purpose and foreseeable to the accused. The Pre-Trial Chamber 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

[247] *See Blaškić* Appeal Judgement, paras. 34–42.
[248] *Blaškić* Appeal Judgement, para. 41.
[249] *Ibid.* The Appeals Chamber concluded at para. 42 that "a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime".

responsibility was punishable as well. In such circumstances, the principle of legality requires the ECCC to refrain from relying on the extended form of JCE in its proceedings.[250]

88. The Pre-Trial Chamber, therefore, upholds the appeal insofar as the applicability of JCE III before the ECCC is concerned.[251]

89. As a result of the above finding, Ground 1 of Ieng Thirith Appeal, alleging that the Impugned Order "lacks clarity and is ambiguous" in its formulation of the third form of JCE[252] is moot. The Pre-Trial Chamber will therefore turn to her third ground of appeal, which alleges that the Impugned Order failed to address her argument that JCE was improperly pleaded in the Introductory Submission.[253] In doing so, as a result of its finding related to the applicability of JCE III before the ECCC, the Pre-Trial Chamber will limit its review of this ground of appeal to the extent that it relates to the way JCE I was pleaded.

B. Whether JCE I was properly pleaded in the Introductory Submission

90. The Appellant alleges that the Impugned Order failed to address the argument in Ieng Thirith Submission that "JCE was improperly pleaded in the Introductory Submission".[254] Relying on the Pre-Trial Chamber's finding in Case 001 that "the formulation of the S-21 JCE [... is] vague, particularly as it concerns the pleading of the three different forms of [JCE]", and stressing the importance of precision in this

[250] The Pre-Trial Chamber further notes that the OCIJ failed to address the related specific arguments raised by the Defence in their motion and subsequent submissions and is in this respect deficient, and finally, that conspiracy and the concept of *association de malfaiteurs* referred to by the OCP are *inchoate* offences rather than forms of responsibility and of little assistance in relation to determining the issue at stake.
[251] Ieng Thirith's further argument that in the absence of legal basis for JCE III in the 1956 Cambodian Penal Code, international customary law cannot fill the gap is therefore moot.

[252] Ieng Thirith Appeal, para. 9.
[253] Ieng Thirith Appeal, para. 28.
[254] Ieng Thirith Appeal, para. 28.

matter,[255] the Appellant submitted that the way "JCE [is] pleaded in the Introductory Submission in Case 002 [is likewise] vague and imprecise".[256]

91. The OCP in their response submitted that the Appellant improperly requested the Co-Investigating Judges to evaluate the adequacy of the pleadings in the Introductory Submission, and this analysis should be left until the "post-Closing Order" stage of the proceedings.[257] They also submit that because "[n]one of the Appellants have yet been indicted for a crime relying on JCE as a mode of liability," the challenge is not yet "ripe for determination".[258] In respect of the substance of the pleadings, the OCP submit that they did properly plead JCE in the Introductory Submission such that the Charged Persons received sufficient notice of charges brought against them.[259]

92. The Pre-Trial Chamber recalls that the right to receive notice of charges is a fundamental right of a charged person.[260] The right to notice arises upon arrest[261] and is meant in part to ensure the Charged Person's ability to fully participate in the investigation.[262] The Pre-Trial Chamber considers that a comparison between the respective terms of Internal Rules 53(1)(a)(b) and 67(2) show that, while only a summary of the facts and type of offence alleged are required at the stage of the Introductory Submission, a more complete "description of the material facts" and their legal characterization is required in the Closing Order. Internal Rules 55(2) and (3) stipulate that "the Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission" and shall not investigate new facts coming to their knowledge during the investigation unless such facts are limited to aggravating circumstances relating to an existing Submission, or until they receive a Supplementary Submission from the OCP.[263] When read in light

[255] Decision on Appeal against Closing Order, para. 135.
[256] Ieng Thirith Appeal, para. 31.
[257] Co-Prosecutors' Joint Response, paras 79-80.
[258] Co-Prosecutors' Joint Response, para. 15.
[259] Co-Prosecutors' Joint Response, para. 81.
[260] Rule 21(1)(d), ICCPR, Art. 9(2).
[261] Rule 21(1)(d); Decision on Appeal against Closing Order, para. 140.
[262] Decision on Appeal against Closing Order, para. 138.
[263] Unless the new facts are limited to aggravating circumstances relating to an existing submission, the OCIJ shall inform the OCP of the new facts in question.

of a charged person's fundamental rights recalled above, the Pre-Trial Chamber concludes that particulars of facts summarized in the Introductory Submission can validly and in fact must be pleaded in the Closing Order so as to provide the Defence sufficient notice of the charges based on which the Trial shall proceed.

93. The Pre-Trial Chamber notes that the jurisprudence of the ICTY has specified what material facts must be pleaded in an indictment where the accused is alleged to have committed the crimes in question by participating in a JCE. The jurisprudence in question is relevant in the context of the ECCC because it has been developed in a legal framework whose requirements for notice are comparable to the legal framework applicable at the ECCC, even though the ICTY does not utilize investigating judges.[264] However, the Pre-Trial Chamber must still determine whether all such requirements are applicable at the Introductory Submission stage or only at the Closing Order stage. Firstly, ICTY cases consider that the existence of the JCE is a material fact which must be pleaded. In addition, the indictment must specify a number of matters which were identified by the Trial Chamber in *Krnojelac* in the following terms:

> In order to know the nature of the case he must meet, the accused must be informed by the indictment of:
> (a) the nature or purpose[265] of the joint criminal enterprise (or its "essence", as the accused here has suggested),
> (b) the time at which or the period over which the enterprise is said to have existed,
> (c) the identity of those engaged in the enterprise –so far as their identity is known, but at least by reference to their category as a group, and

[264] Indeed, pursuant to Article 18(4) of the ICTY Statute, the indictment must set out "a concise statement of the facts and the crime or crimes with which the accused is charged". Likewise, Rule 47(C) of the ICTY Rules of Procedure and Evidence provides that the indictment shall set out not only the name and particulars of the suspect but also "a concise statement of the facts of the case". However, like at the ECCC, the minimal requirement for the Prosecution to set out a concise statement of the facts of the case in the indictment must be interpreted in the light of the provisions of Articles 21(2), 21(4)(a) and 21(4)(b) of the ICTY Statute, which provide that, "in the determination of charges against him, the accused shall be entitled to a fair hearing" and, more specifically, to be informed "of the nature and cause of the charges against him" and "to have adequate time and facilities for the preparation of his defence".

[265] The ICTY Appeals Chamber in the same case holds that, irrespective of the category of JCE pleaded, "using the concept of joint criminal enterprise to define an individual's responsibility for crimes physically committed by others requires a strict definition of common purpose". *Krnojelac* Appeal Judgement, para. 116.

> (d) the nature of the participation by the accused in that enterprise.
> Where any of these matters is to be established by inference, the Prosecution must identify in the indictment the facts and circumstances from which the inference is sought to be drawn.[266]

94. The nature of the participation by the accused in the JCE must be specified and, where the nature of the participation is to be established by inference, the Prosecution must identify in the indictment the facts and circumstances from which the inference is sought to be drawn.[267] In this respect, the Pre-Trial Chamber notes that, while ICTY jurisprudence seems to leave open to the Prosecution the possibility of either pleading the required *mens rea* in terms or by pleading the specific facts from which such *mens rea* is to be inferred,[268] in case the Prosecution actually intends to rely upon the "conduct of the accused" to establish that the accused possessed the required *mens rea*, then such conduct must have been pleaded as a material fact in the indictment.[269] As rightly noted by one ICTY Trial Chamber in

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[266] *Prosecutor v. Krnojelac,* IT-97-25-PT, Decision on Form of Second Amended Indictment, Trial Chamber II, 11 May 2000 ("*Krnojelac* Decision on Form of Indictment"), para. 16. *See also, Kvočka* Appeal Judgement, para. 42.

[267] *Milutinović, et al* Decision on Form of Indictment ,para. 7.

[268] *See* in particular, *Blaškić* Appeal Judgement, para. 219, approving the statement in *Prosecutor v. Brđanin and Talić*, Case No IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Trial Chamber II, 26 June 2001, para. 33, that with respect to the *mens rea,* "there are two ways in which the relevant state of mind may be pleaded: (i) by pleading the evidentiary facts from which the state of mind is necessarily to be inferred, or (ii) by pleading the relevant state of mind itself as a material fact."

[269] For example, in the *Kordić and Čerkez* Case, the Appeals Chamber considered that a meeting which Kordić was alleged at trial to have attended, and which the Appeals Chamber found was a fundamental part of the Prosecution's case against Kordić, constituted a material fact which should have been pleaded in the Indictment. *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, paras. 144 and 147. *See also, Kvočka* Appeal Judgement, para. 29. Also, in the ICTR *Ntakirutimana* case, the Prosecution had pleaded the specific conduct of the accused in rather general terms in the indictments without describing various aspects of the acts and conduct of the accused to which it was in position to refer. The ICTR Appeals Chamber quashed several of the Trial Chamber's findings of fact relating to specific acts and conduct, such as the finding that Gérard Ntakirutimana "killed a person named 'Esdras' during [the] attack" at Mutiti Hill, upon which the Trial Chamber relied to establish the *actus reus* and/or *mens rea* required for committing genocide, on the basis that the indictment was defective due to the failure by the Prosecution to include the relevant factual allegations in it (*Prosecutor v. Ntakirutimana et al.,* ICTR-96-10-A & ICTR-96-17-A, Judgement, Appeals Chamber, 13 December 2004 ("*Ntakirutimana* Appeal Judgement"), paras. 86, 99 and 504; *see also Prosecutor v. Ntakirutimana et al.,* ICTR-96-10-T & ICTR-96-17-T, Judgement and Sentence, Trial Chamber, 21 February 2003, paras. 832 and 834. In the same case the Appeals Chamber found that the Trial Chamber erred in basing the conviction of Elizaphan Ntakirutimana for aiding and abetting genocide on material facts that had not been pleaded. It accordingly quashed Elizaphan Ntakirutimana's conviction under the Mugonero Indictment for conveying attackers to the Mugonero complex, as well as his conviction under the Bisesero Indictment, for his participation in a convoy of vehicles carrying attackers to Kabatwa Hill, where he pointed out Tutsi Refugees at Gitwa Hill,

Milutinovic et al., "since *mens rea* is almost always a matter of inference from facts and circumstances established by the evidence, the emphasis on pleading the facts on which the Prosecution will rely to establish the requisite *mens rea* signifies the importance attached by the Appeals Chamber to ensuring that the indictment informs the accused clearly of the nature and cause of the charges against him."[270]

95. As to the Co-Prosecutors' argument that they are not required to plead in such a way that distinguishes between the three forms of JCE, and accordingly, the Charged Persons are on sufficient notice that they are being investigated for their potential participation in a JCE,[271] the Pre-Trial Chamber is of the view that, again, some guidance can be obtained from international or other internationalized courts. In *Krnojelac*, the ICTY Appeals Chamber considered that "it is *preferable* for an indictment alleging the accused's responsibility as a participant in a [JCE] also to refer to the particular form(s) (basic or extended) of [JCE] envisaged".[272] It, however, found that "this does not, in principle, prevent the Prosecution from pleading elsewhere than in the indictment - for instance in a pre-trial brief - the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in law in the light of the facts alleged. This option is, however, limited by the need to guarantee the accused a fair trial".[273] Transposed to the context of the ECCC, the Pre-Trial Chamber is of the view that, for the Charged Person to exercise her right to participate in the investigation, the notice requirement must apply to the Introductory Submission to some degree.[274] However, the level of particularity demanded in an indictment cannot be directly imposed upon the Introductory Submission, because the OCP makes its Introductory Submission

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and for transporting attackers to and being present at an attack at Mubuga Primary School in mid-May. *See Ntakirutimana* Appeal Judgement.

[270] *Lazarević* Indictment Decision, para. 8.

[271] Co-Prosecutors' Joint Response, para. 81.

[272] *Krnojelac* Appeal Judgement, para. 138. *See also*, in the context of the SCSL, *Prosecutor v. Kanu*, SCSL-2003-13-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, Trial Chamber, 19 November 2003, para. 14. In *Kanu*, the issue was whether or not the Prosecution must elect between the basic form of JCE and the extended form; the Chamber did not make any findings about differentiating between JCE I & II.

[273] *Krnojelac* Appeal Judgement, para. 138.

[274] Decision on Appeal against Closing Order, para. 140 ("Rule 21(1)(d) is deemed to apply from the time of the arrest").

without the benefit of a full investigation. Thus, while it is, in the Pre-Trial Chamber's view, preferable for an Introductory Submission alleging the accused's responsibility as a participant in a JCE to also refer to the particular form(s) (basic or systemic)[275] of JCE envisaged, the OCP are not precluded from doing so in the Final Submission. At the latest, the Co-Investigating Judges may refer to the particular form(s) of participation in their Closing Order.[276]

96. As to the Appellant's reliance on the finding by the Pre-Trial Chamber in Case 001 that the formulation of the JCE is vague as it concerns the pleading of the three forms of JCE, the Pre-Trial Chamber notes that it concerned the pleading of the alleged "S-21 JCE" in the Closing Order in that case, following the separation order. The Pre-Trial Chamber noted that "the joint criminal enterprise in which [Duch and the Charged Persons in Case 002] were allegedly involved was within the separated [Case File 002]."[277] Therefore, the Pre-Trial Chamber's finding on the application of JCE in Case 001 has no bearing on application of JCE in Case 002.

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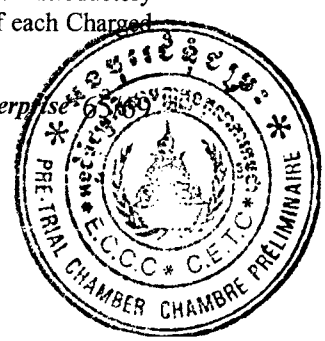
[275] Because the extended form of JCE is not applicable before the ECCC, differentiating form III of JCE is not pertinent to the current proceedings.
[276] Under *Krnojelac*, the Prosecutors must at least plead facts giving rise to an inference of the requisite *mens rea* in order to plead the "nature of the participation by the [Charged Person]" in the alleged JCE. *Krnojelac* Decision on Form of Indictment, para. 16; *see also Milutinović, et al* Decision on Form of Indictment, paras 7-9. The requisite *mens rea* for JCE 1 is the "intent to perpetrate" the crimes which are the object of the JCE, and for JCE 2, it is the "knowledge of the nature of the [common concerted system of ill-treatment]" and the "intent to further [that] system." *See* Impugned Order, para. 15. Thusly, in order to properly plead JCE I and II, the Co-Prosecutors must plead material facts from which an inference of the two different applicable *mentes reae* can be shown.
[277] Decision on Appeal against Closing Order, para. 123.

97. Having reviewed the relevant portions of the Introductory Submission,[278] the Pre-Trial Chamber is of the view that the OCP provided to the Charged Persons sufficient details of the facts related to the allegation that the accused participated in a JCE, allowing them to fully participate in the investigation and be on sufficient notice during that stage of the proceedings. This is clearly so in relation to the nature or purpose of the alleged JCE and its timing. As to whether the Charged Persons had sufficient notice of the OCP's intention to allege all forms of JCE, the Pre-Trial Chamber notes that the Appellant understands paragraphs 5-16 of the Introductory Submission to plead JCE II, and asserts that the first and third forms of JCE are only

[278] "A common criminal plan, or a joint criminal enterprise (JCE), came into existence on or before 17 April 1975 and continued at least until 6 January 1979" (para. 5); "The object of this common criminal plan was the systematic persecution of specific groups within the Cambodian population, [...] abolishing all ethnic, national, religious, racial, class and cultural differences through the commission of crimes punishable under [...] the ECCC Law" (para. 6); "The object of this common criminal plan also included the denial of fundamental rights, such as the rights to liberty, security of person and property; the right to freedom of opinion, expression, thought, conscience and religion; and the right to a family and personal life [...]". (para. 7); "Individuals who participated knowingly and willfully in the JCE throughout its duration, or alternatively at different times in its duration, included but were not limited to NUON Chea, IENG Sary, KHIEU Samphan, IENG Thirith and KANG Keck Iev [sic.] (DUCH) [...]. These individuals participated in the JCE as co-perpetrators, either directly or indirectly. They intended the criminal result, even if they did not physically perpetrate all crimes [committed in pursuit of that plan]". (para. 8); IENG Sary as a member of the Standing Committee and as Deputy Prime Minister for Foreign Affairs, he promoted, instigated, facilitated, encouraged and/or condoned the perpetration of the crimes described in [the Introductory Submission ...]. IENG Sary was also aware of the unlawful conditions in the country through his personal visits to various ministries and their sub-units in and around Phnom Penh [...]. That he had this knowledge is evident from his public statements. [...] IENG Sary was aware of and facilitated the large-scale forced labour, unlawful detention, ill-treatment, torture and extra-judicial executions of Ministry of Foreign Affairs personnel [...]". (para. 88); "KHIEU Samphan through his numerous leadership positions within the CPK, he promoted, instigated, facilitated, encouraged, and/or condoned the perpetration of the crimes described in [the Introductory Submission]. [...] KHIEU Samphan encouraged and facilitated the forcible evacuation of Phnom Penh and the other major cities immediately after the CPK victory of 17 April 1975. [...] He participated in the organization of forced labour throughout the country. He regularly inspected state facilities, worksites, factories and agricultural sites". (para. 97); "IENG Thirith as Minister of Social Affairs promoted, instigated, facilitated, encouraged and/or condoned the perpetration of the crimes described in [the Introductory Submission]. [...] IENG Thirith planned, directed, coordinated, influenced and ordered the implementation of CPK policies [...] including: [...] recruiting illiterate and unqualified teenagers to replace trained medical personnel [... and] touring the country to assess and report directly to POL Pot on the health, diet and living conditions [...]. IENG Thirith assisted in implementing these policies, despite her knowledge of the healthcare situation within Democratic Kampuchea and contributed therefore to create and maintain inhumane living conditions and to cause numerous deaths in the Democratic Kampuchea population". (para. 103); These suspects planned, instigated, ordered, aided and abetted or committed these crimes. They directly intended that these crimes be committed [...]". (para. 115); "Where these suspects committed these crimes they did so by participating in a joint criminal enterprise with other co-perpetrators. These crimes were the object of the JCE [...]. Other members of the JCE acted on the basis of the common purpose, with shared intent". (para. 116). *See* Introductory Submission, 18 July 2007, D3, pp. 56-84 for a more exhaustive recounting of the nature of each Charged Person's participation.



pleaded in the concluding part of the Introductory Submission and have no factual basis in the charging document, so the pleading of these forms lack the precision required by the Pre-Trial Chamber.[279] However, in the Pre-Trial Chamber's view, this assertion is unsupported by a proper reading of the Introductory Submission: the fact that the OCP intended to allege all forms of JCE is not ambiguous. In fact, the Charged Person expressly noted all three forms of JCE *were* present in the Submission to some degree. As to the alleged members of the JCE, while the OCP failed to name other members than the Charged Persons, the Pre-Trial Chamber would expect the Co-Investigating Judges to provide specific names of any other members of the alleged JCE, identified in the course of the investigation, in their Closing Order where applicable. As to the alleged nature of the participation of the Charged Persons, the Pre-Trial Chamber is of the view that the OCP could have provided more particulars with regard to the nature of each Appellant's participation in the alleged JCE. This however does not amount to a lack of notice at this stage of the proceedings so long as the Closing Order, were it to indict any of the Appellants and assert their participation in a JCE as a mode of commission, contains the specific aspects of the conduct of the accused from which the OCIJ considers that their respective participation in the JCE and/or required *means rea* is to be inferred.

C. Whether JCE applies to domestic crimes as well as to international crimes?

98. In support of their Appeal, Co-Lawyers for Civil Parties assert that JCE also applies to crimes under the 1956 Cambodian Penal Code because "JCE liability existed under Cambodian Law in 1956, where it was referred to as '*coaction and complicité*' [co-perpetration and complicity], and included, at a minimum, the first two forms of JCE [...]".[280] They argue that there is no "autonomous legal regime for international

[279] IENG Thirith's Submissions, paras 18-23. The Prosecution responds that the OCIJ did not have to consider the relief sought by Ieng Thirith; that the Closing Order is the only appropriate stage to analyze whether the crimes and modes of liability have been proven and, in any event the OCIJ only investigate facts contained in the Introductory Submission and are not bound by legal characterizations that they can change upon analysis of the evidence obtained during the investigation, and; that the decision relied upon by the Appellant pertained to the Closing Order stage and thus, is unhelpful. Co-Prosecutors' Joint Response, in particular paras 78-80

[280] Civil Party Co-Lawyers' Appeal, para. 10.

crimes under Cambodian Law [... and thus] no need to devise an interpretation scheme for specific categories based on the French legal tradition".[281] They also argue that "[t]hese crimes, which are international in character, are primarily and also domestic crimes, and are prosecuted as such under the relevant national law, which provides for a plurality of perpetrators (co-perpetration) and aiding and abetting (complicity)".[282] Contrary to what the Co-Prosecutors contend in their Response,[283] Co-Lawyers for Civil Parties seek reversal of the Order made by OCIJ on the issue of JCE under Cambodian national law.

99. In response, the OCP agree that no such dichotomy based on the existence of autonomous regimes governing national and international crimes exists at the ECCC, irrespective of its existence in French or even Cambodian laws. This is because the ECCC "has a *sui generis* jurisdiction based on [the ECCC Law and the ECCC] set of rules of procedure that envisage no such a dichotomy".[284]

100. The Pre-Trial Chamber notes that the OCIJ determined that modes of liability such as JCE cannot apply beyond the domain of international crimes. The Pre-Trial Chamber understands that the OCIJ based its finding on the fact that the 1956 Cambodian Penal Code is inspired from French law. The OCIJ asserts that "international crimes [...] constitute [a specific category] of crimes under autonomous legal '*regimes*'" and that, in turn, modes of liability for international crimes cannot apply to crimes under domestic law.[285]

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[281] Civil Party Co-Lawyers' Appeal, para. 11. Although seemingly contrary to the spirit of their Appeal, the Civil Party Co-Lawyers do not seek reversal of the Impugned Order in so far as it decides that JCE is not applicable to domestic crimes. The Khieu Samphan Appeal also argues that the Impugned Order institutes a "two-tiered criminal justice system", and challenges the OCIJ's reference to French law as a basis for an "autonomous legal regime for international crimes", because the law book referred to by the Impugned Order was published only in 2002, and the autonomous legal regime for international crimes referred to did not form part of the French law from which the 1956 Penal Code was inspired. He adds that "the autonomous legal regime instituted for crimes against humanity (only) under French law in 2002 contains no specific rules on individual responsibility". Khieu Samphan Appeal, paras 60-71.
[282] Civil Party Co-Lawyers' Appeal, para. 11.
[283] Co-Prosecutors' Joint Response, para. 73.
[284] Co-Prosecutors' Joint Response, para. 75.
[285] Impugned Order, para. 22, according to which such regimes are "distinct from domestic criminal law and characterized by a coherent set of rules of procedure and substance". *See also*, Impugned Order, para.

101. The argument raised by Co-Lawyers for Civil Parties that JCE liability existed under Cambodian Law in 1956, where it was referred to as "*coaction and complicité*" [co-perpetration and complicity], is not entirely correct. As previously stated,[286] JCE, at least in its basic and systemic forms, resembles the form of co-perpetration under the applicable Cambodian law, but is not the same. They both treat as co-perpetrators not only those who physically perform the *actus reus* of the crime, but also those who possess the *mens rea* for the crime and contribute to or participate in its realization. However, participation in a JCE, even if such participation must be more than significant and not purely immaterial, embraces situations where the accused may be more remote from the actual perpetration of the *actus reus* of the crime than those foreseen by the direct participation required under domestic law. The argument raised by Co-Lawyers for Civil Parties does not, therefore, support its allegation that the Impugned Order errs in determining that the ECCC can only apply JCE to international crimes.

102. The Prosecution is correct that Article 29 of the ECCC law, which lists forms of individual responsibility applicable before the ECCC, does not differentiate between national crimes defined in Article 3(new) and international crimes defined in Articles 4-7. This, however, is not determinative of the issue in focus. Like Article 1 of the same law, the purpose of Article 29 is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for these international crimes and crimes under Cambodian penal law, defined by Article 3(new), that were committed between 17 April 1975 and 6 January 1979. The Pre-Trial Chamber is of the view that both the domestic form of co-perpetration and participation in a JCE are modes of responsibility which fall within the purpose of Article 29 of the ECCC Law and are forms of commission. In the view of the Pre-Trial Chamber, irrespective of whether the reference by the Impugned Order to the French concept of autonomous regimes is misplaced, none of the arguments raised by the parties in the present

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22, n.44, referring to F. Desportes and F. Le Gunehec, *Droit Pénal Général,* Ed. ECONOMICA, CorpusDroitPrivé, (2002), p. 177, para. 174.

[286] *See* para. 41 above.

appeal demonstrate that the Impugned Order is in error in considering that JCE, a form of liability recognized in customary international law, shall apply to international crimes rather than domestic crimes. This ground of the appeal thus fails.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

1. **GRANTS** the Appeals made on behalf of IENG Sary, IENG Thirith, and KHIEU Samphan in relation to the challenge of the OCIJ finding on the applicability of the extended form of Joint Criminal Enterprise (JCE III) before the ECCC; and
2. **DISMISSES** the remainder of the Appeals.

Phnom Penh, 20 May 2010

Pre-Trial Chamber **President**

Rowan DOWNING NEY Thol Catherine MARCHI-UHEL PEN Pichsaly PRAK Kimsan