



ECCC judges agree to apply controversial legal doctrine

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JUDGES have ruled that joint criminal enterprise, a controversial form of liability under which suspects can be found responsible for crimes committed as part of a common plan, could apply at the Khmer Rouge tribunal, setting the stage for further debate on the issue between prosecutors and lawyers for the four regime leaders awaiting trial.

In a decision dated Tuesday, the Office of the Co-Investigating Judges determined that all three forms of joint criminal enterprise (JCE) could apply for international, but not domestic, criminal charges.

The first form of JCE exists when participants share intent to commit a crime, the second form exists when a criminal plan is implemented in “a common concerted system of ill-treatment”, and the third, or extended, form concerns crimes considered “natural and foreseeable” consequences of a common plan.

Deputy co-prosecutor William Smith praised the decision Wednesday, saying it would ensure “that the full extent of the charged persons’ alleged criminal behaviour is brought to account” by the tribunal.

But Michael Karnavas, international co-lawyer for former Khmer Rouge foreign minister Ieng Sary, who filed a motion against the application of JCE in July 2008, called the jurisprudence on which the decision was based “dubious” and said his team would “most definitely” appeal.

“JCE is by far the most controversial piece of law to have been legislated from the bench,” he said.

Parties on notice

Anne Heindel, a legal adviser for the Documentation Centre of Cambodia, said the decision served primarily as a way of informing parties that JCE “could be an issue”, thereby avoiding some of the confusion that plagued the tribunal’s first case, that of Kaing Guek Eav, alias Duch.

Co-investigating judges did not include JCE in the Duch closing order, and the Pre-

Trial Chamber later ruled that Duch had not been informed of the JCE allegation in time, effectively leaving the issue unresolved. The Trial Chamber is expected to rule on the applicability of JCE in that case when it issues a verdict.

“It’s good to have this decision now, so that the parties have notice that this could be part of Case 002,” Heindel said. “The problem with the Duch case is, we still don’t know what the Trial Chamber is going to do, so they were arguing in a vacuum.”

As for the substance of the doctrine, she said: “This sidesteps every controversy that’s been raised about the issue by any of the parties. The reasoning is not very useful here. It’s not pointing to any new reasoning, and it’s not offering any new insight into the legal issues.” These issues, she added, include the size, scope and nature of an alleged JCE.

Heindel noted that the third, extended mode of JCE concerning “natural and foreseeable crimes” was the most controversial.

“The classic example is a bank robbery,” she said. “Everyone goes in with guns, robs a bank, and shoots someone. Under [the third mode of JCE], everyone could be responsible for the death of that person even though they only agreed to rob the bank.”

She added: “JCE allows you to kind of tie everybody up together so that nobody can escape responsibility.”

Andrew Ianuzzi, a legal consultant for Khmer Rouge Brother No 2 Nuon Chea, said that the defence team was “not at all surprised by the decision” and would “consider exercising our appellate rights”, though he noted that other chambers would have the chance to weigh in on whether JCE should apply in the second case.

Heindel said it was conceivable that the issue would be debated all the way up to the Supreme Court Chamber.

Because Wednesday’s decision was not specific to the second case, JCE could also be applied in additional cases. Prosecutors filed introductory submissions for five more suspects in September.

“If the [co-investigating judges] feel that JCE applies before the ECCC, then it applies potentially in any case,” Heindel said.