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NUON CHEA'S RESPONSE TO CO-PROSECUTORS' APPEAL AGAINST THE TRIAL JUDGEMENT IN CASE 002/01

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Pursuant to Rule 108(6) of the ECCC Internal Rules and Article 8.3 of the Practice Direction for the Filing of Documents Before the ECCC, the Co-Lawyers for Mr. Nuon Chea (the "Defence") submit this response (the "Response") to the Co-Prosecutors' appeal against the Case 002/01 Judgement:

I. PROCEDURAL HISTORY

1. On 28 November 2014, the Co-Prosecutors filed their appeal against the Case 002/01 Judgement ("Co-Prosecutors' Appeal" or "Appeal").[1] They argue that the Trial Chamber erred in law by adopting a Pre-Trial Chamber decision[2] refusing to apply the extended form of Joint Criminal Enterprise ("JCE III") at the ECCC. They request that the Supreme Court Chamber reinstate JCE III as an applicable mode of liability.

2. On 1 and 2 December 2014, the Defence requested an extension of time to respond to the Co-Prosecutors' Appeal.[3] On 11 December 2014, the Chamber granted this request and set 28 January 2015 as the filing deadline.[4] On 15 January 2015, in light of ITU's estimate that the Response's Khmer translation would not be finalised by the deadline, the Defence requested to file the Response in English only, with the Khmer translation to follow as soon as possible.[5] On 16 January 2015 the Chamber granted this request.[6]

II. ARGUMENT

A. The Co-Prosecutors' Appeal is Inadmissible

3. As mentioned above, the Co-Prosecutors allege that the Trial Chamber erred in law by failing to apply JCE III in assessing Nuon Chea's criminal liability.[7] However, Rules 104(1)(a), 105(2)(a) and 105(3) – pursuant to which the Co-Prosecutors bring their

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1 Doc No. **F11**, 'Co-Prosecutors' Appeal against the Judgement of the Trial Chamber in Case 002/01', 28 Nov 2014 ("Co-Prosecutors' Appeal").

2 Doc No. **E100/6**, 'Decision on the Applicability of Joint Criminal Enterprise', 12 Sep 2011 ('Trial Chamber JCE Decision'), adopting Doc No. **D97/15/9**, 'Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)', 20 May 2010 ('Pre-Trial Chamber JCE Decision').

3 Doc No. **F12**, 'Demande urgente de la défense de M. KHIEU Samphân aux fins de prorogation du délai de réponse au mémoire d'appel des Co-procureurs', 1 Dec 2014; Doc No. **F14**, 'Nuon Chea's Urgent Request for An Extension of Time to Respond to the Co-Prosecutors' Appeal against the Case 002/01 Judgement', 2 Dec 2014.

4 Doc No. **F13/2**, 'Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond', 11 Dec 2014.

5 Email from the Defence's Senior Legal Consultant to the Supreme Court Chamber, 15 Jan 2015.

6 Email from the Supreme Court Chamber's Legal Officer to the Defence's Senior Legal Consultant, 16 Jan 2015.

7 **F11**, Co-Prosecutors' Appeal, para. 1.

appeal[8] – provide that appealable errors of law contained in a Trial Chamber judgement are those which "invalidate the judgement". However, the Co-Prosecutors have not sought to argue that the Trial Chamber's alleged error in respect of JCE III invalidates the Case 002/01 Judgement or any part of it; indeed, they have publicly declared that they are bringing their appeal for the purposes of *future trials*.[9] In short, the alleged error does not satisfy the express requirements of the Internal Rules.

4. While not expressly provided in the Internal Rules, it has been established that the Supreme Court Chamber also has jurisdiction over legal errors "that would not lead to the invalidation of the Judgment but [are] nevertheless of significance to the ECCC's jurisprudence".[10] In their notice of appeal ("Notice"), the Co-Prosecutors advise that they bring their appeal "in the interests of the law".[11] However, they did not explicitly indicate that this statement was intended to serve as a basis for demonstrating that Trial Chamber's alleged error in respect of JCE III constituted an error of law "of significance to the ECCC's jurisprudence". Nor did the Co-Prosecutors provide any more express explanations in this regard in either their Appeal or their Notice. In any case, however, even assuming that the Co-Prosecutors had argued that the applicability of JCE III was a matter of "significance to the ECCC's jurisprudence", this argument is erroneous. The applicability of JCE III has been litigated at length at the ECCC in the context of Case 002. Even if it was at one time a matter of "significance to the ECCC's jurisprudence" which may have warranted consideration by the Supreme Court Chamber, any such significance in Case 002 has long been eroded. Therefore, the error alleged by the Co-Prosecutors is not of a kind which could properly seize the Supreme Court Chamber and should be declared inadmissible.

5. Even if the Supreme Court Chamber admits the Co-Prosecutors' Appeal, the Defence submits that it should nevertheless be dismissed for the reasons detailed below.

B. The Principle of Legality Applies to Modes of Liability

6. In their Appeal, the Co-Prosecutors assert that the Pre-Trial Chamber, in analysing the applicability of JCE III, "fundamentally misapplied" the principle of *nullum crimen sine*

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[8] These are Rules "104, 105, 106, 107 and 108(1): *see*, **F11**, Co-Prosecutors' Appeal, para. 1.
[9] Holly Robertson, 'Prosecution Appeals to KR Tribunal to Widen Scope', *Cambodia Daily*, 4 Dec 2014.
[10] Case 001, **F28**, 'KAING Guek Eav Appeal Judgment', 001/18-07-2007/ECCC/SC, 3 Feb 2012, para. 15.
[11] Doc. No. **E313/3/1**, 'Co-Prosecutors' Notice of Appeal of a Decision in Case 002/01', 29 Sep 2014, para. 2.

lege, also known as the principle of legality.[12] However, it is the Co-Prosecutors who are mistaken. They erroneously contend that the principle of legality does not bar this Court from applying JCE III because the principle only concerns whether the "conduct" for which a person is convicted was criminalised at the relevant time, not whether the mode of liability by which a person is convicted "was defined with the same elements at the time".[13] They also erroneously suggest that JCE III, instead of being a discrete mode of liability, is simply a "natural[] evol[ution]" of the definition of JCE as a result of the "gradual clarification" of the rules through judicial interpretation.[14] The Co-Prosecutors then build on these errors to mistakenly allege that "for [the] purposes of the *nullum crimen* principle, it is not necessary to consider whether JCE liability as it existed [...] prior to 1975 extended to [...] JCE III"[15] because the "conduct required for JCE III is identical to the conduct required for JCE I", JCE I having been deemed applicable at the ECCC.[16] Thus, for the Co-Prosecutors, the "application of JCE III would not therefore make an accused criminally liable when he otherwise would not be" under JCE I, even though "it might make him criminally liable for more crimes on the basis of the same criminal conduct".[17]

7. The rationale behind the principle of legality, a fundamental principle of the rule of law, is that "individual[s] must be protected against arbitrary government power and the vicissitudes of the majority's animosities".[18] As the ECtHR has emphasised, it is essential that human rights principles be "interpreted and applied in a manner which renders the guarantees practical and effective and not theoretical and illusory".[19] In this regard, the ECtHR specifically requires that the principle of legality "be construed and applied, as follows from its object and purpose, so as to provide effective safeguards against arbitrary prosecution, conviction and punishment".[20]

8. It follows from the requirement for "effective safeguards" that the principle of legality must focus on what actually affects an accused, which in criminal cases is whether his or

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[12] Doc No. **F11**, Co-Prosecutors' Appeal, para. 13.
[13] Doc No. **F11**, Co-Prosecutors' Appeal, para. 16.
[14] Doc No. **F11**, Co-Prosecutors' Appeal, paras. 17-18, 21-22.
[15] Doc No. **F11**, Co-Prosecutors' Appeal, paras. 22.
[16] The Defence notes, however, that it has appealed against the applicability of JCE in its entirety: *see*, Doc. No. **F16**, 'Nuon Chea's Appeal Against the Judgment in Case 002/01', 29 Dec 2014, paras. 484-493.
[17] Doc No. **F11**, Co-Prosecutors' Appeal, para. 14.
[18] Antonio Cassese et al., *International Criminal Law: Cases & Commentary* (2011) ('Cassese, *Cases & Commentary*') p. 53.
[19] *Hirsi Jamaa and Others v. Italy*, 'Judgement', ECtHR, App. No. 27765/09, 23 Feb 2012, para. 175.
[20] *Kononov v. Latvia*, 'Judgement', ECtHR, App. No. 36376/04, 17 May 2010, para. 185.

her conduct will result in criminal responsibility (and punishment). For conduct to attract criminal responsibility, it is necessary to establish an applicable mode of liability. This necessity is reflected in Article 29 of the ECCC Law, which provides that only those "who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in Article 3 *new*, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime". Proof of modes of liability, in other words, is an essential step but for which it would be impossible to arrive at a criminal conviction. Accordingly, for the principle of legality to properly serve as an "effective safeguard", its application must logically extend to modes of liability.

9. The Co-Prosecutors recognise that the interpretation and application of modes of liability must be governed by the principle of legality. This is why they argue that JCE III is not a discrete mode of liability but a gradually-clarified yet natural extension of another mode of liability, JCE I, which was considered applicable at the relevant time. In addition, their endeavour to bolster this erroneous argument by interpreting the notion of "conduct" rigidly and in isolation, disregarding its connection with responsibility, is also an attempt to disguise the true nature of their request, which in fact seeks the retrospective application of a discrete mode of liability which did not exist at the relevant time. However, neither of these related arguments is legally tenable.

10. A mode of liability is not defined by an accused's conduct alone. It is also affected by other factors such as the conduct of other individuals or the connection between different conduct through culpable state of mind or another nexus. Therefore, an accused's conduct cannot be relied on exclusively as the decisive factor in determining whether a mode of liability is a discrete one or merely an inseparable part of another. Accordingly, even if the conduct of the accused under JCE I and JCE III is identical – which is still subject to question – this does not mean that JCE III is not a discrete mode of liability. Indeed, as the Co-Prosecutors themselves admit,[21] JCE III could extend the basis for an accused's criminal responsibility to encompass a vast array of conduct by other individuals, and in doing so, stretch far beyond the scope of JCE I. The fact that there is such an essential difference between JCE III and JCE I clearly underscores why, even if JCE III and JCE I may *theoretically* be grouped under a common JCE umbrella, they must be considered discrete modes of liability in terms of the principle of legality.

[21] Doc No. **F11**, Co-Prosecutors' Appeal, para. 21.

11. As mentioned above, the principle of legality is concerned not with theoretical concepts but with what may actually affect an individual. Modes of liability affect individuals by determining not only whether or not a person may be held criminally responsible but also the *scope and number* of crimes for which they may be held responsible. To an individual accused, the latter matters just as much as the former. Therefore, it is both erroneous and unreasonable for the Co-Prosecutors to suggest that as long as a person intentionally and jointly commits a crime within the ECCC's jurisdiction and would be liable through JCE I for *that* crime, it would be completely acceptable and of "no danger" to also hold the person responsible for "more crimes" even when no mode of liability exists in law to link this person to those additional crimes.[22] The Co-Prosecutors' suggestion would render modes of liability completely superfluous, not to mention contradict in every sense the rationale and purpose of the principle of legality.

12. The Co-Prosecutors' reliance on *Furundžija* to support their argument that JCE III is nothing but a natural evolution of the definition of JCE[23] is misplaced. In *Furundžija*, the issue was whether forced oral sex, which is "in any event a crime", may be charged as "rape" or as "sexual assault".[24] What is at issue here, however, is *not* whether undoubtedly criminalised "conduct" such as forced oral sex should be described as a crime of "rape" or of "sexual assault". Instead, the issue is whether, in addition to being convicted of this sexual offence, the person who carried out the conduct may, due to additional factors, *also* be held responsible for the victim's subsequent murder even if this person neither intended nor committed the murder. Unlike *Furundžija*, where the development of the definition of a sexual offence does not affect the *scope* of a person's responsibility, the present issue concerns the introduction of a mode of liability which would tremendously extend that scope. Therefore, *Furundžija* gives no relevant guidance on the present issue. The Defence further notes that in regard to the relationship between judicial interpretation and the principle of legality, a court should always be cautiously aware that "international crimes often elicit revulsion and horror and the temptation to blur the line between judicial interpretation and clarification of

[22] E.g., Doc No. **F11**, Co-Prosecutors' Appeal, paras. 14, 20, 22.
[23] Doc No. **F11**, Co-Prosecutors' Appeal, para. 17.
[24] *Prosecutor v. Furundžija*, 'Judgement', Case No. IT-95-17/1-T, 10 Dec 1998 ('*Furundžija* Trial Judgement'), para. 184.

existing rules and retroactive expansion of the rules".[25] It is incumbent upon courts trying such crimes to maintain vigilance and ensure that they do not blur this line.

13. The Co-Prosecutors also contend that the gravity of the crimes within the ECCC's jurisdiction "provides further safeguard against any violation of the *nullum crimen* principle" because this precludes the accused from pleading ignorance of the criminal nature of their conduct.[26] Again, however, this argument is erroneous. As the Co-Prosecutors acknowledge, the jurisprudence is unequivocal that "the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation".[27] Moreover, even if the gravity of crimes alleged would bar an accused from pleading ignorance of the nature of his own conduct, it does not open the door for a court to convict the accused for any other criminal conduct however remote it may be from the accused's conduct. Contrary to the Co-Prosecutors' assertion, in assessing the foreseeability, what a court should contemplate is that "[i]f courts still wrestle and fracture over whether international law proscribed conduct at the time it occurred, how realistic or fair is it to pretend that the law was sufficiently specific so that the accused knew in advance that his conduct was criminal?"[28]

14. Apart from serving as the nexus between crime and responsibility, modes of liability also impact on individuals by defining the *nature and degree* of their responsibility. Whether a person is responsible as a principal who directly carried out the crime or as an accessory who aided and abetted is not merely a matter of precision in description but of fair attribution of responsibility.[29] Different modes of liability indicate different nature and degrees of responsibility which in turn normally lead to different punishments. Even if the punishment is not affected, the description of the nature and degree of one's responsibility *per se* carries with it social stigma and condemnation, which matters to an individual no less than the penalty itself. This indicative effect of modes of liability is yet another reason why they must be governed by the principle of legality: to safeguard individuals against arbitrary, retroactive introduction of modes of liability which may lead to them being unfairly held responsible to a greater degree.

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[25] Cassese, *Cases & Commentary*, p. 74.
[26] Doc No. **F11**, Co-Prosecutors' Appeal, paras. 19-20.
[27] Doc No. **F11**, Co-Prosecutors' Appeal, para. 19; *Case 001*, **F28**, 'Judgement', 001/18-07-2007-ECCC/SC, 3 Feb 2012, para. 96.
[28] Cassese, *Cases & Commentary*, p. 74.
[29] Antonio Cassese, *The Oxford Companion to International Criminal Justice* (2009) ('Cassese, *International Criminal Justice*'), p. 59.

15. In this regard, it is worth highlighting that the very reason why the ICTY Appeals Chamber in *Tadić* introduced JCE was that it was concerned that in some circumstances "to hold [certain individuals] liable only as aiders and abettors might understate the degree of their criminal responsibility". The ICTY Appeals Chamber's brainchild solution, JCE, would remedy this by enabling a Court to hold such individuals responsible as (co-)perpetrators.[30] However, this should have been a precise reason why JCE should *not* have been introduced: its introduction flouts the applicable law at the time which did not support such an extensive mode of liability.[31]

C. Sources of International Law & the Role of Domestic Law

16. The Co-Prosecutors acknowledge that both the Trial Chamber and the ICTY Appeals Chamber in *Tadić* limited the purpose of their review of domestic legislation and jurisprudence to simply identifying the existence of a general principle that may or may not support the applicability of JCE.[32] They allege, however, that this approach is erroneous because in addition to evidencing general principles, domestic law and jurisprudence may also serve as evidence of customary international law; and that unlike general principles, customary international law does not require such a high level of uniformity of State practice. Thus, the Co-Prosecutors – who assert that JCE is a customary international law rule rather than a general principle[33] – suggest that it is unnecessary to establish that "most, if not all, countries" have adopted the same notion of JCE III.[34]

(i) Role of domestic law

17. The Co-Prosecutors correctly assert that the establishment of a general principle requires evidence of its adoption by "most, if not all, countries", and that this is a higher level of uniformity than what is required to establish customary international law. However, they err in their treatment of domestic law as evidence of customary international law.

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30 *Prosecutor v. Tadić*, 'Judgement', Case. No. IT-94-1-A, 15 Jul 1999 ('*Tadić* Appeal Judgement'), para. 192; *see also*, Cassese, *International Criminal Justice*, p. 55, 'The standard of individual guilt should be carefully observed in order to avoid inadequate attribution of responsibility; here, for example, the third category of joint criminal enterprise is a critical issue'.

31 *Prosecutor v. Brđanin*, 'Judgement', Case. No. IT-99-36-A, 3 Apr 2007, para. 430.

32 Doc No. **F11**, Co-Prosecutors' Appeal, paras. 43-44.

33 Doc No. **F11**, Co-Prosecutors' Appeal, para. 44.

34 Doc No. **F11**, Co-Prosecutors' Appeal, paras. 44-48.

18. As the Pre-Trial Chamber rightly held, "cases[] in which domestic courts applied *domestic* law, do not amount to *international* case law" and should not be considered as evidence of customary international law.[35] The reason why is straightforward: a domestic "court cannot be presumed to apply [domestic] law with a preconceived notion that the rules that it is applying are either required or authorised by customary international law".[36] If domestic courts' application of domestic law may be considered evidence of customary international law, it would absurdly lead to murder, theft and all kinds of other ordinary crimes becoming crimes under international law.

19. Therefore, contrary to the Co-Prosecutors' assertion, the ECCC[37] and the ICTY[38] correctly distinguished between domestic courts' application of *international* law (e.g. the Control Council Law No. 10 trials) and domestic courts' application of *domestic* law by only reviewing the former in their determination of the customary international law, and limiting review of the latter to the sole purpose of establishing general principles.

20. In addition to erroneously maintaining that domestic jurisprudence on domestic law may be relied upon as evidence of customary international law, the Co-Prosecutors' submissions in this regard also erred in confusing the concept of customary international law with that of general principles. In an effort to explain how to detect State practice for the purpose of identifying customary international law, the Co-Prosecutors assert that "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 [...] are present in the State's applicable statutory provisions and jurisprudence".[39] However, this approach as described by the Co-Prosecutors is in fact the approach for identifying *general principles* rather than customary international law.[40] Customary international law 'rules' differ fundamentally from general 'principles'.[41] The Co-Prosecutors apparently failed to recognise this distinction.

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[35] Doc No. **D97/15/9**, Pre-Trial Chamber JCE Decision, para. 82. (emphasis added)

[36] G. Boas & W. Schabas, *International Criminal Law Developments in the Case Law of the ICTY* (2003), 283.

[37] Doc No. **E100/6**, Trial Chamber JCE Decision, para. 37; Doc No. **D97/15/9**, Pre-Trial Chamber JCE Decision, para. 82..

[38] *Tadić* Appeal Judgement, para. 225; *Furundžija* Trial Judgement, para. 196, 'the law applied was domestic, thus rendering the pronouncements of the British courts less helpful in establishing rules of international law on this issue'.

[39] Doc No. **F11**, Co-Prosecutors' Appeal, para. 49.

[40] *Prosecutor v. Erdemović*, 'Joint Separate Opinion of Judge Mcdonald and Judge Vohrah', Case. No. IT-96-22-A, 7 Oct 1997 ('*Erdemović*, Joint Separate Opinion'), para. 57, ' "general principle" must not be confused with concrete manifestations of that principle in specific rules [...] our approach will necessarily not involve

(ii) General principles of criminal law recognised by the nations worldwide

21. In regard to general principles as a source of international law, the Defence wishes to make two points. First, there is a hierarchy in the sources of international law applicable in a trial of international crimes, according to which the general principles of criminal law recognised by the world nations' domestic legal systems is the last resort. As such, general principles may only be relied upon when neither treaties, customary international law nor general principles of international criminal law (such as the principle of legality) provide sufficient guidance.[42] The ICJ suggested in *Barcelona Traction* that for an international court to justifiably refer to national law, there has to be "no corresponding institutions of international law to which the Court could resort".[43] Article 21(1)(c) of the Rome Statute endorsed the same approach by providing that only "[f]ailing" the identification of any applicable international law may that Court resort to general principles derived from domestic laws. One corollary of this hierarchy is that so long as answers may be found in either international treaties, customary international law, or general principles of international criminal law, it is unnecessary and even improper for a court entrusted with international justice to refer to domestic law, even when this reference is aimed at deriving shared *principles* rather than directly transposing particular *rules* as such.

22. Second, unlike customary international law, general principles require a much higher level of uniformity of domestic law. That is, "it would be necessary to show that most, if not all, countries adopt the same notion" and that "in any case, the major legal systems of the world take the same approach to this notion".[44] However, since in practice it is almost impossible for a court to review the domestic law of all States worldwide, a court should be allowed to focus its review on selected representative States. This selective scrutiny *approach* does not and must not affect the "most, if not all, countries" *standard*. At the same time, if selective scrutiny already reveals a lack of the required uniformity, it is safe to conclude that there is no general principle among States worldwide.

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a direct comparison of the specific rules […] but will instead involve a survey […] in an effort to discern a general trend, policy or principle underlying the concrete rules'.

41 *Erdemović*, Joint Separate Opinion, para. 57.

42 Cassese, *Cases & Commentary*, pp. 34-35.

43 *Case concerning Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, 'Judgement', [1970] ICJ Report 3, para. 50.

44 *Tadić* Appeal Judgement, para. 225; Doc No. **E100/6**, Trial Chamber JCE Decision, para. 37.

23. The reliability of a selective scrutiny largely depends on the representativeness of the objects selected, which in turn varies and is defined by the purpose of each scrutiny. Since the purpose here is to identify a general principle – a principle shared by all States worldwide – all States must be represented in the scrutiny in this case, and there is *normally* by definition no question of "specially affected" States[45] when it comes to general principles. However, Rome Statute Article 21(1)(c) highlights that in identifying the general principles of criminal law of the world's nations, "the national laws of States that would normally exercise jurisdiction over the crime" in particular must be included in a selective review. Such States include "the State on the territory on which the crime was (principally) committed, that of the accused's nationality or that where the latter is imprisoned".[46] Despite appearing to be inconsistent with the "general" nature of "general principles", this special attention to "States that would normally exercise jurisdiction over the crime" is considered by some to be justified by the principle of legality.[47] Similarly, the Pre-Trial Chamber dismissed the Co-Prosecutors' argument advancing the applicability of JCE III at the ECCC without even considering whether a general principle existed in domestic law on the basis that in any event, such a concept was not foreseeable to the accused at the relevant time due to the absence of any "underpinning" for such a concept in the concurrent Cambodian law, and that it would therefore be contrary to the principle of legality to apply this concept.[48] To recapitulate, the Defence maintains that the establishment of a general principle requires that "most, if not all" States share the same notion, and the states selected for scrutiny must represent all nations worldwide, although particular attention must be paid to the laws of the States that would normally exercise jurisdiction over the crime.

D. Customary International Law Does Not Support the Existence of JCE III at the Relevant Time

24. Based on the arguments advanced above, it is clear that the Co-Prosecutors' Appeal rests on a fundamentally defective foundation. Contrary to the Co-Prosecutors' assertion, the ECCC Pre-Trial and Trial Chambers did *not* err in law when they elected not to consider domestic law as evidence of customary international law but instead to

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[45] *North Sea Continental Shelf Cases*, 'Judgement', [1969] ICJ Report 3, para. 73, the practice and attitude of "specially affected" States is considered by the ICJ as *necessary* (in that the survey must include such States) but *not sufficient* factors in determining customary international law.

[46] Antonio Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary: Volume II* (2002) ('Cassese, *Rome Statute Commentary*'), p. 1075.

[47] Cassese, *Rome Statute Commentary*, p. 1075.

[48] Doc No. **D97/15/9**, Pre-Trial Chamber JCE Decision, para. 87.

limit their review to international instruments and cases tried either by international tribunals or national tribunals applying international law. Since the Chambers' approach toward customary international law was not defective, there is no reason to disturb the previous rulings (at least in that regard). Nevertheless, the Defence will still respond to submissions made by the Co-Prosecutors in regard to the 'new' cases that have not been considered by the Chambers in their previous adjudication of the applicability of JCE III.

(i) Analysis on cases relied on by the Co-Prosecutors

25. To support their argument that JCE III existed in customary international law, the Co-Prosecutors referred to ten Second World War ("WWII") cases tried either by the International Military Tribunal ('IMT') or by national tribunals pursuant to Control Council Law ("CCL") No. 10. Two of the ten cases, namely *Borkum Island* and *Essen Lynching*,[49] were also relied on by the ICTY Appeals Chamber in *Tadić* as proof of JCE III. Both the Pre-Trial and Trial Chambers have already carefully examined the two cases and concluded that the basis of convictions in these cases "cannot be ascertained because no reasoned judgement" was published and that based on the surviving record, "JCE III is not the only possible" inference because the basis of those convictions "might equally have been some other form of responsibility".[50] The Defence hence sees no need to respond to the Co-Prosecutors' submissions as to these two cases. Responses as to the other cases cited by the Co-Prosecutors are as follows.

26. ***Sauckel***: With regard to the IMT's conviction of Fritz Sauckel, the Co-Prosecutors contend that Sauckel was convicted of war crimes and crimes against humanity for the inhumane treatments of foreign labourers even though he did not intend such brutality.[51] Once again, however, contrary to the Co-Prosecutors' allegation, the IMT did not conclude that there was no intent on Sauckel's part. Quite the contrary: the IMT held that despite the fact that Sauckel did not appear to have "advocated brutality for its own sake", Sauckel did express his position on the treatment of labourers as "to exploit them to the highest possible extent at the lowest conceivable degree of expenditure".[52] Moreover, the judgement explicitly found that "[Sauckel] was aware of ruthless methods

[49] Doc No. **F11**, Co-Prosecutors' Appeal, paras. 31-33.
[50] Doc No. **E100/6**, Trial Chamber JCE Decision, paras. 30-31; Doc No. **D97/15/9**, Pre-Trial Chamber JCE Decision, paras. 79-81.
[51] Doc No. **F11**, Co-Prosecutors' Appeal, paras. 28-29.
[52] 'Trial of the Major War Criminals before the International Military Tribunal', Nuremberg, 14 Nov 1945-1 Oct 1946, Vol. XXII ('IMT Judgement'), p. 568.

being taken to obtain laborers and vigorously supported them on the ground that they were necessary to fill the quotas".[53] Therefore, apparently, the IMT did find intent on Sauckel's part. Whether or not he intended the ill-treatment solely for brutality itself, or rather for filling quotas, or exploiting them to the highest possible extent was for the IMT only a matter of *motive* with no bearing on the finding of *intent*. Hence this case does not support JCE III, which holds individuals responsible for crimes unintended by them and committed by others. Even if the IMT was not satisfied as to Sauckel's intent, it was nevertheless more reasonable to infer that he was convicted under the mode of superior responsibility rather than JCE III, given that the IMT found that "Sauckel had over-all responsibility for the slave labor program" and "[a]t the time of the events in question he did not fail to assert control over the fields".[54]

27. ***Speer***: As to the IMT's conviction of Albert Speer, the Co-Prosecutors claim that Speer was convicted of "the abuses inflicted on the workers" – which he did not intend – simply because he was aware of the existence of the slave labour program.[55] However, the judgement itself did not in fact state in any way that Speer was convicted of the "abuses". Rather, the judgement focused on Speer's "extensive authority over production" and "authority to instruct Sauckel to provide laborers",[56] Speer's definite knowledge (as opposed to only foreseeing a likely consequence) that the labourers he demanded from Sauckel were supplied by foreign labourers "serving under compulsion",[57] and the various meetings that Speer attended where "it was agreed that Sauckel should bring laborers by force from occupied territories".[58] Hence, a more reasonable reading of the IMT's conviction of Speer is that he was convicted of intentional participation in "slave labour" (London Charter Art. 6(b), war crimes) or "enslavement" (London Charter Art. 6(c), crimes against humanity), rather than of the unintended, but foreseeable, resultant "ill-treatment" (London Charter Art. 6(b), war crimes) or "inhumane acts" (London Charter Art. 6(c), crimes against humanity). Therefore, this case does not support the application of JCE III.

28. ***Hans Renoth and Three Others***: Concerning *Hans Renoth and Three Others*, the Co-Prosecutors allege that the three other accused were "convicted of the murder based on

[53] IMT Judgement, p. 567.
[54] IMT Judgement, p. 567.
[55] Doc No. **F11**, Co-Prosecutors' Appeal, para. 30.
[56] IMT Judgement, p. 577.
[57] IMT Judgement, p. 578.
[58] IMT Judgement, p. 578.

the fact that they could have foreseen that the beating would escalate to a killing" although "no one other than Renoth used deadly force or had the intent to kill".[59] This assertion is baseless. In that case, the prosecution case was that all four accused shared a common design to "commit a crime [of] war", and that the three others took part in the beating while Renoth shot the pilot in the end.[60] Whether their common design was to commit a war crime of *killing* or of something else, or even of any war crime in general, was unclear. It may well have been that all four were charged and convicted for sharing the intent to kill. More interestingly, in response to the defence case that the three others were not taking part in the beating but simply stood by and watched, the prosecution in that case claimed that mere presence could be seen as "aiding and abetting".[61] Once again, therefore, this case does not support the application of JCE III.

29. ***Pohl***: In regard to *Pohl*, the Co-Prosecutors' submissions are focused on two of the defendants, Hans Hohberg and Hans Baier. As regards Hohberg, the Co-Prosecutors assert that not being an SS member, Hohberg "did not actively participate in the crimes" but was still convicted of the "SS excesses" in the concentration camps because he had visited those camps and could not plead ignorance of what transpired there and that those "SS excesses were foreseeable consequences of the common plan".[62] Again, however, the judgement did not actually specify which specific type of war crime and crime against humanity Hohberg was convicted for. It may well be that Hohberg was actually convicted of intentional participation in 'slave labour' (CCL No.10, Art. II(1)(b), war crimes) and 'enslavement' (CCL No.10, Art. II(1)(c), crimes against humanity) rather than of 'ill-treatment' or 'inhumane acts' unintended by him through JCE III. Indeed, intentional participation in 'slave labour' and 'enslavement' appears to be a more reasonable inference given that the judgement focused on Hohberg's being an "active participant in the economic enterprises of the SS"[63] and found that "Hohberg is definitely associated with concentration camps";[64] that "[w]hen the Hermann Goering Works wanted inmate labor, Hohberg attended the conference which considered the

[59] Doc No. **F11**, Co-Prosecutors' Appeal, para. 34.
[60] *Trial of Hans Renoth and Three Others*, British Military Court, 8-10 Jan 1946, UNWCC, 'Law Reports of the Trials of War Criminals' ('UNWCC Law Reports'), Vol. XI, p. 76.
[61] UNWCC Law Reports, Vol. XI, p. 77.
[62] Doc No. **F11**, Co-Prosecutors' Appeal, para. 35.
[63] *The Pohl Case*, 'Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10' ('NMT Trials'), Vol. V, p. 1042.
[64] NMT Trials, Vol. V, p. 1040.

ways and means of supplying these inmates";[65] and that he knew the daily wages paid to the inmates and gave his opinion on what those enterprises should pay to the Reich.[66]

30. Similarly, the Co-Prosecutors assert that one of the other defendants in that case, Hans Baier, was convicted through JCE III of crimes that were "foreseeable consequences of slave labour".[67] The judgement did not indicate that Baier was convicted of anything outside either his intention or the consequences of his own acts. On the contrary, it was clearly ruled that the basis for his conviction was that Baier "in his position as chief of staff W, took a consenting and active part in the exploitation of slave labor" and "[a]s successor to Hohberg, Baier is as much involved as Hohberg in crimes against humanity arising out of his activities as chief of staff W".[68] In particular, it was found that Baier supervised the management of enterprises that used prisoner labour, supervised and set the wages and working hours to exploit the inmates, and signed papers converting forced labour camps into concentration camps.[69] Therefore, this case provides no basis for arguing that Baier's conviction supports JCE III.

31. ***RuSHA***: In respect of *RuSHA*, the Co-Prosecutors allege that Hildebrandt's conviction is a proof of JCE III because he was "found liable for deaths by hanging" that resulted from his order of "special treatment" for foreigners who had sexual intercourse with German women, knowing that hanging might result from "special treatment".[70] The Co-Prosecutors' assertion in this respect is erroneous in several respects. First, while the judgement held that Hildebrandt as head of RuSHA "actively participated in and is criminally responsible for [...] illegal and unjust punishment of foreign nationals for sexual intercourse with Germans",[71] it was in fact unclear whether he was held responsible specifically for hangings. Second, contrary to the Co-Prosecutors' assertion, it is unclear whether the tribunal did accept Hildebrandt's assertion that he knew only of the possibility of hanging as a form of "special treatment". What the tribunal found was that Hildebrandt did "have familiarity with the term 'special treatment'",[72] and earlier in the judgement the tribunal took note of a decree issued by RSHA which explicitly stated

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65 NMT Trials, Vol. V, p. 1042.
66 NMT Trials, Vol. V, p. 1041.
67 Doc No. **F11**, Co-Prosecutors' Appeal, para. 36.
68 NMT Trials, Vol. V, pp. 1043, 1047.
69 NMT Trials, Vol. V, pp. 1044-1045.
70 Doc No. **F11**, Co-Prosecutors' Appeal, para. 37.
71 *The RuSHA Case*, 'Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10', Vol. V, p. 161.
72 NMT Trials, Vol. V, p. 120.

that "Special treatment is hanging".[73] RSHA and RuSHA, both main offices of SS command,[74] were found by the tribunal to have worked closely together in the punishment of foreigners for having sex with German women.[75] The tribunal also found that "practically every decree or piece of correspondence concerning this subject either originated in the office of RuSHA or was sent to that office".[76] Third, in any event, even if Hildebrandt was indeed held responsible for hangings which were unintended but foreseeable by him, the basis of his conviction may well be *ordering* rather than JCE III.

32. ***Einsatzgruppen***: With regard to *Einsatzgruppen*, the Co-Prosecutors assert that despite finding that Franz Six was not involved in the murder program, the tribunal "convicted him for all the crimes – including the killings – of the organization" of which he was found to be part.[77] This assertion is erroneous and misrepresents the judgement. Six was convicted on Count Three for membership in a criminal organisation pursuant to Article II(1)(d) of Control Council Law No. 10;[78] That does not mean, however, that he was thereby held responsible for all the crimes of the organisation. Six was also convicted on Count One (crimes against humanity) charging all the defendants with "murders, atrocities, and other Inhumane acts",[79] and Count Two (War Crimes) charging all the defendants with "atrocities and offenses against persons and property [...], including, but not limited to, murder and ill-treatment of prisoners of war and civilian populations [...]".[80] The tribunal in this instance clearly explained the basis for convicting Six on Counts One and Two. The basis was: despite not being satisfied with his active role in the "murder program", the tribunal did find it "evident" that Six "formed part of an organization engaged in atrocities, offenses, and inhumane acts against civilian populations".[81] It is clear, therefore, that Six was convicted of atrocities and inhumane acts which are also charged under Counts One and Two, but not of murders. It is obvious from the foregoing that this case in no way evidences JCE III.

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[73] NMT Trials, Vol. V, p. 117.
[74] NMT Trials, Vol. V, p. 43.
[75] NMT Trials, Vol. V, pp. 117-118.
[76] NMT Trials, Vol. V, p. 118.
[77] Doc No. **F11**, Co-Prosecutors' Appeal, para. 38.
[78] *The Einsatzgruppen Case*, 'Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10', Vol. IV, p. 526.
[79] NMT Trials, Vol. IV, pp. 15-16.
[80] NMT Trials, Vol. IV, p. 21.
[81] NMT Trials, Vol. IV, p. 526.

33. ***Sch. et al.***: The Co-Prosecutors claim that the Supreme Court in *Sch. et al.* makes an observation that supports the theory of JCE III – namely, that:

> if 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 regard to crimes against humanity, for everything that happened to N.

For the Co-Prosecutors, this supports the theory of JCE III because the Court "found that even if Sch. did not intend the crime, he would be responsible" for it.[82] The Co-Prosecutors' reading of the court's position as to the intent of the accused is erroneous. The Jury Court in that case had found that Sch. "intended and accepted that this mistreatment take place".[83] The Supreme Court also found that:

> the statement of the Accused that N should be "done away with" immediately on site, prove without a doubt that [Sch. was] well aware of the true nature of their conduct and that the Accused, in particular, knew that he was not only being brutal and violent to N. himself, but was also consciously allowing N. to be subjected to further acts of violence […] he was acting in full awareness that N. would be subjected to inestimable acts of violence.[84]

Based on these background findings, the observation cited by the Co-Prosecutors does not indicate a mere recklessness on Sch.'s part. Moreover, the Jury Court found Sch. guilty "not only of failing to act /properly/ but also of actively committing the deed'.[85] The Supreme Court also found that "even if active participation in the crime had not been established", Sch. may still be held guilty for omission because the victim was "completely and actually in [Sch.'s] power. As a result, the Accused had the legal obligation to stop and prevent any attack against the individual in his protective custody".[86] Apparently, neither court was considering Sch.'s guilt for conduct that was not his own actions and omissions. Based on the above, neither the *actus reus* nor the *mens rea* of this case supports the application of JCE III.

34. ***Martin Gottfried Weiss***: With regard to the *Martin Gottfried Weiss* case (one of the Dachau concentration camp cases), the Co-Prosecutors simply refer to the Judge Advocate's statement of "the law on liability for common design", claiming that his words are "almost exactly declarative of JCE III".[87] Since the Judge Advocate's opinion

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[82] Doc No. **F11**, Co-Prosecutors' Appeal, para. 39.
[83] 'Decision of the Supreme Court for the British Zone', Volume II, Judgement ('*Sch. et al.* Judgement'), para. 3.1 (see, Doc. No. **F11.1.52**, ERN 01041020).
[84] *Sch. et al.* Judgement, para. 3.1 (see, Doc. No. **F11.1.52**, ERN 01041021).
[85] *Sch. et al.* Judgement, para. 3.1 (see, Doc. No. **F11.1.52**, ERN 01041021).
[86] *Sch. et al.* Judgement, para. 3.1 (see, Doc. No. **F11.1.52**, ERN 01041021).
[87] Doc No. **F11**, Co-Prosecutors' Appeal, para. 40.

is not the judgement and cannot be considered case law, the Defence will respond to this in a separate section below.

35. ***Shoichi Ikeda***: In addition to the ten WWII cases, the Co-Prosecutors also refer to a case from post war *Batavia Trials* conducted by Dutch authorities on Indonesian territory. The Co-Prosecutors assert that the conviction of Shoichi Ikeda of rape and enforced prostitution, which were outside the initial plan of setting up brothels but nevertheless foreseeable consequences thereof, provide proof of JCE III.[88] However, the judgement clearly states otherwise. It was repeatedly emphasised in the judgement that the accused as a "senior officer" did not take sufficient investigative measures after he found some irregularities in the administrative papers relating to the brothels.[89] In the end, the judgement held that "if the accused had appreciated and exercised the duties for which he was responsible as a *heitan* officer correctly, it is inconceivable why he did not immediately start an investigation into the true situation and events" and that the accused must be found guilty.[90] It therefore appears that Shoichi Ikeda was convicted on the basis of superior responsibility rather than JCE III.

36. ***General comments***: In addition to the above analysis, the Defence points out that none of these cases clearly indicate that the accused persons were held responsible as a *principal* as opposed to an *accessory*. However, as discussed above,[91] the very reason why the ICTY Appeals Chamber in *Tadić* introduced the concept of JCE was that it deemed it desirable to be able to hold individuals responsible as principal perpetrators rather than merely aiders or abettors.[92] Therefore, to support the existence of JCE, it has to be unequivocally demonstrated that the accused in those cases were not merely convicted but convicted as a principal instead of accessory. This also seems to be the approach adopted by the Trial Chamber. In dismissing *Borkum Island* as evidence of JCE III, the Trial Chamber remarked that in addition to the basis of the conviction, "[a]lso unclear from the verdict is the *extent* to which any defendant was found criminally responsible for an act not directly perpetrated by him".[93]

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88 Doc No. **F11**, Co-Prosecutors' Appeal, para, 41.
89 *Queen v. Shoichi Ikeda*, Judgement No. 72A/1947, 30 Mar 1948 ('*Queen v. Shoichi Ikeda*'), pp. 8, 9 (*see*, Doc. No. **F11.1.59**).
90 *Queen v. Shoichi Ikeda*, pp. 9-10 (*see*, Doc. No. **F11.1.59**).
91 *Supra* at para. 15.
92 *Tadić* Appeal Judgement, para. 192; *see also*, Cassese, *International Criminal Justice*, p. 55.
93 Doc No. **E100/6**, Trial Chamber JCE Decision, para. 30. (emphasis added)

(ii) Division between common law and continental law systems

37. As mentioned above as to the case of *Martin Gottfried Weiss*, the Co-Prosecutors refer to the comment of the US Staff Judge Advocate on the law of common design, claiming that it was declarative of JCE III.[94] However, the opinion of Judge Advocate is neither a judgement nor the law itself. Even if seen as a statement given by a national organ thus reflecting *opinio juris* of the US, this opinion – reflecting the position of only one State – would be insufficient to prove the existence of a customary international law rule, especially given that continental law starkly differed from common law in this area.

38. The Defence notes that, although cited by the Co-Prosecutors in support of the existence of customary international law, the Judge Advocate's comment referred to the concept of common design as a "well-settled principle of law".[95] However, apart from two academic sources (appearing to be on domestic criminal law), the Judge Advocate's statement did not refer to any other authority.[96] It is not clear whether this "well-settled principle" refers to principle of US law, of common law, or generally of the laws of world nations. However, since it mentions "principle", the Defence will respond to this in terms of general principles.

39. It is true that in the trials of WWII cases before national courts, certain elements of national criminal law were cited to explain, for instance, concepts of "murder"[97] and of modes of liability such as "being concerned in the killing" and "common design"[98]. It is not clear how those national courts themselves would justify such use of national law, but in the UNWCC's opinion, such citation of national law was not intended as application of national law as such or even as a substitute for international law, but only to amplify international law under the theory of general principles of civilised nations.[99] The UNWCC even went so far as to suggest, without conducting any review of the

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94 Doc No. **F11**, Co-Prosecutors' Appeal, para. 40.

95 'Review of Proceedings of General Military Court in the Cases of United States v. Martin Weiss and Others' ('US Judge Advocate Review'), p. 141 (*see*, **F11.1.55**, ERN 01041038).

96 US Judge Advocate Review, p. 141 (*see*, **F11.1.55**, ERN 01041038).

97 *The Jaluit Atoll Case*, US Military Commission, 7-13 Dec 1945, UNWCC, 'Law Reports of the Trials of War Criminals', Vol. I, p. 80.

98 *Trial of Franz Schonfeld and Nine Others*, British Military Court, 11-26 Jun 1946, UNWCC, 'Law Reports of the Trials of War Criminals', Vol. XI, pp. 68-72.

99 UNWCC Law Reports, Vol. I, p. 80; UNWCC Law Reports, Vol. XI, p. 72.

national law of any States, that "the rules of English law regarding complicity in crimes [...] will be 'found in substance in the majority' of systems of civilised law".[100]

40. Insofar as it is suggested that the common law concept of "common design" constituted a general principle of criminal law of the world nations, neither the US Judge Advocate nor the UNWCC's above comments may be taken as a safe conclusion. This is not only because neither had based their comments on any substantial survey, but also because the concurrent continental law clearly differed in substance from common law.

41. Indeed, as was remarked by the German Judge Otto Kranzbühler who defended one of the accused before the IMT:

> No attempt was made to come to a really thorough understanding of what was defensible under international law. The Charter obviously was merely intended to bring certain defendants to prosecution and conviction. As an instance I refer to the discussion aimed at introducing the American concept of conspiracy, i.e. a common plan or design to commit criminal acts. The Continental participants at the conference had considerable doubts about including this concept, which was *unknown* to them, in the rules of the London Charter. But when the argument was brought forward that without this concept a man such as Schacht could not be convicted, this was accepted as a sufficient basis for including conspiracy in the London Charter.[101]

This comment not only indicates that the common law concept of common plan or design was "unknown" to continental law, but also sheds light on the reason behind the inclusion in the London Charter of such a concept which in no way amounted to a general principle recognised by world nations: to hold certain people responsible. This reason, echoing the over-activist rationale behind the ICTY's introduction of JCE, should have as such barred the introduction of the concept. It is true that the concept of common design was not limited to conspiracy. However, the difference between the two major legal systems was not limited to the narrow notion of conspiracy, either.

42. According to Article 4 of the *Ordinance of 28th August, 1944* which gave French Military Tribunals competence to try war criminals:[102]

> Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates.

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[100] UNWCC Law Reports, Vol. XI, p. 72.
[101] Otto Kranzbühler, 'Nuremberg Eighteen Years Afterwards', in Guénaël Mettraux ed., *Perspectives on the Nuremberg Trial* (2008), pp. 436-437 (emphasis added).
[102] UNWCC Law Reports, Vol. III, Annex II, pp. 93-94.

43. It is apparent from this article that French law applicable to war crimes trials at that time distinguished between an "actual perpetrator" and an "accomplice" who organises or tolerates the crimes. It explicitly stipulated, in fact, that such accomplice cannot be held as being equally responsible as a perpetrator. This is substantially different from common law which did not have a strict distinction in terms of responsibility and indictment between perpetrator and accomplice. This Ordinance was applicable in all French colonies at that time,[103] including Cambodia. Therefore, in the spirit of the principle of legality, this Ordinance should be given particular attention in the assessment of the foreseeability of the law to the accused in the present case.[104]

44. Based on the above, it is easy to see that the common law notion of "common design" was not at all a general principle during the post WWII era. Indeed, even if it was, the notion would not support a mode of liability of JCE, as will be explained below.

E. Domestic Law and Jurisprudence Do not Support the Existence of JCE III in the General Principles of Nations

45. As set out above,[105] the Co-Prosecutors' submissions on national law,[106] though purporting to support the existence of JCE III under customary international law, may only be considered within the meaning of general principles instead.

46. As a general comment on methodology, the Defence notes that while the establishment of a general principle requires a very high standard – i.e. "most, if not all" States sharing the same notion – refuting the existence of a general principle only requires a showing of a divergence among the laws of the major States. When the "principle" concerns criminal law, the principle of legality demands that the national law of the States which would normally have jurisdiction over the crime be given particular attention.

(i) National law of six major powers and Cambodia reviewed by the Trial Chamber

47. The Co-Prosecutors refer to 40 States' national law, among which seven have already been carefully reviewed by the Trial Chamber. Those seven include six major national legal systems (the UK, the US, Germany, Soviet Union, France, and the Netherlands) and Cambodia. Based on that review, the Trial Chamber concluded that there is a

[103] UNWCC Law Reports, Vol. III, Annex II, p. 93.
[104] *Supra* at para. 23.
[105] *Supra* at paras. 18-19.
[106] Doc No. **F11**, Co-Prosecutors' Appeal, paras. 50-57.

"considerable divergence of approach" among these seven national jurisdictions and that national law on the subject at issue therefore "lacks sufficient uniformity to be considered a general principle of law".[107] Moreover, the Trial Chamber's specific findings on each of these States also indicate that contrary to the Co-Prosecutors' assertion, the laws of six of the seven States (but for the US) at the relevant time were all clear – despite certain divergences – that in the case of a joint crime, responsibility of an individual may not extend to crimes outside the agreed design or intention.[108] As regards the US, the Trial Chamber concluded that the most relevant concept in its law was 'conspiracy', which is very peculiar to that legal system and is considered a "distinct offense" rather than a mode of liability.[109] The Co-Prosecutors' Appeal fails to provide any new information on these States' national law that might be sufficient to warrant disturbing the Trial Chamber's findings. The Defence will only respond to some of their submissions in this regard.

48. ***The Netherlands***: As to the Netherlands, the Co-Prosecutors assert that the Trial Chamber failed to consider Articles 47(1), 300, 302 and 312 of the Dutch Penal Code.[110] However, Article 47 is simply a general article on modes of liability providing for perpetration, co-perpetration, and instigation. It does not support JCE III. Moreover, Article 47 explicitly provides that responsibility of instigators does *not* extend to crimes outside the instigation. The Defence also notes that Article 48 of the Dutch Penal Code – which the Co-Prosecutors omit to refer to – provides for complicity. It is expressly stipulated in Article 48 that complicity is limited to felonies only and that one may only be held responsible via complicity if he or she *intentionally* contributes to a felony committed by others. Therefore, contrary to the Co-Prosecutors' allegation, these articles in fact underscore that Dutch law does not support JCE III. The Defence will not respond to Articles 300, 302, and 312 as they are obviously irrelevant.

49. ***Germany***: The Co-Prosecutors claim that German case law subsequent to the case relied on by the Trial Chamber shows that at least as of 1967, German law accepted "liability for unintended but foreseeable group crimes".[111] However, the two new cases referred to by the Co-Prosecutors[112] do not seem to overturn the case relied on by the Trial Chamber

[107] Doc No. **E100/6**, Trial Chamber JCE Decision, para. 37 (fns 85-91).
[108] Doc No. **E100/6**, Trial Chamber JCE Decision, para. 37 (fns 85, 87-91).
[109] Doc No. **E100/6**, Trial Chamber JCE Decision, para. 37 (fn 86).
[110] Doc No. **F11**, Co-Prosecutors' Appeal, para. 56.
[111] Doc No. **F11**, Co-Prosecutors' Appeal, para. 56.
[112] Doc No. **F11**, Co-Prosecutors' Appeal, para. 56, fn 178, citing BGH 17.03 (1967) (*see*, Doc. No. **F11.1.88**) and BGH 11.05 (1971) – VI ZR 211/69 (*see*, Doc. No. **F11.1.89**).

which held that responsibility in a joint crime does not extend to excessive acts outside their common decision.[113] Moreover, one of the two cases was a civil damage case,[114] and the standard in a civil damage case cannot be equated to that in a criminal case.

50. ***Cambodia***: The Co-Prosecutors also contend that there is basis for JCE III in Cambodian law by referring to Articles 145 and 231 of the 1956 Penal Code.[115] However, Article 145 only states that there may be crimes committed by multiple people who "*agreed* to commit an offense, either as *co-authors* or as *accomplices by aid and abetting*" (emphasis added). It does not indicate that responsibility may extend to conduct outside of what is agreed upon, or that those who are involved have to be held responsible as "perpetrator" instead of "accomplice". Article 231 regulates a very specific offence which only applies to "sedition" by a "band". Neither of these articles support the theory of JCE III.

51. In this regard, the Defence wishes to remind this Chamber that as noted above,[116] the 1944 Ordinance of France regarding the trials of war criminals also applied to Cambodia, then a colony of France. Article 4 of the Ordinance suggests that the modes of liability provided in that law was very different from JCE III.

52. Since none of the information demonstrated in the Co-Prosecutors' Appeal may disturb the Trial Chamber's detailed review of these seven States' national law, there is no need to depart from the Trial Chamber's findings that there was insufficient uniformity to establish a general principle in support of JCE III. Since refuting a general principle only requests a showing of a divergence among some major States, there is no need to further look into the remaining 33 States referred to by the Co-Prosecutors. The Defence will nevertheless selectively respond to some aspects of the Co-Prosecutors' submissions in this regerd.

(ii) National law of the other 33 states cited by the Co-Prosecutors

53. The Co-Prosecutors admit that the national laws of 18 of the 40 States they reviewed (including Cambodia, Germany, the UK and the then-Soviet Union) *do not* "expressly

[113] RGSt 44, 321, "Die erforderlichkeit eines gemeinsamen Tatentschluss schliesst die Möglichkeit der gegenseitigung von Exzesstaten aus.", cited in Vojislav Damnjanović, *Die Beteiligungsformen im deutschen und serbischen Strafrecht sowie in der ICTY-Rechtsprechung* (2013), p. 43.
[114] BGH 11.05 (1971) – VI ZR 211/69, cited in Doc No. **F11**, Co-Prosecutors' Appeal, para. 56, fn 178 (*see*, Doc. No. **F11.1.89**).
[115] Doc No. **F11**, Co-Prosecutors' Appeal, para. 56, fn 180.
[116] *Supra* at paras. 42-43.

extend[] liability for foreseeable crimes outside a common plan".[117] The Co-Prosecutors nevertheless assert that the 18 States' national laws all acknowledge, albeit separately, both group crimes and the imputation of liability for reckless acts (in non-group crimes). The Co-Prosecutors claim that, read in conjunction with each other, these two notions form the basis of JCE III. However, the fact that these two concepts exist separately does not mean that a combination of the two also exists unless there is specific enunciation in law to that effect. In any case, such extension by analogy is contrary to the principle of legality. The Co-Prosecutors' additional argument regarding "aggravating factor in sentencing" is also irrelevant and immaterial. Hence, the Defence will not address the substantive aspects of the national laws of these 18 States.

54. The Co-Prosecutors allege that 23 out of the 40 States (including France and the US) clearly support JCE III.[118] However, this assertion is untrue. First, these States either do not distinguish between principal and accessory in terms of the degree of their criminal responsibilities, or when they do, the JCE III-like liability is considered only *secondary* (as opposed to principal liability of the perpetrator). For example, New Zealand's case law clearly states that in a "joint enterprise", those individuals who have merely foreseen that a crime might be committed by the "principal party" are considered a "secondary party" and may only be held for "secondary liability".[119] Article 53 of the 1969 Iraqi Penal Code also clearly states that a "party to an offence" may be either a "principal" or an "accessory".

55. In addition, at least two States (Iraq[120] and Italy[121]) limit an individual's responsibility for unintended but foreseeable crimes to those that are a consequence of this individual's own acts or omissions, rather than that of other members of the group. Also, Section 24 of the 1936 Israeli Mandatory Criminal Code Ordinance specifies that only "such persons being *present* at the commission" is deemed to have committed the excessive yet foreseeable crime (emphasis added).

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[117] Doc No. **F11**, Co-Prosecutors' Appeal, para. 53.
[118] Doc No. **F11**, Co-Prosecutors' Appeal, para. 52.
[119] *R v. Tauaalo and Alovili,* [2008] NZHC 1099, 21-23 (*see*, Doc. No. **F11.1.116**).
[120] 1969 Iraqi Penal Code, Article 53, "as long as the offence that is committed is the probable consequence of *his* participation in it" (*see*, Doc. No. **F11.1.97**). (emphasis added)
[121] 1930 Italian Penal Code, Article 116, "if the crime is a consequence of *his* act or omission" (*see*, Doc. No. **F11.1.101**). (emphasis added)

56. The above discrepancies between the national laws and the theory of JCE III do not amount to an exhaustive enumeration. However, for the purpose of refuting the existence of a general principle, these discrepancies are more than sufficient.

(iii) Co-perpetration, common design, and JCE

57. In addition to previous analysis, the Defence also wishes to make some general comments on the differences between the continental law concept of "co-perpetration" the common law concept of "common design", and the concept of JCE. First, co-perpetration is adopted in most continental law states, such as France, Germany, the Netherlands and Cambodia[122]. The most striking difference between co-perpetration and JCE is that the former requires the contribution of the co-perpetrators to be *sine qua non* to the crime, yet the latter only requests "significant" but not necessarily substantial contribution.[123] This is also the major difference between co-perpetration and common design. However, common design also substantially differs from JCE III because, *inter alia*, the common law reckless theory requires that the foreseeable consequence be not only "probable" (as opposed to "possible") but also an "unreasonable" and "unjustifiable" risk to take, while JCE III does not require either of these.[124]

III. RELIEF

58. For the reasons stated above, the Defence requests that the Supreme Court Chamber:

(a) declare that the Co-Prosecutors' Appeal is inadmissible; and

(b) dismiss the Co-Prosecutors' Appeal.

CO-LAWYERS FOR NUON CHEA

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[122] 1956 Cambodian Penal Code, Article 82, "Direct participation constitutes co-perpetration, indirect participation constitutes complicity".

[123] *See*, e.g., *Prosecutor v. Gacumbitsi*, Separate Opinion of Judge Shahabuddeen to the Judgement, Case. No. ICTR-01-64-A, 7 Jul 2006, para. 50.

[124] *See*, e.g., *Prosecutor v. Blaškić*, 'Judgement', Case. No. IT-95-14-A, 29 Jul 2004, paras. 33 (JCE requires 'merely a possible consequence, rather than substantially likely to occur'), 34-35, 38.