BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' APPEAL AGAINST THE JUDGMENT OF THE TRIAL CHAMBER IN CASE 002/01

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I. INTRODUCTION

1. Pursuant to Internal Rules 104, 105, 106, 107 and 108(1),[1] the Co-Prosecutors submit this appeal to the Supreme Court Chamber ("Chamber") against the Trial Chamber's Judgment in Case 002/01.[2] This appeal is grounded on the submission that the Trial Chamber erred in law by excluding the possibility[3] that the Accused, being senior leaders of Democratic Kampuchea,[4] could be criminally liable for consequential crimes committed by direct perpetrators predicated upon the significant contribution of the Accused to a Joint Criminal Enterprise ("JCE") in circumstances where the Accused reasonably foresaw that crimes not expressly included within the scope of the enterprise would be committed.

II. PROCEDURAL HISTORY

2. Adopting and affirming a previous decision of the Pre-Trial Chamber[5] – which itself overturned the decision of the Office of the Co-Investigating Judges ("OCIJ") that JCE III was part of customary international law prior to 1975, and thus applicable before the Extraordinary Chambers in the Courts of Cambodia ("ECCC")[6] – the Trial Chamber held that the two Accused could face criminal charges for offences committed in furtherance of a JCE only if they made a significant contribution to the enterprise and the crimes were either expressly contemplated within the scope of that enterprise ("JCE I") or where their shared intent to commit crimes could be inferred from their participation in an institutionalised system of ill-treatment ("JCE II").[7]

3. However, the Trial Chamber, again accepting the Pre-Trial Chamber's analysis, declined to allow prosecution of the Accused under a form of participation that would hold them liable for crimes committed in furtherance of the JCE that had been reasonably foreseeable but not intended as part of the enterprise ("JCE III"). Departing from the consistent line of decisions of other international and internationalised tribunals, which

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1 Extraordinary Chambers of the Courts of Cambodia, Internal Rules (Rev. 8), as revised on 3 August 2011 ("Rules").
2 E313 Judgment, 7 August 2014.
3 *Ibid.* at para. 691.
4 *Ibid.* at paras. 13-14.
5 D97/17/6 Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010 ("Pre-Trial Chamber Decision").
6 D97/13 Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009.
7 E100/6 Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011 ("Trial Chamber Decision").

have found equivalent criminal liability in post-World War II Cases ("WWII Cases"),[8] the Trial Chamber concluded that JCE III liability was not itself established as a mode of liability by those cases.[9] The Trial Chamber also found that, based on a survey of seven domestic systems following World War II, the lack of consistency in the proscription of reasonably foreseeable crimes excluded the possibility that JCE III was a general principle of law recognised by civilised nations.[10] The Trial Chamber did not address explicitly the compliance of JCE III liability with the principle of legality (*nullum crimen sine lege*), having found "no cogent reason to depart from the Pre-Trial Chamber's analysis."[11]

4. As the Co-Prosecutors demonstrate below, the Trial Chamber's refusal to accept the availability of JCE III liability was an error of law. The "conduct" requirement necessary to establish JCE III is exactly the same as the conduct required for JCE I and therefore it is logically inconsistent to hold that JCE I does not violate the principle of legality but JCE III would do so. Further, the extension of liability to reasonably foreseeable crimes, attributable to JCE members but outside the common plan, was well established in international customary law prior to 1975.

5. For clarity, the term "reasonably foreseeable" in this Appeal refers to the dual objective-subjective legal requirement of JCE III, requiring *both*: (a) that commission of the crime charged be the natural and foreseeable consequence of the execution of the JCE ("*objective foreseeability*");[12] (b) that the accused willingly took that risk – in other words, that the accused: (i) had subjective (in the sense of cognitive) awareness of the objective foreseeability of the crime; and (ii) willingly took the risk that this crime might be committed ("*advertent recklessness*", a close analogue of *dolus eventualis*).[13]

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[8] As the ICTR Appeals Chamber stated unequivocally, "… there can be no question that third-category JCE liability is firmly accepted in customary international law"; *see e.g. Prosecutor v. Édouard Karemera* et al., Case Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise (Appeals Chamber), 12 April 2006 at para. 13.

[9] E100/6 Trial Chamber Decision, *supra* note 7 at paras. 31, 35.

[10] E100/6 Trial Chamber Decision, *ibid.* at paras. 37-38.

[11] E100/6 Trial Chamber Decision, *ibid.* at para. 26.

[12] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment (Appeals Chamber), 29 July 2004 at para. 33; *Prosecutor v. Ramush Haradinaj* et al., Case No. IT-04-84-T, Judgment (Trial Chamber I), 3 April 2008 at paras. 137-138.

[13] *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgment (Appeals Chamber), 8 October 2008 at para. 83; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgment (Appeals Chamber), 22 March 2006 ("*Stakić* Appeal Judgment") at para. 101; *Prosecutor v. Miroslav Kvočka* et al., Case No. IT-98-30/1-A, Judgment (Appeals Chamber), 28 February 2005 ("*Kvočka* Appeal Judgment") at para. 83; *Prosecutor v. Fatmir Limaj* et al., Case No. IT-03-66-T, Judgment (Trial Chamber II), 30 November 2005 at para. 511.

III. ADMISSIBILITY

6. This Chamber held in Case 001 that it can admit alleged legal errors of "general significance to the jurisprudence",[14] even if those errors do not invalidate the judgment in itself. This is a self-standing basis for admissibility of appeals, well-established in international procedural rules,[15] and operates independently from ordinary review of errors of law under Internal Rule 104. Moreover, Rule 105(3) provides that a party appealing an error of law in a judgment must "specify the alleged error of law invalidating the *decision*." It is noteworthy that the Internal Rules do not require that alleged errors of law invalidate the judgment but only the decision. This Chamber may therefore review and correct *prospectively* those legal errors that raise issues of "general significance", even if the disposition in a trial judgment would stand under the corrected legal standard.

7. The Appeals Chambers of both the International Criminal Tribunal for the former Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") have a well-established power to declare the applicable law on issues of "general significance" absent any invalidation of the judgment at trial,[16] and even "where an appeal is based *solely* on issues of general importance."[17] In *Akayesu*, the ICTR Appeals Chamber held:

> [C]*onsideration of an issue of general significance is appropriate since its resolution is important to the development of the Tribunal's jurisprudence and since at issue here is an important point of law which merits review.*[18] […] *Indeed, the Appeals Chamber must provide guidance to the Trial Chambers in interpreting the law.*[19] […] [T]*he courts contribute to the overall development of international humanitarian law and criminal law. Such a definition must be uniform* […] *Consequently, the Appeals Chamber is of the opinion that in deciding to pass on an issue of general importance, it is playing its role of unifying the law.*[20]

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[14] CF001-F28 Appeal Judgment, 3 February 2012 ("Appeal Judgment") at para. 15.
[15] See *infra* at paras. 7-8.
[16] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment (Appeals Chamber), 30 November 2006 at para. 6; *Stakić* Appeal Judgment, *supra* note 13 at para. 7; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgment (Appeals Chamber), 23 October 2001 at para. 22; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999 ("*Tadić* Appeal Judgment") at para. 247; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-1-A, Judgment (Appeals Chamber), 1 June 2001 ("*Akayesu* Appeal Judgment") at paras. 18-19.
[17] *Akayesu* Appeal Judgment, *ibid.* at para. 21 [emphasis added].
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.* at para. 22.

8. On this basis, the *Akayesu* Appeals Chamber admitted the Prosecutor's appeal on three legal issues bearing on the elements of criminal liability, even though none affected the Trial Chamber's verdict.[21] The *Brđanin* Appeals Chamber also acceded to the Prosecutor's request to "clarify the law"[22] on the application of JCE to large-scale criminal enterprises, despite the agreement of all parties that the Appeals Chamber would enter no new convictions as a result.[23]

9. Additionally, as the apex judicial body of the ECCC, the Chamber should exercise the same authority as would be available under Cambodian law to address compelling issues of law even if they would not affect the ultimate judgment. The UN-RGC Agreement and the ECCC Law, granting a single opportunity for appeal,[24] excludes interlocutory opportunities for remedies provided in Cambodia's two-tier system of review and allows only one post-final judgment action.[25]

10. Absent admitting an appeal at this stage, this Chamber will be powerless to settle this issue of general significance regarding the applicability of JCE III. The error of law by the Trial Chamber in rejecting consideration of JCE III as a mode of liability will undoubtedly be repeated in future trials of Case 002. The Co-Prosecutors have already publicly notified the Accused and the Trial Chamber that they will seek the application of JCE III as a factually-appropriate, *alternative* mode of liability in connection with particular allegations in those proceedings.[26] Given the anticipated length of proceedings, and the fact that residual charges excluded from Case 002/02 are unlikely to be adjudicated, this Chamber will not have occasion to finally determine this issue, unless this appeal is heard now.

11. Compelling considerations of international public policy favour review by this Chamber, as set out in the Co-Prosecutors' Notice of Appeal.[27] The joint criminal enterprise

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21 *Ibid.* at paras. 25-28.

22 *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgment ("Appeals Chamber"), 3 April 2007 ("*Brđanin* Appeal Judgment") at para. 448; see also *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Prosecution's Brief on Appeal (Office of the Prosecutor), 28 January 2005 at para. 3.49.

23 *Brđanin* Appeal Judgment, *ibid.* at para. 448.

24 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), ("ECCC Law"), Art. 9 new; Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003 (entered into force 29 April 2005), ("UN-RGC Agreement"), Art. 3(2)(b).

25 ECCC Law, Art. 2 (providing for trial, appeals, and supreme courts).

26 E1/240.1 Transcript, 30 July 2014 at pp. 33-34 at 10:12:15.

27 E313/3/1 Co-Prosecutors' Notice of Appeal of a Decision in Case 002/01, 29 September 2014 at para. 8.

doctrine provides society with the legal mechanism to hold leaders responsible for all the crimes, intended and foreseeable, that are the consequence of their criminal enterprise, based on their intentional and significant contribution thereto. Allowing these foreseeable crimes to go unpunished, when committed by persons who know their conduct is criminal, is not in the interests of justice. Allowing the appeal to proceed will give this Chamber the opportunity to speak on this important issue and, if it deems such action to be appropriate, to harmonise the ECCC's legal position with decisions and final judgments of the ICTY, ICTR, SCSL and STL,[28] thus further developing an overwhelmingly consistent line of JCE III international jurisprudence.

IV. MERITS

a. JCE III liability is incorporated within the ECCC Law

12. In accordance with ICTY, ICTR and SCSL jurisprudence, all Chambers of the ECCC have held that JCE is incorporated as a mode of liability by virtue of the term "committing" in Article 29 of the ECCC law.[29] Unlike the Co-Investigating Judges, the Pre-Trial and Trial Chambers held that only JCE I and II were applicable.[30] The Co-Prosecutors submit that since: (1) Article 29 of the ECCC Law is virtually identical to corresponding provisions in the statutes of the ICTY, ICTR and SCSL;[31] (2) the drafters

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28 Before the ICTY, see *Tadić* Appeal Judgment, *supra* note 16 at para. 232 ["The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk."]; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgment (Appeals Chamber), 19 April 2004 at para. 151 ["responsibility of … for the crimes committed … arose from his individual participation in a joint criminal enterprise to forcibly transfer civilians. The opportunistic crimes were natural and foreseeable consequences of that joint criminal enterprise."]; *Stakić* Appeal Judgment, *supra* note 13 at para. 98 ["… the factual findings of the Trial Chamber demonstrate that the Appellant had the requisite *mens rea* to be found responsible under the third category of joint criminal enterprise"]; see also paras. 233-234. Before the ICTR, see *Prosecutor v. Édouard Karemera* et al., Case No. ICTR-98-44-T, Judgment (Trial Chamber III), 2 February 2012 ("*Karemera* Trial Judgment") at para. 1482; *Prosecutor v. Édouard Karemera* et al., Case No. ICTR-98-44-A, Judgment (Appeals Chamber), 29 September 2014 at para. 623. Before the SCSL, see *Prosecutor v. Alex Tamba Brima* et al., Case No. SCSL-2004-16-A, Judgment (Appeals Chamber), 22 February 2008 at paras. 73-76, 87. Before the STL, see STL-11-01/I Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber), 16 February 2011 at para. 245.

29 E188 Judgment, 26 July 2010 at para. 511; D97/17/6 Pre-Trial Chamber Decision, *supra* note 5 at para. 69; E100/6 Trial Chamber Decision, *supra* note 7 at paras. 15, 22; *See, e.g. Tadić* Appeal Judgment, *supra* note 16 at paras. 220, 227-228; *Prosecutor v. Elizaphan Ntakirutimana* et al., Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment (Appeals Chamber), 13 December 2004 ("*Ntakirutimana* Appeal Judgment") at paras. 461-484; *Prosecutor v. Alex Tamba Brima* et al., Case No. SCSL-04-16-T, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98 (Trial Chamber), 31 March 2006 ("*Brima* Rule 98 Decision") at paras. 308-326.

30 D97/17/6 Pre-Trial Chamber Decision, *supra* note 5 at paras. 69, 72, 77-88; E100/6 Trial Chamber Decision, *supra* note 7 at paras. 22, 29, 30-35, 37-38.

31 The statutes of the ICTY, ICTR, and SCSL contain two minor differences from the ECCC Law in that (1) the former includes the word "otherwise" prior to aiding and abetting; and (2) the mode of liability of commission is listed before aiding and abetting. See Statute of the International Criminal Tribunal for the

of the ECCC Law neither objected nor explicitly excluded JCE III liability from the ECCC Law, even though the other tribunals had affirmed its existence at the time of enactment;[32] and (3) the inclusion of all forms of JCE liability is most consistent with the object and purpose of the ECCC, the Trial Chamber should have interpreted Article 29 to include the JCE III mode of liability. The failure of the Trial Chamber to find JCE III applicable at the ECCC was due to its error in following the Pre-Trial Chamber's decision which found that JCE III was not part of customary international law during the temporal jurisdiction of the ECCC and that to apply this mode of liability would violate the principle *nullum crimen sine lege*.

b. **JCE III liability conforms to the principle of *nullum crimen sine lege***

13. The Pre-Trial Chamber ruled that "the principle of legality requires the ECCC to refrain from relying on the extended form of JCE."[33] The Trial Chamber decision on JCE stated that where it could find "no cogent reason to depart from the Pre-Trial Chamber's analysis" and agreed with the result, it would not issue a lengthy decision.[34] The Pre-Trial Chamber decision on JCE III fundamentally misapplied the principle of *nullum crimen sine lege* (the "*nullum crimen* principle") in holding that the application of the extended form of JCE at the ECCC would violate this principle. The *nullum crimen* principle prevents courts from finding individuals criminally responsible for conduct that was not criminal at the time it was committed. The Trial Chamber found that accused at the ECCC can be held responsible for the crimes under the first two forms of JCE as these modes of liability were part of customary international law by 1975. It is incongruous to hold that accused at the ECCC may be held responsible under JCE I but may not be held responsible for crimes under JCE III on the basis that it would violate the *nullum crimen* principle.

Former Yugoslavia, 25 May 1993, amended 7 July 2009 ("ICTY Statute"), art. 7(1) (providing for individual criminal liability for individuals who "planned, instigated, committed or otherwise aided and abetted" the crimes punishable by the Court); Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, amended 16 December 2009 ("ICTR Statute"), art. 6(1) (same); Statute of the Special Court for Sierra Leone, 16 January 2002 ("SCSL Statute"), art. 6(1) (same). Given that the criminal responsibility set out in these provisions is described using the same words as in the ECCC provision, there is no reason to think that the omission of the word "otherwise" and the slight reordering of terms was intended to give the ECCC provision a different meaning.

[32] *See, e.g. Tadić* Appeal Judgment, *supra* note 16 at paras. 189, 191, 195-226; *Ntakirutimana* Appeal Judgment, *supra* note 29 at paras. 461-484; and *Brima* Rule 98 Decision, *supra* note 29 at paras. 308-326.

[33] D97/17/6 Pre-Trial Chamber Decision, *supra* note 5 at para. 87.

[34] E100/6 Trial Chamber Decision, *supra* note 7 at para. 26.

14. The *nullum crimen* principle requires only that the accused be on constructive notice that his conduct is unlawful. The conduct required for JCE III is identical to the conduct required for JCE I: an act or omission that constitutes a significant contribution to a criminal enterprise in which a plurality of persons intend the commission of a crime within the jurisdiction of the court. The application of JCE III would not therefore make an accused criminally liable when he otherwise would not be, but it might make him criminally liable for more crimes on the basis of the same criminal conduct.

15. The purpose of the *nullum crimen* principle is to ensure that no person is held criminally responsible for actions or omissions that he or she had no reason to foresee would be a crime at the time of the conduct. Article 22 (1) of the ICC statute restates the principle:

> *A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.*

16. The *nullum crimen* principle is concerned with whether the conduct of the accused was criminal at the time of the act and is not concerned with whether the offence or mode of liability by which the accused is convicted was defined with the same elements at the time of the act. In the *Duch* Appeal Judgment, this Chamber quoted[35] from a *Hadžihasanović* Appeals Chamber decision that addressed the *nullum crimen* principle's requirements regarding the foreseeability "that the conduct in question may be criminally sanctioned at the time when the crime was allegedly committed".[36] The quoted sentence, of which this Chamber provided an elided version in the Judgment, states: "As to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision."[37] The *Hadžihasanović* Appeals Chamber also stated in the same paragraph that it "agrees with the answers given by the Trial Chamber"[38] on this issue. It is therefore instructive to quote the *Hadžihasanović* Trial Chamber, which held in relevant part that:

> *In interpreting the principle of* nullum crimen sine lege, *it is critical to determine whether the underlying conduct at the time of its commission was*

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35 CF001-F28 Appeal Judgment, *supra* note 14 at para. 96.

36 *Prosecutor v. Enver Hadžihasanović* et al., Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Appeals Chamber), 16 July 2003 at para. 34.

37 *Ibid.*

38 *Ibid.*

> *punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance.*[39]

17. It would be extremely problematic to preclude criminal liability in international criminal law unless the offence or mode of liability can be shown to have existed with the same precise definition at the time of the offence. Such an approach would improperly narrow the scope of international criminal law because national jurisdictions, and even international tribunals, differ significantly in their definitions of offenses and the elements of modes of responsibility, and these definitions naturally evolve over time. To take just one example, it would be anathema to the interests of international criminal justice to preclude the prosecution of rape merely because the criminal conduct of a sexual nature involved did not fit within the definition of rape of some jurisdictions at the time it was committed. In *Furundžija*, the Trial Chamber convicted the accused of rape based on his conduct involving forced oral copulation. Although the Chamber acknowledged that such forced oral copulation would not have been classified as rape in the former Yugoslavia or many other jurisdictions at the time it was committed, it held:

> *[T]he Trial Chamber is of the opinion that it is not contrary to the general principle of* nullum crimen sine lege *to charge an accused with forcible oral sex as rape when in some national jurisdictions, including his own, he could only be charged with sexual assault in respect of the same acts. It is not a question of criminalising acts which were not criminal when they were committed by the accused, since forcible oral sex is in any event a crime, and indeed an extremely serious crime.*[40]

18. In conformity with this view, courts have held that the *nullum crimen* principle is not violated by the "gradual clarification" of the rules of criminal liability through judicial interpretation.[41] As the *Hadžihasanović* Trial Chamber stated: "It is not necessary that the elements of an offence are defined, but rather that general description of the prohibited conduct be provided."[42] This is especially true in international criminal law. The Trial Chamber in *Karemera* held that "given the specificity of international criminal

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[39] *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction (Trial Chamber), 12 November 2002 ("*Hadžihasanović* TC Decision*")* at para. 62.

[40] *Prosecutor v. Anto Furundžija,* Case No. IT-95-17/1-T, Judgment (Trial Chamber II), 10 December 1988 at para. 184.

[41] See *S.W.* v. *The United Kingdom,* Judgment (ECtHR), 22 November 1995 ("*S.W. v. The United Kingdom* Judgment") at para. 36 (interpreting Article 7(1) of the European Convention on Human Rights which provides, in part: "No 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 it was committed."); see also, *Streletz, Kessler and Krenz v. Germany*, Judgment (ECtHR), 22 March 2001 at para. 49.

[42] *Hadžihasanović* TC Decision, *supra* note 39 at para. 58, citing *S.W. v. The United Kingdom* Judgment, *ibid.* at para. 35, and *Kokkinakis v. Greece* (1993), Judgment (ECtHR), 25 May 1993 at para. 52.

law, the principle of legality does not apply to international criminal law to the same extent as it applies in certain national legal systems"[43], and the *Mucić* et al. (*Čelebići*) Trial Chamber has similarly held that:

> *It could be postulated ... that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order.*[44]

19. Moreover, the gravity of the crimes within the jurisdiction of the ECCC provides further safeguard against any violation of the *nullum crimen* principle by heightening the foreseeability of the actions' criminality. This Chamber has previously held that "[a]lthough the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation [...], it may in fact play a role [...] insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts."[45] The Appeals Chamber in *Mucić* et al. (*Čelebići*) explained how the gravity of the crimes dealt with in war crimes tribunals intersects with the principle of legality noting:

> *[T]he principle of* nullum crimen sine lege *does not prevent a court from interpreting and clarifying the elements of a particular crime. It is universally acknowledged that the acts enumerated in common Article 3 are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15(2) of the ICCPR, "criminal according to the general principles of law recognised by civilised nations."*[46]

20. By the jurisdictional nature of the ECCC, all crimes prosecuted are of the highest gravity. Since JCE III requires proof beyond a reasonable doubt that the accused person shared the intent to commit a crime within the jurisdiction of the court and made a significant contribution to a criminal enterprise to achieve that common plan, there is no danger that an accused under the third form of JCE could have been unaware that his conduct was criminal if he is held liable for foreseeable crimes. It is thus inconceivable

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43 *Prosecutor v. Édouard Karemera* et al., Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, Andre Rwamakuba and Matheieu Ngirumpatze Challenging Jurisdiction in Relation to Joint Criminal Enterprise (Trial Chamber III), 11 May 2004 at para. 43.

44 *Prosecutor v. Zejnil Delalić* et al., Case No. IT-96-21-T, Judgment (Trial Chamber II *quarter*), 16 November 1998 at para. 405.

45 CF001-F28 Appeal Judgment, *supra* note 14 at para. 96 quoting *Prosecutor v. Milan Milutinović*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise (Appeals Chamber), 21 May 2003 at para. 42.

46 *Prosecutor v. Zejnil Delalić* et al., Case No. IT-96-21-T, Judgment (Appeals Chamber), 20 February 2001 at para. 173.

that a court would find that a person who intentionally made a significant contribution to further a crime within the jurisdiction of the ECCC — as required under JCE III — would have been unable to understand that his conduct was criminal.

21. JCE III simply extends the liability of those who have made a significant contribution to a criminal enterprise sharing the intent to commit at least one crime within the statute of the court to additional crimes that the accused could reasonably foresee could result from the plan. For example, an accused who has made a significant contribution to a criminal plan to forcibly transfer large numbers of civilians under harsh conditions can be held responsible for killings that he could reasonably foresee could result from the implementation of the plan. Similarly, an accused who contributes to a criminal enterprise to enslave and persecute civilians, including girls and young women, or to force couples into marriages against their will, can be held responsible for the rapes that the accused could reasonably foresee could result from the implementation of that plan.

22. Therefore, for purposes of the *nullum crimen* principle, it is not necessary to consider whether JCE liability as it existed in customary international law prior to 1975 extended to foreseeable crimes that were outside the common plan (JCE III). The criminal conduct required for JCE III is exactly the same as the first form of joint criminal enterprise: membership in a joint criminal enterprise that shares the intent to commit a crime within the ECCC jurisdiction and a significant contribution to that criminal enterprise. There is no danger that a person could be convicted at the ECCC under JCE III without being aware at the time of his acts that his conduct was criminal. Extending liability for those who contribute to a criminal enterprise to foreseeable crimes committed by other members of the JCE cannot violate the principle of *nullum crimen sine lege* and therefore if the first form of JCE is a valid mode of liability at the ECCC, JCE III must also be applicable. Moreover, the Co-Prosecutors will demonstrate below that this extended form of joint criminal enterprise was well grounded in customary international law prior to the period of jurisdiction of this court and that the Trial Chamber erred in failing to recognise this fact.

C. JCE III liability was firmly established in customary international law after the Second World War

23. The first major international effort to prosecute war crimes and crimes against humanity committed on a mass scale occurred after the Second World War. The resulting WWII Cases are persuasive precedents for the elements of international criminal law since that

time. Contrary to the finding of the Trial Chamber,[47] all forms of joint criminal enterprise, including JCE III, were firmly established in the jurisprudence from the courts and tribunals dealing with these cases. Case law from the International Military Tribunal at Nuremberg ("IMT"), the British and American military courts operating under Control Council Law Number 10 (an international agreement for State trials of alleged war criminals), and the Batavia trials in Southeast Asia, crystallised JCE III as a recognized mode of liability in international customary law.

24. The significance of these post-war trials has been confirmed by the United Nations International Law Commission,[48] and by the United Nations General Assembly's adoption of the principles of the Nuremberg Charter. Both bodies affirmed that the substantive law and the theory of individual criminal liability (including "common plan" liability) formed part of international customary law.[49]

25. The fact that the judgments from these WWII Cases have often not specified the exact mode of liability applied, or used terminology differing from that used today, does not prevent an attentive reader from concluding that a mode of liability akin to JCE III was applied in these cases. The use of JCE III-type liability can be established when a court's findings on the form of the accused's participation and mental state, read with the facts of the case, fulfil the core components of JCE III.

26. As noted by the ICTY Appeals Chamber in *Tadić,* evidence of the use of JCE III in these cases begins with the founding instruments of these tribunals. The London Charter of the International Military Tribunal[50] and the Charter of the International Military Tribunal for the Far East[51] contain identical language, providing that: "Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts

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47 E100/6 Trial Chamber Decision, *supra* note 7 at paras. 29-35.

48 Report of the International Law Commission on the Work of its Forty-Eighth Session (6 May–26 July 1996) at p. 19 (describing the principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg as the "cornerstone of international criminal law" and the "enduring legacy of the Charter and Judgment of the Nuremberg Tribunal").

49 UN General Assembly Resolution 95 (I), Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, 11 December 1946, at p. 188 (the Resolution affirming the Nuremberg Principles also directed the UN International Law Commission ("ILC") to codify them 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" (art. 2, para. 13(i)); Report of the International Law Commission on the Work of its Forty-Eighth Session (6 May–26 July 1996) at p. 21.

50 London Charter of the International Military Tribunal, 8 August 1945, art. 6.

51 Charter of the International Military Tribunal for the Far East, 19 January 1946, art. 5.

performed by any persons in execution of such plan." This language — "all acts performed by any persons in execution" — goes far beyond the first form of JCE, which only imputes criminal responsibility to members of the enterprise for the crimes within the common plan. Similarly, Control Council Law Number 10 provides that any person is deemed to have committed a crime who "was connected with plans or enterprises involving its commission."[52]

27. The jurisprudence from these tribunals further confirms that JCE III was a recognised mode of liability to hold individuals, particularly leaders, accountable for foreseeable crimes arising out of a criminal enterprise. The IMT judgment attached criminal responsibility to those who made intentional contributions to a criminal plan for crimes they themselves did not intend, as long as they had knowledge of, or could foresee, the likelihood of these crimes occurring because of the criminal enterprise. While the judgment dealt with individuals involved in many different aspects of the Nazi criminal campaign – from civilians involved in the use of slave labour, to administrators of territories where Jews and other minorities were targeted for extinction, to admirals and generals charged with killing prisoners of war — the application of the reasonable foreseeability standard is apparent in that the convictions did not specify the particular crimes for which the individual accused were convicted other than specifying war crimes (Count Three) or crimes against humanity (Count Four). Thus, each accused who had made an intentional contribution to the overall Nazi criminal enterprise was convicted of all crimes that resulted, without a discussion of whether the individual intended each of these crimes.

28. The application of JCE III liability is even more apparent in individual convictions by the IMT. For example, Fritz Sauckel was Plenipotentiary-General for the Utilisation of Labour, with authority over "all available manpower, including that of workers recruited abroad and of prisoners of war".[53] The IMT judgment finds that Sauckel played a key role in the use of forced labour (enslavement). However, it also cites Sauckel's repeated assertions that he had no intent for the workers to be treated inhumanely, and makes no attempt to refute or question the truthfulness of this assertion. Rather, the judgment points out that "whatever the intention of Sauckel may have been, and however much he

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52 Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945 ("Control Council Law No. 10"), art. II, 2(d).

53 *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, Judgment (International Military Tribunals), 22 August – 1 October 1946 ("IMT Judgment") at p. 461.

may have desired that foreign labourers should be treated humanely, the evidence before the Tribunal establishes the fact that the conscription of labour was accomplished in many cases by drastic and violent methods."[54] While the Tribunal found that "[i]t does not appear that he advocated brutality for its own sake, or was an advocate of any programme such as Himmler's plan for extermination through work," Sauckel "was aware of ruthless methods being used to obtain labourers,"[55] and "was informed of the bad conditions which existed."[56] On the basis of this form of participation, the IMT convicted Sauckel of Counts 3 and 4, crimes against humanity and war crimes.

29. Whilst the IMT judgment does not use modern terminology for modes of liability, it is clear that Sauckel, like other accused before that Tribunal, was convicted of crimes he himself did not intend but which were committed as part of a criminal enterprise to which he had contributed. Based on its findings that Sauckel intended to further the involuntary labour (enslavement) programme and had made a significant contribution to the criminal enterprise, the Tribunal held him responsible for crimes he did not intend to be committed on the basis that the evidence showed he knew these crimes were likely to be committed.

30. On the same basis, the Tribunal convicted Albert Speer of war crimes and crimes against humanity. Speer was the Minister of Armaments and War Production in the Third Reich, and directed the production programme that utilised slave labour.[57] The Tribunal concluded that "Speer was not directly concerned with the cruelty in the administration of the slave labour program" and repeatedly "insisted that the slave labourers be given adequate food and working conditions so that [they] could work efficiently." Nonetheless, he was convicted of the abuses inflicted on the workers because "he was aware of its [*i.e.* the slave labour programme's] existence".[58] Speer was thus convicted of crimes he did not intend yet were reasonably foreseeable to him. While Speer clearly intended the use of slave labour and made a contribution to that criminal plan, he was held responsible for abuses he did not intend but of which he was aware – the essence of JCE III liability.[59]

54 *Ibid.*
55 *Ibid.* at p. 515.
56 *Ibid.*
57 *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I, Judgment (International Military Tribunal), 14 November – 1 October 1946 ("*Speer* Case") at p. 331.
58 *Ibid.* at pp. 332-333.
59 IMT Judgment, *supra* note 53 at p. 522.

31. The *Tadić* appeal decision relied on two trials conducted under Control Council Law Number 10. The first was the *Essen Lynching Case*, tried before the British Occupied Zone Tribunal. In this case, a German Army captain instructed a private to transport three British prisoners of war through the German town of Essen, and not to interfere if the civilian crowd attacked the prisoners.[60] The civilians attacked and killed all three prisoners. The captain, the private and three civilians were found guilty of killings as a war crime.[61] Although there is no written judgment on record, the verdict and the sentences imposed by the Tribunal, along with the arguments proposed by Counsel, provide insight into the Tribunal's reasoning.[62]

32. The essential components of JCE III are reflected, firstly, in the conviction of the captain and the private despite their lack of physical participation in the crimes and the lack of evidence that they had agreed to the killing the prisoners in the course of the enterprise to transport them without adequate protection from attacks by the crowd; and secondly, in the conviction of certain civilian accused "because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the Accused had it been exactly proved that they had individually shot or given the blows which caused the death."[63]

33. Similar reasoning was applied by the American Occupied Zone Tribunal in the *Borkum Island Case*,[64] the second case cited in *Tadić* to support JCE III liability. In that case, a group of American airmen was taken prisoner in German territory and subsequently marched through the town of Borkum.[65] Despite the presence of seven German soldiers who had been assigned to escort the prisoners, the prisoners were beaten and eventually shot to death by a group of civilians and off-duty German soldiers.[66] The Tribunal held that fourteen of the fifteen defendants, including the soldiers escorting the prisoners,

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60 *Law Reports of Trials of War Criminals*, Vol. I, Outline of the Proceedings and Notes (British Military Court for the Trial of War Criminals, Essen) 1947 ("*Essen Lynching* Case") at p. 89.

61 *Ibid.* at pp. 90-91.

62 *Ibid.* at p. 91. See also transcript in Public Record Office, London, WO 235/58 at p. 65, as cited in *Tadić* Appeal Judgment, *supra* note 16 at para. 208.

63 *Essen Lynching* Case, *ibid.* at p. 91.

64 Although not published in the Report of the UN War Crimes Commission, a detailed record of this case is publicly available through the U.S. National Archives Microfilm Publications. The United States Archives, Publication Number M1103, Records of United States Army War Crimes Trials, *United States of America v. Goebell* et. al., 6 February–21 March 1946 ("*Borkum Island* Case"). Moreover, a detailed report of the trial (based on trial transcripts) was published in 1956. See also Maximilian Koessler, "*Borkum Island Tragedy and Trial*", 47 Journal of Criminal Law (1956)("Koessler, *Borkum Island Tragedy and Trial")* at pp. 183-196.

65 Koessler, *Borkum Island Tragedy and Trial, ibid.* at pp. 184-189.

66 *Ibid.* at pp. 184-189, esp. 185.

were responsible for the crimes charged but did not provide a judgment or any other reasoning on the mode of liability applied.[67] The convictions of the soldiers escorting the prisoners indicate JCE III reasoning: these soldiers did not participate in the killings, nor did they intend to kill the prisoners. However, by parading them through the town and standing by as the crowd attacked them, the prisoners' deaths were nonetheless a foreseeable consequence.[68]

34. Additionally, there are other examples of the use of JCE III-type liability in war crimes cases under Control Council Law Number 10 that were not considered in *Tadić*. In the *Trial of Hans Renoth and Three Others* before the British Military Court,[69] four accused were charged with committing a war crime in that they "were concerned in the killing of an unknown Allied airman, a prisoner of war." According to the allegations, the pilot crashed on German soil unhurt, and was arrested by Renoth, a policeman, then attacked and beaten with fists and rifles by a number of people while the three other defendants witnessed the beating but took no active part to stop it or to help the pilot. Renoth eventually shot and killed the pilot. "The case for the prosecution was that there was a common design in which all four Accused shared to commit a war crime, that all four Accused were aware of this common design and that all four Accused acted in furtherance of it."[70] All the Accused were found guilty, despite the fact that no one other than Renoth used deadly force or had the intent to kill. It appears, therefore, that the Court found that the presence and silent acquiescence of the other three accused in the beating amounted to a contribution to the beating and demonstrated at least their intent that the pilot be beaten. These three appear to have been convicted of the murder based on the fact that they could have foreseen that the beating would escalate to a killing – thereby fulfilling the requirements of JCE III.

35. In the *Pohl Case*,[71] conducted in the American Occupied Zone Tribunal, eighteen Officers of the *Schutzstaffel* ("SS") Economics and Administrative Department, including the Executive Officer Hohberger and Auditor Baier, were found liable for crimes against humanity and war crimes on the basis of their participation in the joint

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67 *Ibid.* at p. 192.

68 *Ibid.* at p. 194.

69 *Law Reports of Trials of War Criminals*, Vol. XI, Outline of the Proceedings and Notes (British Military Court for the Trial of War Criminals, Elten), 1949 at p. 76.

70 *Ibid.*

71 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. V, Judgment (United States Military Tribunal II), October 1946 – April 1949 at pp. 193–1273.

criminal enterprise, but without them actually "physically [having] manhandled Jews, or other detainees of the Reich."[72] Hohberger did not actively participate in the crimes, and stated that, since "he was neither a member of the National Socialist Party nor the SS", he could claim "an immunity from responsibility for SS excesses."[73] The Tribunal, however, concluded that "having visited many of the concentration camps he cannot plead ignorance as to what transpired within them". The SS excesses were foreseeable consequences of the common plan.[74]

36. Similar reasoning was applied with regards to Baier, who despite his lack of direct participation was found to have taken "a consenting and active part in the exploitation of slave labour."[75] Baier was convicted of these crimes through JCE III-type liability, on the basis that the foreseeable consequences of slave labour were "the systematic persecution, impoverishment, confinement, and eventual slaying of these persecutes, [which] could not have been possible without the vast machinery of the SS."[76]

37. Similarly, in the *RuSHA Case*, the American Occupied Zone Tribunal found fourteen defendants — all of whom were officials of various SS organisations — guilty for their participation in the furtherance of a criminal enterprise: the "pure race program". The Chief of the SS Race and Resettlement Main Office, Hildebrandt, was found liable for deaths by hanging, as he was responsible for ordering "special treatment" for foreigners found to have had sexual intercourse with German women.[77] The Tribunal concluded that whilst Hildebrandt "first denied that he comprehended the meaning of the term 'special treatment'…[he] later admitted that he knew that in the case of 'special treatment' hanging might result". The Tribunal's reasoning clearly demonstrates that Hildebrandt was held liable for the hangings he did not intend, but which were reasonably foreseeable to him.

38. In the *Einsatzgruppen* case, twenty-four of the senior leaders of the Organisation of Administrative Units were alleged to be responsible for the deaths of more than one

72 *Ibid.* at p. 1047.
73 *Ibid.* at p. 1041.
74 *Ibid.* at pp. 1041-1042.
75 *Ibid.* at p. 1047.
76 *Ibid.*
77 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10,* Vol. V, Opinion and Judgment (United States Military Tribunal II), October 1946 – April 1949 at pp. 1–192.

million people across Europe.[78] In relation to one of the defendants, Franz Six, who was Chief of the Vorkommando Moscow, the Tribunal held that "[d]espite the finding that Vorkommando Moscow formed part of Einsatzgruppe B and despite the finding that Six was aware of the criminal purposes of Einsatzgruppe B, the Tribunal cannot conclude with scientific certitude that Six took an active part in the murder program of that organization. It is evident, however, that Six formed part of an organization engaged in atrocities, offenses, and inhumane acts against civilian populations."[79] The Tribunal thereby convicted him for all the crimes — including the killings — of the organization he was a part of, despite him lacking participation as well as intent in those specific crimes.

39. A form of responsibility akin to JCE III was also applied in the *Sch. et al.* case. This was an appeal decision by the Supreme Court for the British Zone on review of a verdict of a Jury Court in Braunschweig (Brunswick), under Control Council Law Number 10. The Supreme Court found that the Jury Court had made a legal error in "what is factually regarded as a crime against humanity."[80] Sch. and others arrested N without any evidence N was involved in a crime, as part of a campaign of persecution of Jews. Sch. took his prisoner N to a police station and a burning synagogue where others kicked N, who was then shot. The Court held that what happened to N that night "was a crime against humanity from start to finish." While there was no evidence Sch. was himself involved in the kicking or the shooting of N, the Court held that "[i]f it should be found that the Accused was aware or *even reckoned with the possibility that he would be responsible* for N's terrible fate when he took him there, he would bear criminal responsibility with regards to crimes against humanity for everything that happened to N at the burning synagogue."[81] The holding is consistent with JCE III because it found that even if Sch. did not intend the crime, he would be responsible for the criminal acts of other co-participants in the enterprise as long as he was aware of ("reckoned with") the possibility that these crimes could occur.

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78 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10,* Vol. IV, Opinion and Judgment (United States Military Tribunal II-A), October 1946 – April 1946 at pp. 427-433.

79 *Ibid.* at p. 526.

80 Decisions of the Supreme Court for the British Zone, Vol II, Judgment (Supreme Court), 20 April 1949 at pp. 11-15(German) or para. 3.1(English).

81 *Ibid.* at pp. 11-15 [emphasis added].

40. In the *Martin Gottfried Weiss* case, again conducted under Control Council Law 10, the Staff Judge Advocate stated the law on liability for common design. His words are almost exactly declarative of JCE III:

> *[A]ll who join in such common design to commit an unlawful act must take responsibility for all the consequences of the execution of the act if done in furtherance of the plan although not specifically contemplated by the parties, or even forbidden by the defendant, or although the actual perpetrator is not identified.*[82]

41. As has been demonstrated above, the elements underpinning the very core of JCE III as a mode of liability were recognised and applied in these WWII Cases in Europe. Moreover, JCE III has been recognised and applied in the post-war Batavia Trials conducted by Dutch authorities on Indonesian territory. Shoichi Ikeda, a Japanese colonel, was charged with rape, abduction and enforced prostitution as well as other crimes arising out of the involuntary recruitment of "comfort women" from Indonesian internment camps.[83] Whilst the initial criminal plan was to set up brothels, recruit women and offer customers their sexual services, the Tribunal found that Ikeda also *knew or ought to have known* that women would be procured against their will and forced to engage in the sex acts against their will.[84] Such knowledge made rape and enforced prostitution foreseeable consequences of the initial criminal plan, although the defendant claimed that he did not intend, anticipate or know that the women would be forcibly taken to the brothels where they were subjected to rape and violence.[85] Nevertheless, the Tribunal found the defendant criminally liable for both the initial criminal enterprise and the additional crime.

42. These post Second World War tribunal statutes and case law unequivocally establish that those who willingly participate in and contribute to a criminal enterprise to commit war crimes and crimes against humanity should be held responsible for the crimes of co-participants that they could foresee could result from the enterprise. Thus, JCE III was part of customary international law by 1975. This conclusion is only further confirmed by the prevalence of such extended liability for group crimes in national judicial systems as demonstrated in the following section of this appeal brief.

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[82] *Review Proceedings of General Military Court in the case of US v. Martin Gottfried Weiss et al. of the recommendation of the Staff Judge Advocate* (1945) at p. 141.

[83] *The Queen v. Shoichi Ikeda*, No. 72A/1947, Translated Judgment Summary (The Temporary Court Martial [Temporaire Krijgsraad] in Batavia), 30 March 1948.

[84] *Ibid.* at pp. 1, 8 [emphasis added].

[85] *Ibid.* at pp. 7, 10-11.

d. JCE III Liability was firmly established in customary international law before 1975

43. The Trial Chamber adopted the finding that "common purpose liability was not adopted by most domestic legal systems".[86] Having further surveyed the status of JCE III in seven national legal systems *proprio motu*, they held that "State practice in this area lacked sufficient uniformity to be considered a general principle of law."[87]

44. However, there is a significant difference between finding a "general principle of law" and finding that "State practice" evidences the existence of a norm of customary international law. Neither ECCC Chambers nor the *Tadić* Appeals Chamber made a systematic review of State practice for this purpose. The *Tadić* Appeals Chamber itself cautioned that its references to domestic legislation and jurisprudence served a very limited purpose: "to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems", having already established the existence of all three forms of JCE liability on the basis of international conventions and WWII Cases.[88] It was also careful to indicate that for a demonstration that JCE was a general principle of law "it would be necessary to show that most, if not all, countries adopted the same notion of common purpose".[89] In this Appeal, the Co-Prosecutors do not assert that JCE III has the status of a general principle of law but will conclusively demonstrate the status of JCE III as a rule of customary international law prior to 1975.

45. The existence of a rule of customary international law is formally established by the demonstration of State practice that is (i) virtually uniform (ii) extensive and representative, as well as a demonstration of (iii) *opinio juris*.[90] The International Court of Justice ("ICJ") has held that "sufficiently extensive and convincing" practice alone is

86 E100/6 Trial Chamber Decision, *supra* note 7 at para. 28; D97/17/6 Pre-Trial Chamber Decision, *supra* note 5 at para. 85; *Tadić* Appeal Judgment, *supra* note 16 at para. 225.

87 E100/6 Trial Chamber Decision, *supra* note 7 at para. 37.

88 *Tadić* Appeal Judgment, *supra* note 16 at para. 225.

89 *Tadić* Appeal Judgment, *supra* note 16 at para. 225.

90 *North Sea Continental Shelf Cases (Germany v. the Netherlands and Denmark),* Merits, Judgment, I.C.J. Reports 1969, p. 3 ("*North Sea Continental Shelf* Cases") at p. 44 ("[the acts] 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. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*").

capable of confirming *opinio juris*.[91] Indeed, it has been observed that the ICJ 'does not trouble itself to look for *opinio juris* where there is well-established practice.'[92]

46. As to the uniformity of State practice, whilst a certain degree of consistency in the application of the custom is required, there is no clear authority as to the requisite amount.[93] On review of the jurisprudence of the ICJ, the scope of practice that constitutes the corpus of the customary rule has been defined as "general";[94] "common, consistent and concordant";[95] and "both extensive and virtually uniform"[96] – but never "unanimous" or "universal".[97] Importantly, the ICJ has emphasised that practice does *not* need to be completely uniform to be the basis of custom, so long as it is consistent.[98] It observed that "general practice suffices" to generate customary rules binding on all

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91 *The Gulf of Maine Case concerning the Delimitation of Maritime Boundary in the Gulf of Maine Area (U.S. v. Canada),* Merits, Judgment, I.C.J. Reports 1984, p. 246 at para. [111] ("… *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice"). See further International Committee of the Red Cross, *International Review of the Red Cross* at p. 182 ("When there is sufficiently dense State practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*").

92 Brian D Lepard, "*The Necessity of Opinio Juris in the Formation of Customary International Law, Discussion Paper for Panel on 'Does Customary International Law Need Opinio Juris?*' at p. 2, citing Maurice Mendelson, "*The Subjective Element of International Law*" 66(1) British Yearbook of International Law 177 (1995) at pp. 183-184, 206-207.

93 Robbie Sabel, "*Procedure at International Conferences: A Study of the Rules of Procedure of International Inter-Governmental Conferences*" (Cambridge University Press, 1997) at p. 38; Anthea E Roberts, "*Traditional and Modern Approaches to Customary International Law: A Reconciliation*", 95 American Journal of International Law 757 (2001) ("Roberts, *Traditional and Modern Approaches to Customary International Law")* at p. 767 ("The process of custom formation is inherently uncertain, with no clear guide to the amount, duration, frequency, and continuity of State practice required to form a custom."); Anthony D'Amato, "*The Concept of Custom in International Law"* (Cornell University Press, 1971) at pp. 56-66; Ulrich Fastenrath, "*Relative Normativity in International Law"*, 4 European Journal of International Law 305 (1993) at pp. 317-318 ("The individual instances of practice from which customary law is derived are never identical.").

94 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. USA),* Merits, Judgment, I.C.J. Reports 1986 ("*Nicaragua* Case"), p. 14 at p. 98; *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland),* Joint Separate Opinion of Judges Forster, Bengzon, Jimenez de Arechaga, Nagendra Singh and Ruda, I.C.J. Reports 1974 ("*Fisheries Jurisdiction* Case"), p. 3 at p. 52.

95 *Nicaragua* Case, *ibid.*; *Fisheries* Case, *ibid.* at p. 50.

96 *North Sea Continental Shelf* Cases, *supra* note 90 at p. 44.

97 Prosper Weil, "*Towards Relative Normativity in International Law*", 77 American Journal of International Law 413 (1983) at p. 434; Emily Crawford, "*Blurring the Lines between International and Non-International Armed Conflicts - The Evolution of Customary International Law Applicable in Internal Armed Conflicts*", 15 Australian International Law Journal 29 (2008) at p. 32 ("'Virtually uniform' does not mean absolutely uniform.").

98 *Nicaragua* Case, *supra* note 94 at p. 98 ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule."). See also Jeane-Marie Henckaerts, "*Assessing the Laws and Customs of War: The Publication of Customary International Humanitarian Law*", 13 Human Rights Brief 2 (2006) at p. 9 ("To be virtually uniform means that states must not have engaged in substantially different conduct").

states,[99] where a "unifying thread or theme"[100] is evident, or where practice "contain[s] as a common denominator a general rule",[101] such practice is capable of establishing a rule of customary international law.

47. Courts and tribunals have never conducted an analysis of every state when determining State practice.[102] Such an approach is unnecessary and a "practical impossibility."[103] In fact, not even a majority of the States need to have engaged in the practice.[104] Rather, less than a dozen may suffice,[105] provided that there is no contrary evidence or significant dissent to the rule in question.[106]

48. When it comes to modes of liability, the "virtually uniform" test cannot mean that the State practice must use exactly the same elements for each mode. If this were the case, international tribunals would not be able to apply any mode of liability on the basis of

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99 International Law Association, Committee on Formation of Customary (General) International Law, "*Final Report of the Committee; Statement of Principles Applicable to the Formation of General Customary International Law*" (2000) ("Report of Committee on Formation of Customary (General) International Law") at p. 24; *Fisheries Case (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951, p. 116 at p. 138* ("too much importance need not be attached to a few uncertainties or contradictions, real or apparent which the United Kingdom Government claims to have discovered in the Norwegian practice."). See also Sir Gerald Fitzmaurice, "*The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*", 30 British Yearbook of International Law 1 (1953) at p. 45 ("[t]oo much account should not be taken of superficial contradictions and inconsistencies").

100 Michael Wood, Special Rapporteur, *Second Report on Identification of Customary International Law*, 66th Session, UN Doc A/CN/.4/672 (22 May 2014) ("*Second Report on Identification of Customary International Law*") at fn 174, citing *Secretariat Memorandum* at p. 12 ("a certain variability in practice has often not precluded the Commission from identifying a rule of customary international law.").

101 M. Villiger, "*Customary International Law and Treaties*" (The Hague: Kluwer Law International, 1997) at p. 44 ("an overly strict test ... would jeopardize the formation of customary international law…what appears at first glance to be inconsistent practice may well contain as a common denominator a general rule"). See also *Second Report on Identification of Customary International Law, supra* note 100 at p. 38 ('While the specific circumstances surrounding each act may naturally vary, "a core of meaning that does not change" common to them is required: it is then that a regularity of conduct may be observed.') citing J. Barboza, "*The Customary Rule: From Chrysalis to Butterfly*", in C.A. Armas Barea et al. (eds.), "*Liber Amicorum 'In Memoriam' of Judge José María Ruda*" (Kluwer Law International, 2000) at p. 7 and G.M. Danilenko, "*Law-Making in the International Community*" (Martinus Nijhoff Publishers, 1993) at p. 96 ("any customary rule is a normative generalization from individual precedents").

102 William Worster, "*The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law*", 31 Boston University International Law Journal 1 (2013) at p. 60 ("International courts and tribunals have never taken the approach of assessing the practice of each and every state for every separate question of international law.").

103 Roberts, *Traditional and Modern Approaches to Customary International Law, supra* note 93 at p. 767, citing Jonathan Charney, "*Universal International Law*", 8 American Journal of International Law 529 (1993) at p. 537 and David Fidler, "*Challenging the Concept of Custom*", German Year Book of International Law 198 (1996) at pp. 203, 217.

104 Report of Committee on Formation of Customary (General) International Law, *supra* note 99 at p. 25 ("Provided that participation is sufficiently representative, it is not normally necessary for even a majority of States to have engaged in the practice, provided that there is no significant dissent.").

105 Roberts, *Traditional and Modern Approaches to Customary International Law, supra* note 93 at p. 767 ("[M]ost customs are found to exist on the basis of practice by fewer than a dozen states").

106 Report of Committee on Formation of Customary (General) International Law, *supra* note 99 at p. 25.

customary international law. Even the simplest modes of liability, such as planning or ordering, have distinct requirements in different jurisdictions, particularly in regards to subjective requirements. Some jurisdictions, for example, require "intent"; others *dolus eventualis*; some that the accused is aware of that the crime will occur "in the normal course of events"; and others (such as the ECCC) that the accused is aware of the substantial likelihood that crimes will be committed. Thus when examining whether JCE III - which has exactly the same conduct requirements as JCE I - was part of customary international law by 1975, slight variations in how the subjective requirements are articulated from system to system should not prevent such a finding.

49. Rather, when assessing whether State practice supports the existence of JCE III, the decisive factor is whether the core requirements and underlying principles of this concept — shared imputation of liability for group crimes and reasonable foreseeability — are present in the State's applicable statutory provisions and jurisprudence. It is not decisive that States' use of terminology differed, both among themselves and from the language adopted by the international jurisprudence setting out JCE III liability. With a wide variety of legal systems, legal traditions and languages, there inevitably will be variability in terminology criminalising certain conduct.

50. On the basis of an analysis of the domestic practices of 40 States,[107] the Co-Prosecutors submit that, by no later than 1975, individual criminal responsibility for unintended but foreseeable crimes arising out of a joint criminal enterprise was a rule of customary international law. To ensure sufficient representation, the methodology employed by the Co-Prosecutors safeguards that the States reviewed are appropriately reflective of the international community, representing different (1) geographic locations — Africa (11 States),[108] Asia (10 States),[109] Europe (7 States, including the U.S.S.R.),[110] the Middle East (3 States),[111] North America (2 States),[112] Oceania (5 States),[113] and South/Central

[107] Australia, Austria, Bangladesh, Bermuda, Botswana, Cambodia, Canada, Egypt, Ethiopia, Fiji, France, Germany, Ghana, Greece, India, Iraq, Israel, Japan, Kenya, Malawi, Malaysia, New Zealand, Nigeria, Pakistan, Papua New Guinea, Philippines, Poland, the Union of Soviet Socialist Republics ("the U.S.S.R."), Seychelles, South Africa, South Korea, Sri Lanka, Tanzania, Thailand, Uganda, the United Kingdom, the United States of America, Uruguay, Western Samoa, and Zambia.

[108] Botswana, Ethiopia, Ghana, Kenya, Malawi, Nigeria, Seychelles, South Africa, Tanzania, Uganda and Zambia.

[109] Bangladesh, Cambodia, India, Japan, Malaysia, Pakistan, Philippines, South Korea, Sri Lanka and Thailand.

[110] Austria, France, Germany, Greece, Poland, the U.S.S.R. and the United Kingdom.

[111] Egypt, Iraq and Israel.

[112] Canada and the United States of America.

[113] Australia, Fiji, New Zealand, Papua New Guinea and Western Samoa.

America (2 States);[114] (2) *legal systems*[115] — civil law (15 States),[116] common law (23 States)[117] and hybrid systems (2 States);[118] and (3) levels of *international influence* at the material time — major powers (6 States)[119] and others (34 States).[120]

51. Terminological variations aside, it is apparent from the legislation and judicial decisions of the States analysed that the vast majority of States adopted modes of responsibility substantially similar to JCE III pre-1975, either expressly or by implication.

52. Twenty-three (23) states had domestic criminal legislation in force before 1975 that included identical or highly analogous terminology to that of JCE III. These States are: Australia,[121] Bermuda,[122] Botswana,[123] Canada,[124] France,[125] Fiji,[126] Ghana,[127] Iraq,[128] Israel,[129] Italy,[130] Kenya,[131] Malawi,[132] New Zealand,[133] Nigeria,[134] Papua New

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114 Bermuda and Uruguay.

115 States operating within the civil or common law traditions were selected so as to reflect the dominant legal systems of the world. Whilst there are certainly variations within the systems, such variants comprise sub-families *within* the broader civil law-common law framework.

116 Austria, Egypt, Ethiopia, France, Germany, Greece, Iraq, Japan, Philippines, Poland, the U.S.S.R., South Korea, Thailand and Uruguay.

117 Australia, Bangladesh, Bermuda, Botswana, Canada, Fiji, Ghana, India, Israel, Kenya, Malawi, Malaysia, New Zealand, Nigeria, Pakistan, Papua New Guinea, Seychelles, Tanzania, Uganda, the United Kingdom, the United States of America, Western Samoa and Zambia.

118 South Africa and Sri Lanka.

119 France, Germany, Japan, the United Kingdom, the United States of America and the U.S.S.R.

120 Australia, Austria, Bangladesh, Bermuda, Botswana, Canada, Egypt, Ethiopia, Fiji, Ghana, Greece, India, Iraq, Israel, Kenya, Malawi, Malaysia, New Zealand, Nigeria, Pakistan, Papua New Guinea, Philippines, Poland, Seychelles, South Africa, South Korea, Sri Lanka, Tanzania, Thailand, Uganda, Uruguay, Western Samoa and Zambia.

121 Criminal Code Act of Tasmania, 1924, ss. 4, 157(1)(c); Crime Code Act of Queensland, 1899, ss. 8, 302(2); Criminal Code Act of Western Australia, 1902, s. 8; Criminal Code Act Compilation Act of Western Australia, 1913, s. 279; *Brennan v. The King* (1936) 55 CLR 253; *Johns v. R* (1980) 143 CLR 108; *R v. Solomon* [1959] Qd R 123 at para. 129; *R v. Surridge* (1942) 42 SR (NSW) 278 at para. 283; *R v. Vandine* [1970] 1 NSWR 252 at para. 257; *Stuart v. The Queen* (1974) 4 ALR 545.

122 Criminal Code Act of Bermuda, 1970, s. 28.

123 Penal Code of Botswana, 1964, ss. 22, 23.

124 Criminal Code of Canada, 1893, s. 61(2); *Cathro v. The Queen* [1956] SCR 101; *R v. Guay & Guay* [1957] OR 120; *R v. LeBlanc* (1948) 92 CCC 47; *R v. Silverstone* [1931] OR 50.

125 Penal Code of France, 1810, arts. 97, 265-266, 313; Cour de Cassation, Chambre Criminelle, du 7 Décembre 1966.

126 Penal Code of Fiji, 1970, s. 22.

127 Penal Code of Ghana, 1960, s. 21.

128 Penal Code of Iraq, 1969, art. 53.

129 Mandatory Criminal Code Ordinance of Israel, 1936, s. 24; *Goldstein v. Attorney General* [1954] PD 10 at para. 505; *Yossef Dahan & David Ben Haroush v. State of Israel* (1969) 23(i) PD 197.

130 Penal Code of Italy, 1930, arts. 110, 116; Judgment of the Constitutional Court of Italy, No. 42 (13 May 1965); Court of Cassation (3 March 1978), Court of Cassation (4 March 1988), Rivista Penale, 1986 at p. 421.

131 Penal Code of Kenya, 1930, ss. 21, 22(1); *Dickson Mwangi Munene & Anor v. R* [2011] eKLR; *Solomon Mungai & Ors v. Republic* [1965] EA 363.

132 Penal Code of Malawi, 1930, s. 22.

133 Crimes Act of New Zealand, 1961, s. 66; *R v. Gush* [1980] 2 NZLR 92 at paras. 94-96.

134 Criminal Code Act of Nigeria, 1916, s. 8; *Digbehin & Ors v. R* (1963) All NLR 388; *Garba v. Hadejia Native Authority* (1961) NRNLR 44.

Guinea,[135] Seychelles,[136] South Africa,[137] Sri Lanka,[138] Tanzania,[139] Uganda [140] United States of America,[141] Samoa [142] and Zambia.[143] Whilst the majority of these States employed the term "probable consequence" as opposed to "foreseeable consequence" (as used by the Trial Chamber), a review of the available jurisprudence from those countries reveals that those two phrases are interpreted in virtually the same manner, and resulted in consistent judicial decisions across all the surveyed countries.

53. A further 18 countries reviewed, while not expressly extending liability for foreseeable crimes outside a common plan, recognised the core concepts underlying JCE III liability — imputation of responsibility for group crimes and also for reasonably foreseeable crimes. The legislation contained provisions that, whilst relating to individual offences, imposed criminal liability where the crime was a foreseeable or probable consequence of that individual's acts. It is emphasised that foreseeability is the lynchpin of JCE III, and that when these provisions are read in conjunction with provisions providing for group commission, the practice of such States *is* supportive of the imposition of JCE III liability or, in the every least, consistent with such liability. These states are: Austria,[144] Bangladesh,[145] Cambodia,[146] Egypt,[147] Ethiopia,[148] Germany,[149] Greece,[150] India,[151]

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135 Criminal Code Act of Papua New Guinea, 1974, s. 8.
136 Penal Code of Seychelles, 1955, s. 23.
137 Native Territories' Penal Code of South Africa, 1886, s. 78; *R v. Garnsworthy & Ors* [1923] WLD 17 at 19; *R v. Morela* 1947(3) SA 147(A); *R v. Sikepe & Ors* 1946 AD 1101. See also *S v. Gaillard* 1966 (1) PH H74 (AD); *R v. Kubuse & Ors* 1945 AD 189 at 200; *R v. Matsitwane & Anor* 1942 AD 213; *R v. Ndhlangisa & Anor* 1946 AD 1101; *R v. Ngcobo* 1928 AD 372; *S v. Nkomo & Anor* 1966 (1) SA 831 (AD); *S v. Dambalaza & Ors* 1964 (2) SA 783 (AD).
138 Criminal Code Ordinance of Sri Lanka, 1883, s. 146; *Khan v. Ariyadasa* (1965) 67 NLR 145 (PC) at paras. 154-155; *The King v. Abeywickrema et al.* (1943) 44 NLR 254 at para. 256; *The King v. Sellathurai* (1947) 48 NLR 570 at para. 574.
139 Penal Code of Tanzania, 1945, s. 23.
140 Penal Code Act of Uganda, 1950, s. 20; *Dracaku s/o Afia v. R* [1963] EA 363; *R v. Dominiko Omenyi s/o Obuka* (1943) 10 EACA 81.
141 Criminal Code of Kansas, 1969, s. 21-3205; Criminal Code of Minnesota, 1963, s. 609.05; Criminal Code of Texas, 1973, s. 7.02(b); Criminal Code of Wisconsin, 1955, s. 939.05(2)(c); *Pinkerton v. United States* 328 US 640 (1946); *United States v. Decker* 543 F.2d 1102 (1976). See also *Park v. Huff* 506 F.2d 849 (1975) at paras. 57-59, 75-76; *State v. Moore* 580 SW.2d 747 (1979) at para. 752; *State v. Stein* 70 NJ 369 (1976).
142 Crimes Ordinance of Western Samoa, 1961, s. 23(2).
143 Penal Code of Zambia, 1931, s. 22; *Mutambo & Ors v. The People* [1965] ZR 15; *Petro & Anor v. The People* (1967) ZR 140; *Sakala v. The People* (1987) ZR 23.
144 Penal Act of Austria, 1852 and 1945 as amended to 1965, ss. 1, 126, 195.
145 Penal Code of Bangladesh, 1860, ss. 34, 111, 149.
146 Criminal Code of Cambodia, 1929 and 1956, arts. 145, 231.
147 Penal Code of Egypt, 1937, art. 43.
148 Penal Code of Ethiopia, 1957, s. 35(3).
149 Control Council Law No. 10, *supra* note 52, art. II(2); Criminal Code of Germany, 1871, art. 82; Decision of the Federal Court of Justice of Germany, BGH 17.03 (1967) Az.: 4StR 33/67; Decision of the Federal Court of Justice of Germany, BGH 11.05 (1971) Az.:VI ZR 211/69; *Borkum Island* Case, *supra* note 64;

Japan,[152] Malaysia,[153] Pakistan,[154] Philippines,[155] Poland,[156] U.S.S.R.,[157] South Korea,[158] Thailand,[159] the United Kingdom[160] and Uruguay.[161] Provisions which establish that the group commission of a crime is an aggravating factor in sentencing[162] have also been included in the review as they illustrate two JCE III policy concerns. In increasing the severity or blameworthiness of a criminal act, provisions aggravating sentence reflect the manner in which a State appreciated, and addressed, both (i) the "greater social danger" of group crimes or criminal enterprises (as compared to forms of the same crime committed by individuals)[163] and (ii) the manner in which participants to such enterprises have often evaded liability.[164]

Essen Lynching Case, *supra* note 60 at pp. 89, 91; "); IMT Judgment, *supra* note 53 at pp. 461, 515; *Speer* Case, *supra* note 57 at at pp. 331-332.

150 Penal Code of Greece, 1950, arts. 45, 189(1); I. Anagnostopoulos and K. Magliveras, "*Criminal Law in Greece*" in F. Verbruggen & V. Franssen (eds.) "*International Encyclopaedia of Laws*" (Kluwer Law International, 2000) at para. 87.

151 Penal Code of India, 1860, ss. 34, 149; *Chikkarange Gowda & Ors v. State of Mysore* AIR 1956 SC 731; *Nanak Chand v. The State of Punjab* 1955 SCR (1)1201; *Queen v. Sabid Ali* (1873) 20 WR 5 Cr.

152 Penal Code of Japan, 1907, arts. 60, 111, 178(2), 181(1), 240, 241; Judgment of the Supreme Court, 12 Keishu 1718 (28 May 1958); Judgment of the Supreme Court, 470 Kei-Ji-Han-Rei-Shu 10 (22 October 1931).

153 Penal Code of Malaysia, 1936, arts. 34, 35; *Mimi Wong & Anor v. Public Prosecutor* [1972] 2 MLJ 75; *Public Prosecutor v. Neoh Bean Chye & Anor* [1975] 1 MLJ 3.

154 Penal Code of Pakistan, 1860, ss. 110, 111.

155 *The People of the Philippines v. Peralta, et al.* (1968) GR No. L-19069; *The People of the Philippines v. Carbonel*, et. a*l.* (1926) GR No. L-24177; *The People of the Philippines v. Santos* (1955) GR No. L-7315. See also *The People of the Philippines v. Acaja* (1955) GR No L-7235; *The People of the Philippines v. Buyco* (1950) 47 OG (12th Supp.) 11; *The People of the Philippines v. Del Rosario* (1939) 40 OG (3d Supp.) 25; *The People of the Philippines v. Enriquez*, et al. (1933) 58 Phil. 536; *The People of the Philippines v. Pardo* (1947) 45 OG 2023.

156 Penal Code of Poland, 1932, art. 14(1); Penal Code of Poland, 1969, arts. 7(1), 16; *Trial of Hauptsturmführer Amon Leopold Goeth*, Supreme National Tribunal of Poland, Cracow, 27th-31st August and 2-5 September 1946, UNWCC, Vol. VII at p. 1.

157 Fundamental Principles of the Penal Law of the U.S.S.R., 1924, art. 8; Criminal Code of the U.S.S.R., 1960, arts. 3, 8, 9, 17, 77, 91, 102; Ferdinand Joseph Maria Feldbrugge, Gerard Pieter Van den Berg and William Bradford Simons (eds.), "*Encyclopedia of Soviet Law*" (Martinus Nijhoff Publishers, 1985) ("*Encyclopedia of Soviet Law*") at pp. 2-3; Richard Arens, "*Nuremberg and Group Prosecution*", Washington University Law Quarterly 329 (1951) ("Arens, *Nuremberg and Group Prosecution")* at p. 345, fn. 68; John C. Hogan, "*Justice in the Soviet Union: The Trial of Beria and Aides for Treason*" 41 American Bar Association Journal 408 (1955) at p. 477; Kirsten Sellars, "*Crimes Against Peace and International Law*" (Cambridge University Press, 2013) at p. 55.

158 Criminal Code of South Korea, 1953, arts. 15, 30, 114(1), 116, 263; Judgment of the Supreme Court, Kei-Ji-Han-Rei-Shu 10 (22 October 1931); Judgment of the Supreme Court, 98Do30 (27 March 1998).

159 Penal Code of Thailand, 1956, ss. 59, 87, 213, 215, 299, 340.

160 *R v. Anderson & Morris* (1966) 2 QB 110; *R v. Betts & Ridley* (1930) 29 Cox CC 259; *R v. Smith* (1963) 3All ER 597; *R v. Swindall & Osborne* (1846) 2 Car. & K. 230.

161 Penal Code of Uruguay, 1933, arts. 63, 65.

162 See Austria, Greece and the U.S.S.R.

163 See also *R v. Powell and Daniels; R v. English* [1999] AC 1 at 14. ("Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences."); House of Commons, Justice Committee, "*Joint Enterprise: Eleventh Report of Session 2010-12: Volume 1*" ("Justice Committee Eleventh Report") at para. 2.4.5.1 ("Individuals who perform criminal acts in groups have been shown to be more disposed to act violently than those who act alone."); Prof. A. P. Simester,

54. Supporting State practice of JCE III liability, the ICTY[165] and ICTR[166] have each affirmed their acceptance of JCE III as a rule of customary international law. The ICTY held that JCE III liability is "rooted in the national law of many States."[167] The Appeals Chamber in *Tadić* referred to the following jurisdictions as explicitly imposing such extended liability:[168] Canada,[169] England and Wales,[170] France,[171] Italy,[172] the United States of America,[173] and Zambia.[174] Importantly, in relation to Zambia, it is noted that the domestic legislation of the following States was *identical* to the Zambian legislation held by the *Tadić* Appeals Chamber as unequivocally reflecting JCE III: Bermuda, Botswana, Fiji, Kenya, Malawi, Nigeria, Seychelles, Tanzania, and Uganda.[175]

55. The Trial Chamber's holding that there was insufficient evidence of consistent State practice to establish that JCE III existed as a general principle of law (without considering customary international law *per se*) was based on an analysis that was unduly limited in scope and depth. First, as demonstrated above, and as recognised by the *Tadić* Appeals Chamber, an analysis of domestic law in England and Wales, the United States and France actually supports the contention that JCE III liability was a part of their criminal law prior to 1975.[176] Had the Trial Chamber undertaken a more

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"*The Mental Element in Complicity*", 122 Law Quarterly Review 578 (2006) at p. 599 ("Criminal associations tend to encourage and escalate criminality").

164 Prof. A. P. Simester cited in Justice Committee Eleventh Report, *ibid.* at para. 2.4.5.2 ("[Criminal associations] present a threat to public safety that ordinary criminal prohibitions, addressed to individual actors, do not entirely address").

165 See, e.g, *Tadić* Appeal Judgment, *supra* note 16 at paras. 204, 220, 228; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, Judgment (Trial Chamber), 2 August 2001 at paras. 610-614; *Prosecutor v. Milomir Stakić,* Case No IT-97-24, Judgment (Trial Chamber), 31 July 2003 at para. 436; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36, Decision on Motion for Acquittal Pursuant to Rule 98*bis* (Trial Chamber), 28 November 2003 at para. 23; *Kvočka* Appeal Judgment, *supra* note 13 at para. 83; *Prosecutor v. Vujadin Popović* et al., Case No. IT-05-88, Judgment (Trial Chamber), 10 June 2010 at paras. 1021, 1030-1032; *Prosecutor v. Mitar Vasiljević,* Case No. IT-98-32, Judgment (Appeals Chamber), 24 February 2004 at para. 99.

166 *See, e.g. Ntakirutimana* Appeal Judgment, *supra* note 29 at paras. 465-468; *Karemera* Trial Judgment, *supra* note 28 at paras. 75, 1476-1477.

167 *Tadić* Appeal Judgment, *supra* note 16 at para. 224.

168 It is noted that those countries for which the ICTY cited post-1975 material only have been excluded.

169 *Tadić* Appeal Judgment, *supra* note 16 at fn. 288.

170 *Ibid.* at fn. 287.

171 *Ibid.* at fn. 285.

172 *Ibid.* at fn. 286.

173 *Ibid.* at fn. 289.

174 *Ibid.* at fn. 291.

175 Criminal Code Act of Bermuda, 1970, s. 28; Penal Code of Botswana, 1964, s.22; Penal Code of Fiji, 1970, s. 22; Penal Code of Kenya, 1930, s. 21; Penal Code of Malawi, 1930, s. 22; Penal Code Act of Nigeria, 1916, s. 8; Penal Code of Seychelles, 1955, s. 23; Penal Code of Tanzania, 1945, s. 23; Penal Code Act of Uganda, 1950, s. 20.

176 (United Kingdom see fn. 160) *R v. Anderson & Morris* (1966) 2 QB 110; *R v. Betts & Ridley* (1930) 29 Cox CC 259; *R v. Smith* (1963) 3 All ER 597; *R v. Swindall & Osborne* (1846) 2 Car. & K. 230; (United States see fn. 141) Criminal Code of Kansas, 1969, s. 21-3205; Criminal Code of Minnesota, 1963, s.

extensive review of the legislation and case law of these four countries analysed, it would have found provisions and jurisprudence that supported individual liability for unintended but foreseeable crimes in the context of crimes committed as part of a group.

56. The Trial Chamber's analysis of the Netherlands did not consider Section 47(1) of the Penal Code which creates liability for joint perpetration and Articles 300 to 302 and 312 which recognizes that criminal intent includes *dolus eventualis.* Thus, liability for group crimes outside the criminal plan but foreseeable (JCE III) was supported in Dutch law prior to 1975. In concluding Germany did not support JCE III, the Trial Chamber relied on a High Court case from 1911,[177] but subsequent German jurisprudence demonstrates that liability for unintended but foreseeable group crimes was criminalised in Germany at least as of 1967.[178] Similarly, if the Trial Chamber examined U.S.S.R. legislation from a wider perspective it would have acknowledged the specific and comprehensive criminalisation of behaviour that was unintended, but foreseen.[179] This would have led to a more realistic interpretation that Soviet law supported or was at least consistent with JCE III liability in principle. Cambodian law, while not expressly adopting JCE III, recognizes both the imputation of responsibility for group crimes and liability that extends beyond direct intent.[180] Therefore, a more rigorous analysis of the Trial Chamber's seven-country review does not support their conclusion that there was "widely divergent practice" as to the application of JCE III.

609.05; Criminal Code of Texas, 1973, s. 7.02(b); Criminal Code of Wisconsin, 1955, s. 939.05(2)(c); *Pinkerton v. United States* 328 US 640 (1946); *United States v. Decker* 543 F.2d 1102 (1976). See also *Park v. Huff* 506 F.2d 849 (1975) at para. 855; *State v. Moore* 580 SW.2d 747 (1979) at para. 752; *State v. Stein* 70 NJ 369 (1976); (France see fn. 125) Penal Code of France, 1810, arts. 97, 265, 266, 313; ; Cour de Cassation, Chambre Criminelle, du 7 Décembre 1966.

177 Judgment of the Imperial Court of Justice, RGSt 44. 321 (2 February 1911).

178 Decision of the Federal Court of Justice of Germany, BGH 17.03 (1967); Decision of the Federal Court of Justice of Germany, BGH, 11.05 (1971) - VI ZR 211/69; *Borkum Island* Case, *supra* note 64; *Essen Lynching* Case, *supra* note 60 at pp. 89, 91; IMT Judgment, *supra* note 53 at pp. 461, 515; *Speer* Case, *supra* note 57 at pp. 331-332.

179 Fundamental Principles of the Criminal Legislation of the U.S.S.R. and the Union Republics 1924, art. 8; Criminal Code of the U.S.S.R., 1960, arts. 3, 8, 9; *Encyclopedia of Soviet Law, supra* note 157 at pp. 2, 3, 78; Arens, *Nuremberg and Group Prosecution, supra 157* at p. 345, fn. 68; John C. Hogan, "*Justice in the Soviet Union: The Trial of Beria and Aides for Treason*", (41 American Bar Association Journal 408 1955) at p. 477.

180 Criminal Code of Cambodia, 1956, arts. 145 ("There is a plurality of authors when it is established that at least two persons agreed to commit an offence, either as co-authors or as accomplices by aid and abetting"), 231 (punishing "without distinction" all participants in a group crime, whether present or not during the commission of the crime, including "whoever would have led the sedition or would have held any position within the band or any post of command"). Article 231 expressly applies to the crimes set forth in Article 225, including attacks to "incite civil war by arming or paying people to arm themselves against each other, or to bring devastation, massacre and looting." See also Criminal Code of Cambodia, 1956, art. 505.

57. Given this demonstration of State practice that is virtually uniform, representative and sufficiently extensive, it is apparent that, as of 1975, individual criminal responsibility for unintended but foreseeable crimes arising out of a joint criminal agreement or enterprise was firmly established in customary international law. The Co-Prosecutors therefore submit that the Trial Chamber erred in finding that there was insufficient evidence of consistent State practice and *opinio juris* to establish that JCE III existed as part of customary international law between 1975 and 1979.[181]

V. CONCLUSIONS AND REQUESTED RELIEF

58. In sum, the Co-Prosecutors respectfully submit that, on the basis of the reasons set forth above, the Trial Chamber (1) erred in finding that the principle of *nullum crimen sine lege* precludes the application of JCE III, (2) erred in finding that JCE III was not part of customary international law prior to 1975 and (3) erred in refusing to consider this mode of liability in Case 002. Precedents from the WWII cases and consistent state practice thereafter firmly established in customary international law an extended form of liability for those who intentionally contribute to a joint criminal enterprise, imposing liability for the foreseeable crimes that result. Additionally the principle of *nullum crimen sine lege* does not preclude the application of JCE III, as the principle is satisfied if the accused person was on notice that his conduct was criminal. Given that the Trial Chamber found that the basic form of joint criminal enterprise liability, JCE I, was part of customary international law and this was foreseeable and accessible to accused at the ECCC, it would be illogical to find that imposing JCE III liability would violate the *nullum crimen sine lege* principle. The conduct required for JCE III liability to be incurred is an intentional and significant contribution to a joint criminal enterprise to commit a crime within the jurisdiction of the court — exactly the same conduct required to impose liability under JCE I. Those who make such a contribution with the intent to further a crime within the jurisdiction of the ECCC cannot be unaware of the criminality of their act.

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181 Australia, Austria, Bangladesh, Bermuda, Botswana, Cambodia, Canada, Egypt, Ethiopia, Fiji, France, Germany, Ghana, Greece, India, Iraq, Israel, Japan, Kenya, Malawi, Malaysia, New Zealand, Nigeria, Pakistan, Papua New Guinea, Philippines, Poland, the Union of Soviet Socialist Republics ("the U.S.S.R."), Seychelles, South Africa, South Korea, Sri Lanka, Tanzania, Thailand, Uganda, the United Kingdom, the United States of America, Uruguay, Western Samoa, and Zambia.

59. For the reasons set forth above, the Co-Prosecutors respectfully request this Chamber to:

(a) admit this Appeal; and

(b) declare the applicability of the third (or "extended") form of the mode of liability of joint criminal enterprise before the ECCC.

Respectfully submitted,

Date	Name	Place	Signature
28 November 2014	CHEA Leang Co-Prosecutor	Phnom Penh	
	Nicholas KOUMJIAN Co-Prosecutor		