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

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MR KHIEU SAMPHÂN'S DEFENCE RESPONSE TO THE CO-PROSECUTORS' APPEAL

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Before:

The Supreme Court Chamber
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Judge SOM Sereyvuth
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MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 29 September 2014, the Co-Prosecutors filed their "*Notice of Appeal of a Decision in Case 002/01*".[1] On 28 November 2014, they filed their "*Co-Prosecutors' Appeal against the Judgment of the Trial Chamber in Case 002/01*".[2]

2. The same day, Mr KHIEU Samphân's Defence (the "Respondent") filed his brief in response[3] asking the Supreme Court Chamber (the "Supreme Court") to declare the Co-Prosecutors' appeal inadmissible (I) or, alternatively, to dismiss it on the merits (II).

I. INADMISSIBILITY OF THE CO-PROSECUTORS' APPEAL

1. PROCEDURAL BACKGROUND

3. On 8 December 2009, the Co-Investigating Judges issued an *Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise*.[4]

4. On 20 May 2010, the Pre-Trial Chamber allowed the appeals of the Defence teams against the Order "*in relation to the challenge of the OCIJ finding on the applicability of the extended form of Joint Criminal Enterprise (JCE III) before the ECCC*". It held that JCE III was not part of customary international law at the relevant time.[5]

5. On 15 September 2010, the Co-Investigating Judges issued their Closing Order, limiting the charges against the accused to JCE I and JCE II.[6]

6. The Co-Prosecutors did not appeal the exclusion of JCE III from the Closing Order.[7]

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[1] Co-Prosecutors' Notice of Appeal of a Decision in Case 002/01, 29 September 2014, **E313/3/1** ("Notice of Appeal").
[2] Co-Prosecutors' Appeal against the Judgment of the Trial Chamber in Case 002/01, 28 November 2014, **F11** ("Appeal Brief"). ITU provided the Defence with a courtesy copy of the French translation on 5 January 2015.
[3] *Decision on Defence Motions for Extension of Pages to Appeal and Time to Respond*, 11 December 2014, **F13/2**, para. 17.
[4] Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, **D97/13**.
[5] Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise, 20 May 2010, **D97/15/9**.
[6] Closing Order, 15 September 2010, **D427**, paras. 1521-1523.

7. The Co-Prosecutors raised no preliminary objection concerning the jurisdiction of the Trial Chamber (the "Chamber") within thirty days after the Closing Order became final (i.e. 13 January 2011).[8]

8. On 17 June 2011, after the Closing Order had become final for several months, the Co-Prosecutors requested the Chamber to "*consider the extended form of joint criminal enterprise ("JCE III") as an alternative mode of liability*" and recharacterise the facts in the Closing Order.[9]

9. On 12 September 2011, after (wrongly[10]) stating that the Co-Prosecutors' Request was admissible, the Chamber rejected it on the ground that JCE III did not form part of customary international law and was not a general principle of law at the time of the facts charged.[11]

10. On 7 August 2014, the Chamber issued its judgement in Case 002/01 (the "Judgement"),[12] in which it simply stated at paragraph 691 that "*[t]he Pre-Trial and Trial Chambers have held that JCE III did not exist in customary international or Cambodian law by 1975, and it will accordingly not be considered further.*" It found the accused guilty under JCE I and other modes of liability.

11. It was in this context that the Co-Prosecutors appealed against the Judgement under Rule 105(3) of the Internal Rules,[13] asking the Supreme Court to "*declare the applicability of the third (or "extended") form of the mode of liability of joint criminal enterprise before the ECCC*".[14] They made it clear that they "*do not intend to appeal the dispositive part of the Judgment or any factual or legal findings in that Judgment*".[15]

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[7] Rule 74(2) of the Internal Rules: "*The Co-Prosecutors may appeal against all orders by the Co-Investigating Judges*". See also les Rules 67(5) and 75 of the Internal Rules.
[8] Rule 89(1) of the Internal Rules. The Closing Order became final on 13 January 2011, the date on which the Pre-Trial Chamber issued its decision on the Defence appeals.
[9] Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 17 June 2011, **E100**, paras. 1 and 41.
[10] [Mr KHIEU Samphân's Defence] Response to the Co-Prosecutor's Request Concerning JCE III, 22 July 2011, **E100/3**, paras. 10-26.
[11] *Decision on the Applicability of Joint Criminal Enterprise*, 12 September 2011, **E100/6**.
[12] Judgement in Case 002/01, 7 August 2014, **E313**.
[13] Notice of Appeal, para. 1; Appeal Brief, title and para. 1.
[14] Appeal Brief, para. 59.
[15] Notice of Appeal, para. 10.

2. *LACK OF INTEREST TO APPEAL (GRAVAMEN)*

12. The Co-Prosecutors cannot appeal against the Judgement without appealing against its dispositive part "*or any factual or legal findings in that Judgment*".[16]

13. The Co-Prosecutors cannot, as they claim, appeal under Rule 105(3) of the Internal Rules which provides that "*[a] party wishing to appeal a judgment shall file a notice of appeal setting forth the grounds. The notice shall, in respect of each ground of appeal, specify the alleged errors of law invalidating the decision and alleged errors of fact which occasioned a miscarriage of justice*". Regardless of the linguistic discrepancies in this Rule between "verdict" and "decision",[17] an appellant must, in any event, challenge a legal or factual finding made in the judgement and the error alleged must affect the judgement.

14. In this case, the Co-Prosecutors are taking issue on a question that was not determined in the Judgement and that has no effect on it. They are appealing against paragraph 691 of the Judgement which does no more than recall a decision taken earlier and exclude the issue from consideration in the Judgement.[18]

15. The impugned legal finding was made in an interlocutory decision which was not subject to immediate appeal.[19] Indeed, as the Supreme Court recently emphasized "*that such appeals from decisions (i.e. those that are only permissible at the same time as the judgment on the merits) must demonstrate a lasting gravamen on the part of the appellant; as such, they must relate to one or more of permissible grounds of the appeal from the Trial Judgment*".[20] In fact, in an earlier decision, the Supreme Court had also stated that "*to be admissible, it is necessary that the impugned decision must, as a minimum, affect a legal interest of the appellant (gravamen)*".[21]

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[16] See *supra*, I.1. PROCEDURAL BACKGROUND, para. 11.
[17] Appeal Brief, para. 6.
[18] Notice of Appeal, para. 6; Appeal Brief, para. 1, footnote 3; see *supra*, I.1. PROCEDURAL BACKGROUND, para. 10.
[19] *Decision on the Applicability of Joint Criminal Enterprise*, 12 September 2011, **E100/6**.
[20] *Decision on Motions for Extensions of Time and Page Limits for Appeal Briefs and Responses*, 31 October 2014, **F9**, para. 16.
[21] *Decision on Immediate Appeals by Nuon Chea and Ieng Thirith on Urgent Application for Immediate Release*, 3 June 2011, **E50/2/1/4**, para. 29.

16. In this case, the Co-Prosecutors have not been prejudiced by the Judgement and have no legitimate interest to protect by appealing against the Judgement. Accordingly, the Co-Prosecutors' appeal is inadmissible.

3. LACK OF STANDING

17. Moreover, the Co-Prosecutors waived their right to appeal the decision that JCE III was not applicable at the ECCC quite a long time ago.

18. As noted above, the Co-Prosecutors elected not to appeal against the Closing Order excluding JCE III from the modes of liability that could be applied to the accused. This exclusion became *res judicata* and is final.[22]

19. Moreover, the Co-Prosecutors elected not to raise the matter before the Chamber at the time of objections concerning jurisdiction. They opted for another approach which was simply to ask the Chamber to recharacterise certain facts included in the Closing Order.[23]

20. When a party does not make use of all procedural avenues available to him or her at trial, he or she cannot seek to challenge for the first time at the appellate level a decision which he or she does not like.[24]

21. By forgoing the procedural avenues that were available to them to challenge the decision that JCE III was not applicable at the ECCC, the Co-Prosecutors waived their right to raise the matter on appeal before the Supreme Court. Accordingly, their appeal must be summarily dismissed.

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[22] See *supra*, I.1. PROCEDURAL BACKGROUND, paras. 5-7.
[23] See *supra*, I.1. PROCEDURAL BACKGROUND, paras. 7-8.
[24] *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), para. 55; *Kambanda v. The Prosecutor*, ICTR-97-23-A, Appeal Judgement, 19 October 2000, paras. 25-27; *The Prosecutor v. Akayesu*, ICTR-96-4-A, Appeal Judgement, 1st June 2001 ("*Akayesu* Appeal Judgement"), para. 113; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 640; *Musema v. The Prosecutor*, ICTR-96-13-A, Appeal Judgement, 16 November 2001, para. 127; *The Prosecutor v. Ntakirutimana et al.*, ICTR-96-17-A, Appeal Judgement, 13 December 2004, para. 52; *Rwamakuba v. The Prosecutor*, ICTR-98-44C-A, *Decision on Prosecutor's Notice of Appeal and Scheduling Order*, 18 April 2007, para. 6.

4. FAILURE TO SEISE THE PROPER CHAMBER

22. Additionally, the Co-Prosecutors point out that consideration of their appeal is of general significance to the ECCC's jurisprudence in view of Case 002/02, but not for Case 002/01.[25] Yet, the only matter now before the Supreme Court is Case 002/01.

23. Accordingly, if the Co-Prosecutors wish to raise a matter which is relevant to Case 002/02, they must do so within the proceedings in that case. The present appeal is limited to Case 002/01.

24. Recently, the Supreme Court rejected a request by Mr NUON Chea to file an addendum to his appeal brief further developing his arguments in light of the forthcoming reasoned decision on the application to disqualify the judges of the Chamber. The Supreme Court stated that "*given that the Disqualification Decision concerns Case 002/02 and not the present case, it is first and foremost within those proceedings that the Defence must put forward its complaints in this regards*".[26]

25. The Co-Prosecutors' appeal is thus an attempt to circumvent the procedural system before the ECCC by complaining directly before the Supreme Court which is seised of a matter different from the one which is of interest to the Co-Prosecutors.

26. Moreover, the Co-Prosecutors' submission that the Supreme Court's intervention on the matter of the applicability of JCE III is of significance to Case 002/02 is false. In fact, JCE III was conclusively excluded from the charges against the accused in this case when the Closing Order became final.[27] In reality, the Co-Prosecutors are attempting to obtain an order from the Supreme Court that would enable them to then put pressure on the Chamber to introduce new charges in Case 002/02 under the guise of recharacterising the facts in violation of Rule 98(2) of the Internal Rules.[28]

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[25] Notice of Appeal, paras. 2, 8(2) and 10; Appeal Brief, para. 10.
[26] *Decision on NUON Chea's Request to File an Addendum to his Appeal Against the Trial Judgment in Case 002/01*, 12 January 2015, **F15/1**, p. 2, penultimate paragraph.
[27] See *supra*, I.3. LACK OF STANDING, par 18.
[28] Rule 98(2) of the Internal Rules: "*The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new*

27. Finally, given that JCE III was not included in the charges against the accused in Case 002/02, the Defence does not equate the Co-Prosecutors' position to notice of the said allegation.

28. In any event, given that the Supreme Court is seised of Case 002/01, the Co-Prosecutors' Appeal is inadmissible.

5. LACK OF GROUNDS WARRANTING A DECLARATORY DECISION FROM THE SUPREME COURT

29. Knowing that their appeal does not satisfy the standards of review on appeal,[29] the Co-Prosecutors are seeking to obtain a declaratory decision from the Supreme Court on the applicability of JCE III at the ECCC.[30] While the Defence does not dispute the Supreme Court's power to provide declaratory relief under certain conditions, the Defence believes, on the other hand, that these conditions are not met in this case (1). Moreover, none of the arguments advanced by the Co-Prosecutors justifies the intervention of the Supreme Court (2), which, on the contrary, has good reasons to refrain from intervening (3).

A. The legal requirements for declaratory relief are not met

30. The fact of the matter is that in setting out the case law on declaratory relief,[31] the Co-Prosecutors carefully omitted to refer to the decisive criteria clearly mentioned by these cases.

31. In *Duch*, the Supreme Court referred to the applicable jurisprudence in these terms:

> *In exceptional circumstances, the Supreme Court Chamber may (...) hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgment but is nevertheless of general significance to the ECCC's jurisprudence.*[32]

32. The standard was first set out in the *Tadić* Appeal Judgement.[33] In *Kupreškić*, the ICTY Appeals Chamber pointed out that:

> *The general rule is that the Appeals Chamber will not entertain arguments that do not allege legal errors invalidating the judgement, or factual errors occasioning a miscarriage of justice, apart*

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constitutive elements are introduced." See *supra*, I.1. PROCEDURAL BACKGROUND, para. 9.
[29] Notice of Appeal, paras. 2, 8(2), 10.
[30] Notice of Appeal, paras. 3, 5; Appeal Brief, paras. 6-11, 59.
[31] Notice of Appeal, para. 5; Appeal Brief, paras. 6-8.
[32] KAING Guek Eav alias *Duch*, 001/18-07-2007/ECCC, Appeal Judgement, 3 February 2012 ("*Duch* Appeal Judgement"), para. 15 (emphasis added). At footnote 39, the Supreme Court refers to the *Galić* Appeal Judgement (§6), which itself refers to the appeal judgements in *Stakić* (§7), *Kupreškić* (§22) and *Tadić* (§247).
[33] *Tadić* Appeal Judgement, para. 247.

> *from the exceptional situation where a party has raised a legal issue that is of general significance to the Tribunal's jurisprudence. Only in such a rare case may the Appeals Chamber consider it appropriate to make an exception to the general rule.*[34]

33. In *Akayesu*, the ICTR Appeals Chamber stated that:

> *[t]he the Appeals Chamber of the Tribunal does not have advisory power. On the other hand, it may deem it necessary to pass on issues of general importance if it finds that their resolution is likely to contribute substantially to the development of the Tribunal's jurisprudence. The exercise of such a power is not contingent upon the raising of grounds of appeal which strictly fall within the ambit of Article 24 of the Statute. In other words, it is within its discretion. While the Appeals Chamber may find it necessary to address issues, it may also decline to do so. In such a case (if the Appeals Chamber does not pass on an issue raised), the opinion of the Trial Chamber remains the sole formal pronouncement by the Tribunal on the issue at bar. It will therefore carry some weight. Therefore, the Appeals Chamber will not consider all issues of general significance. Indeed, the issues raised must be of interest to legal practice of the Tribunal and must have a nexus with the case at hand."*[35]

34. Essentially, three conditions must be met before the Supreme Court can consider granting the Co-Prosecutors' request for declaratory relief:

- the request must not seek an advisory opinion,

- the issue raised must have a nexus with the case on appeal,

- there must be exceptional circumstances justifying the Supreme Court's intervention.

35. The Co-Prosecutors' appeal does not meet any of these three conditions.

36. To begin, the relief sought by the Co-Prosecutors is purely advisory. In fact, while they plead the need to provide "*legal guidance*" to the Chamber in view of Case 002/02,[36] that argument is misleading. Since JCE III has been conclusively excluded from the charges against the accused in this case,[37] the advice of the Supreme Court would have no practical effect on this case. Furthermore, there is no nexus between the question submitted to the Supreme Court and the case before it, i.e. Case 002/01.[38] Finally, the Co-Prosecutors failed to acknowledge the need

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[34] *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgement"), para. 22 (emphasis added).
[35] *Akayesu* Appeal Judgement, paras. 23-24 (emphasis added).
[36] Notice of Appeal, paras. 8(2), 9, 10; Appeal Brief, para. 10.
[37] See *supra*, I.4. FAILURE TO SEISE THE PROPER CHAMBER, para. 26.
[38] See *supra*, I.2. LACK OF INTEREST TO APPEAL (GRAVAMEN), paras. 12-14; I.4. FAILURE TO SEISE THE PROPER CHAMBER, paras. 22-28.

to demonstrate that there were exceptional circumstances warranting the intervention of the Supreme Court. In fact, they neither sought to do it.

37. For these reasons, the Supreme Court must reject the Co-Prosecutors' request.

B. Irrelevance of the Co-Prosecutors' arguments

38. There are many other reasons why the Supreme Court must decline to grant declaratory relief.

39. First, the Co-Prosecutors submit that the issue "*has not been settled definitively by [the Supreme Court]*".[39] This argument is totally irrelevant because the Pre-Trial Chamber and the Chamber have both held that JCE III is not applicable at the ECCC. Moreover, the Supreme Court does not have to settle all legal issues apart from those that have been validly litigated in conformity with the relevant processes. Thus, it is unnecessary for the Supreme Court to express its own opinion on this point. The fact that the Co-Prosecutors are unhappy with the decision of the Pre-Trial Chamber and the Chamber is no justification for the Supreme Court "to *settle the matter definitively*".

40. Second, the Co-Prosecutors submit that since the hearing of 30 July 2014, the Accused are on notice of their intention to seek the application of JCE III in Case 002/02.[40] That argument is both flawed and irrelevant. Indeed, a statement of intent uttered by the Co-Prosecutors at a hearing does not transform that intention into a material allegation that would form part of the charges. Only the Closing Order can validly determine the modes of participation for which the accused are accountable. However, in this case, JCE III is not one of them and the accused do not have to answer thereto in Case 002/02.

41. Third, the Co-Prosecutors plead the need to harmonise the ECCC's position with the jurisprudence of the ICTY, ICTR, SCSL and STL in order not to "render suspect" the decisions of these tribunals. They argue that the jurisprudence of the ECCC is isolated and should be "harmonised" with that of these other tribunals in furtherance of "*an overwhelmingly consistent*

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[39] Notice of Appeal, para. 8(1); Appeal Brief, para. 9.
[40] Notice of Appeal, para. 8(2); Appeal Brief, para. 10.

line of JCE III international jurisprudence".[41] This argument is misleading and ridiculous. It suggests that the ECCC's position on JCE III is inconsistent with that of these tribunals. However, as the Co-Prosecutors must know, each international or internationalised tribunal has its own temporal jurisdiction and must ascertain the applicable law as it stood at the time of the facts encompassed in its subject-matter jurisdiction.[42] Thus, it has been held at the ECCC that JCE III did not exist between 1975 and 1979. By contrast, the ICTY, ICTR, SCSL and STL had to establish the existence of this doctrine two or three decades later and never sought or never had to determine if it existed in 1975 or before the 1990s. The case law of the ECCC and that of these tribunal are perfectly consistent:[43] in 1975, JCE III did not exist in customary international law; from 1992 at least, this doctrine was recognised as part of customary international law. Not only does the ECCC not have to "harmonise" its jurisprudence with that of these tribunals, the ECCC has the duty not to apply rules of law that are subsequent to the facts being tried.[44]

42. Four, the Co-Prosecutors plead the need to provide "*legal guidance*" to the Chamber in relation to Case 002/02.[45] This argument is no more valid than the previous ones. To start, JCE III is not part of the charges laid in this case. Guidance on the issue is thus not necessary. Furthermore, even if the accused were charged with JCE III, there is nothing to show that the Chamber would need to be guided on the issue. When the Chamber needed guidance from the Supreme Court, the Chamber sought it.[46] That was not the case with respect to the applicability of JCE III. Finally, the Chamber and the Pre-Trial Chamber had the benefit of about two decades of international criminal case law on the subject, which they studied and considered before concluding that at the relevant time, JCE III did not exist. The present situation is thus not comparable to that of the first cases tried before the ICTY and the ICTR, which established the

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[41] Notice of Appeal, paras. 8(3), 8(4); Appeal Brief, para. 11.
[42] *Duch* Appeal Judgement, paras. 89-91, 95-96.
[43] The Co-Prosecutors' submission that ECCC jurisprudence is in direct contradiction with that of the STL Appeals Chamber (Notice of Appeal, para. 8(4), footnote 20) is totally false. The Appeals Chamber did not make the finding that the Co-Prosecutors would like to read into §245 of the referenced interlocutory decision (which, as a matter of fact, was wholly *obiter* on the issue).
[44] *Duch* Appeal Judgement, para. 97.
[45] Notice of Appeal, para. 9; Appeal Brief, para. 10.
[46] *Decision on the Implementation of the Supreme Court Chamber's "Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused Ieng Thirith"* (Doc. No. E138/1/10/1/5/8), 26 March 2013, **E138/1/10/1/5/8/1**.

standard for declaratory decisions.[47] Accordingly, there are no exceptional circumstances warranting the intervention of the Supreme Court in this case.

C. Other reasons warranting the non-intervention of the Supreme Court

43. There are other reasons why the Supreme Court should decline to exercise its discretion to grant declaratory relief.

44. By contrast with the ad hoc tribunals, numerous legal issues raised in the cases before the ECCC are determined by the Pre-Trial Chamber and the Chamber. In this case, their conclusions on the inapplicability of JCE III at the ECCC are *res judicata* and cannot be lightly disturbed. These two chambers have ruled consistently without the Co-Prosecutors using the valid procedural vehicles available to them to challenge their conclusions. The trials were held on the basis of these conclusions that the ECCC had no jurisdiction in relation to JCE III. If the Supreme Court were to adopt a different point of view, it would create instability in the case law of the ECCC and would open the door to relitigation of past cases. The fact of the matter is that the jurisprudential stability and consistency are critical to the credibility and viability of the legal legacy of any court.

6. CONCLUSION

45. With no interest to defend before the Supreme Court in Case 002/01 and having waived their right to raise the matter before the Supreme Court, the Co-Prosecutors have also failed to justify the need for the Supreme Court to intervene exceptionally on the matter of the applicability of JCE III at the ECCC. Accordingly, their "appeal", which is inadmissible on each of these grounds, should not be considered on its merits.

II. INAPPLICABILITY OF JCE III AT THE ECCC (PRINCIPLE OF LEGALITY)

46. In the unlikely event of the Supreme Court accepting to consider the Co-Prosecutors "appeal" on its merits, it would have no alternative but to also find that the principle of legality precludes the applicability of JCE III at the ECCC. The fact is that JCE III did not exist at the

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[47] See *supra*, I.5.A. The legal requirements for declaratory relief are not met, paras. 32-33.

time of the facts charged (1) in addition to not being accessible nor foreseeable to the accused at the relevant time (2).

1. JCE III DID NOT EXIST AT THE TIME OF THE FACTS CHARGED

47. The Co-Prosecutors submit that JCE III was "*well established*" in customary international law before the facts charged. Contrary to their submission, JCE III was not part of post-World War jurisprudence (B) nor of domestic legislations (C). Moreover, the Co-Prosecutors have submitted no evidence of the existence, at the time of the facts charged, of the required *opinio juris*, which did not exist at the time since JCE III was established well after the facts (D).

A. Preliminary remarks: the creation of JCE III

48. As we shall see, JCE III is an intellectual construct, wholly invented by one person: Professor and Judge Antonio CASSESE. In fact, it has a date of birth: 15 July 1999.[48] Before CASSESE and his appeal judgment in *Tadić*, it did not exist, even conceptually. After that appeal judgement, JCE III became part of international custom. It was by patching together shreds of law, pieces of jurisprudence and clothing it with an interpretation that only he understood that CASSESE birthed this legal creature, this fishing net for prosecutors, this negation of the principle of the individualisation of criminal responsibility.

49. While it may be too late for some international(ised) tribunals to renounce it, the credibility and the legacy of these tribunals will be undoubtedly discredited by the use of this abusive and collectivising JCE III "theory". It is with good reason that the ECCC has refused to apply this theory.

B. JCE III did not exist in post-World War jurisprudence

50. The Co-Prosecutors suggest that JCE III was already in existence and was recognised as part of customary international law at the time of the post-World War II trials.[49] That was certainly not the case. No post-war tribunal and no domestic court has ever claimed to apply the JCE III theory.

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[48] *Tadić* Appeal Judgement.
[49] Appeal Brief, paras. 23-42.

a) *The non-precedents of the* Tadić *Appeal Judgement*

51. None of the post-war cases cited in *Tadić* as relevant to the eventual creation of a JCE III theory in the 1990s claims to apply customary international law. Rather, they applied a mixture of domestic law (such as in the Italian cases) and/or domestic legislation specifically enacted to deal with the crimes in question.

52. Moreover, as the Pre-Trial Chamber and the Chamber have rightly noted, the "precedents" underpinning the *Tadić* Appeal Judgement (the *Essen Lynching Case*, the *Borkum Island Case*, the Italian cases)[50] are far from being convincing.

53. With respect to the ***Essen Lynching Case*** and the ***Borkum Island Case***, the official documents do not specify the law that was applied. It is thus impossible to consider that they applied international law. There is as yet no indication that the statutory law of these tribunals provided for the application of a JCE III type mode of liability.

54. There are no written findings or reasoning in the judgements in these cases. Accordingly, there is no basis on which to ascertain and assess the content of the judicial findings made by these tribunals. Accordingly, these cases can hardly constitute reliable "precedents" for any mode of liability, let alone JCE III.

55. In both cases, there is no judicial indication that liability was incurred by reason of membership in a common criminal plan.[51] In other words, the facts do not satisfy the basic elements of JCE.

56. The findings concerning each accused, to the extent that they may help in understanding the reasoning of the tribunals, do not support the view that the accused were convicted on the basis of JCE III. For example, in the *Essen Lynching Case*, HEYER was found guilty based on his statements (that prisoners of war should not be protected).[52] As for KOENEN (a soldier who

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[50] Appeal Brief, paras. 31-33; *Tadić* Appeal Judgement, paras. 204-219.
[51] J.D.Ohlin, *Joint Intentions to Commit International Crimes,* Chicago Journal of International Law, Vol. 11 No. 2, 2011 ("Ohlin"), p. 708 (http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1168&context=facpub).
[52] *Trial of Erich Heyer and six others,* British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945, UNWCC, vol. I, p. 88-92 ("*Essen Lynching Case*"), p. 92, footnote 1.

was ordered not to interfere if the prisoners were molested), he was far from being a member of a JCE. The Prosecutor's submissions against him were not consistent with the definition of JCE III.[53]

57. It is common ground between academic writers that there is nothing to suggest that the tribunal applied JCE III in the *Essen Lynching Case*.[54] In that case, the Prosecutor himself never invoked the theory of a common plan. Quite the contrary, he argued that: "*all these seven Germans in the dock were guilty either as an accessory before the fact or as principals in the murder of the three British airmen*".[55]

58. Based on the meagre indications available about the *Borkum Island Case*, academic writers have contended that the facts would, at best, support a charge of JCE I.[56] There is no indication that the law applicable in that case offered the possibility of charging a JCE III type mode of participation.

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[53] *Essen Lynching Case*, p. 90 ("*Referring to the member of the escort, Private Koenen, the Prosecutor pointed out that his position was somewhat difficult because his military duty and his conscience must have conflicted. He was given an order not to interfere and he did not interfere. He stood by while these three airmen were murdered. Mere inaction on the part of a spectator is not in itself a crime. A man might stand by and see someone else drowning and let him go and do nothing. He has committed no crime. But in certain circumstances a person may be under a duty to do something. In the Prosecutor's submission this escort, as the representative of the Power which had taken the airmen prisoners, had the duty not only to prevent them from escaping but also of seeing that they were not molested. Therefore it was the duty of the escort, who was armed with a revolver, to protect the people in his custody. Koenen failed to do what his duty required him to do. In the Prosecutor's opinion, his guilt was, however, not as bad as the guilt of those who took an active part, but a person who was responsible for the safety of the prisoners and who deliberately stood by and merely held his rifle up to cover them while other people killed them, was "concerned in the killing.*"")

[54] Ohlin, p. 708; R. Clarke, *Return to Borkum Island. Extended Joint Criminal Enterprise Responsibility in the Wake of World War II*, Journal of International Criminal Justice 9, 2011, p. 839-861 ("Clarke"), p. 851; A.M. Danner and J.S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law* (2005) 93 California Law Review 75 ("Danner and Martinez"), p. 111 (http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1309&context=californialawreview).

[55] *Essen Lynching Case*, p. 91.

[56] M. Sassoli and L.M. Olson, *The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case*, (2000) 82 International Review of the Red Cross 733 ("Sassoli and Olson"), p. 7 (https://www.icrc.org/eng/resources/documents/misc/57jqqc.htm); Ohlin, p. 708. The Indictment clearly states that the accused "*wilfully, deliberately and wrongfully encouraged, aided, abetted and participated in the killing*" of war prisoners (*Tadić* Appeal Judgement, para. 210 and footnote 261); *Trial Transcripts, Vol. 1* (6 February) p. 11. In his final pleading, the Prosecutor argued that all accused had had the intent to kill. He listed the active contributions of each accused in the killing. They "encouraged", "instigated", "approved", "supervised and encouraged". Nowhere is it suggested that the accused could be held liable on account of a JCE III type mode of liability.

59. Furthermore, these two cases did not concern non-criminal conduct that included the possibility of committing crimes, but intentional crimes, deliberately intended.[57] In the *Tadić* Appeal Judgement, the Appeals Chamber did in fact concede that the *Borkum Island Case* fell under JCE I:

> *It bears emphasising that by taking the approach just summarised, the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder. In other words, the Prosecutor adhered to the doctrine of common purpose mentioned above with regard to the first category of cases.*[58]

60. With respect to the **Italian cases** mentioned in the *Tadić* Appeal Judgement, they applied Italian domestic law, not international law. None of the (common) elements of JCE appears also to have been considered and satisfied. Thus, "*the recognition of JCE III in customary law cannot be deduced from the Italian case law quoted by the* [Tadić] *Appeals Chamber*".[59]

b) *The other cases referred to by the Co-Prosecutors*

61. In an attempt to bolster these cases which were not precedents for *Tadić*, the Co-Prosecutors cite a number of additional decisions. The fact that they lack relevance and do not support the Co-Prosecutors' claims is already apparent from the simple fact that even the *Tadić* Appeals Chamber did not consider that these precedents were relevant for the theory of JCE III. Quite the contrary, the Appeals Chamber expressly concluded that some of these cases were only relevant for JCE I or JCE II.[60]

62. The Co-Prosecutors unreasonably started by arguing that because the IMT did not specify the particular crimes for which the individual accused had been convicted, it must be presumed that the Nuremberg judges applied the theory of JCE III.[61] Aside from the fact that neither the Charter nor the Judgement mentions such a theory, the Judgement provides no basis to infer such

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[57] C. Jalloh, *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2013), p. 89.
[58] *Tadić* Appeal Judgement, para. 211.
[59] *Amicus Curiae* concerning Criminal Case File 001/18-07-2007/ECCC/OCIJ (PTC 02), 27 October 2008, p. 32-33.
[60] See, for example: *Tadić* Appeal Judgement, paras. 200 and 202 (where the *Einsatzgruppen Case* is cited as falling under JCE I and the *Dachau Concentration Camp Case* is cited as falling solely under JCE II). In *Tadić*, none of the other cases cited by the Co-Prosecutors appears as being relevant for JCE III.
[61] Appeal Brief, para. 27.

a proposition. The common plan mentioned by the Charter does not refer to JCE but to the crime of conspiracy (Count 1 of the Indictment).[62] The ICTY has clearly stated that the vague crime of conspiracy could not be equated to JCE.[63] Moreover, the Nuremberg judges clearly stated that this crime did not apply to war crimes and crimes against humanity, but only to the crime of aggression.[64] Contrary to what the Co-Prosecutors assert, the Nuremberg Principles do not suggest anything different.[65]

63. The Co-Prosecutors then seek to rely on the findings of the IMT concerning the accused SAUCKEL.[66] However, they intentionally fail to state that the tribunal discussed at some length SAUCKEL's acts concerning the crimes for which he was accountable, which shows that he was not convicted for a JCE III type liability, but in fact for conspiracy in those acts. This is also apparent from the fact that the tribunal concluded that he was aware of those crimes and therefore did not apply a "foreseeability" standard to SAUCKEL, but a form of liability for conspiracy (provided for by the Charter). Moreover, neither the Tribunal itself nor any commentator has ever suggested that JCE III was applied at Nuremberg or to SAUCKEL in particular.[67] The same observations and conclusions apply to the submissions of the Co-Prosecutors concerning SPEER.[68]

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[62] S. Pomorski, *Conspiracy and Criminal Organizations*, in: George Ginsburgs and V.N. Kudriavtsev eds., *The Nuremberg Trial and International Law* (Martinus Nijhoff; Dordrecht 1990), p. 221-225; Danner and Martinez, p. 116.

[63] *Prosecutor v. Milutinovic et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's motion challenging jurisdiction-joint criminal enterprise, 21 May 2003 ("*Ojdanić* Decision"), para. 22 and separate Opinion by Judge David HUNT, para. 23. See also: Danner and Martinez, p. 118.

[64] *Ojdanić* Decision, para. 22 footnote 62. The IMT refers to the final paragraph of article 6 of the Charter (quoted in the Appeal Brief, para. 26): «'*Leaders, organizers, 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 performed by any persons in execution of such plan'. In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit War Crimes and Crimes against Humanity, and will consider only the common plan to prepare, initiate, and wage aggressive war*" (emphasis added).

[65] Appeal Brief, para. 24.

[66] Appeal Brief, paras. 28-29.

[67] SAUCKEL was found not guilty of participation in a common plan (count one) and guilty of war crimes and crimes against humanity (counts three and four). Moreover, the IMT never referred to any common plan or scheme in which SAUCKEL allegedly participated.

[68] Appeal Brief, para. 30. SPEER was also found not guilty of participation in a common plan (count one), but guilty of war crimes and crimes against humanity (counts three and four). There again, the Tribunal did not refer to any common plan or scheme in which SPEER allegedly participated. SPEER was convicted for his active participation in

64. Finally, the other cases cited by the Co-Prosecutors are no more relevant.[69] None of these cases apply the elements of JCE III and none claims to do so. There is no basis for concluding that the laws applied in these cases provided for the possibility of a JCE III type criminal responsibility. In most of them, nothing is written and there is no reasoned indication that any such mode of liability had been applied. No finding concerning the basic elements of JCE was recorded. According to vague indications, liability was incurred by reason of modes of liability based on conspiracy or causation. All of these cases are a reflection of different domestic legislations and not an embodiment of some sort of developing international legal rule.

C. JCE III did not exist in domestic legislations

65. The Co-Prosecutors try to suggest that State practice supported the idea that JCE III existed before the facts charged.[70] Yet, not one of the domestic legal systems cited recognised that theory. Not only are the systems mentioned irrelevant, in fact, they are at odds with the position of the Co-Prosecutors.

66. In an attempt to obfuscate the reality of the situation, the Co-Prosecutors propose a smokescreen reasoning.[71] Although domestic systems apply different and varied forms of negligence, culpable omission, conspiracy, the Co-Prosecutors attempt to conflate them under a single theory which the systems themselves never claimed to apply. The test of sufficiency of the presence of "*the core requirements and underlying principles of this concept*" that they propose simply has no merit and is wholly baseless. Moreover, it offends the principle of strict construction in criminal law.

67. The Co-Prosecutors attempt to suggest that the fact that the legal systems cited recognised the possibility of incurring liability for crimes that were unintended, but foreseeable and accepted (in one form or another) confirms that JCE III was recognised by all these legal systems. However, none of these legal systems recognised a JCE III type mode of liability.[72] While some

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the slave labour programme and for having requested the supply of labourers.
[69] Appeal Brief, paras. 34-41.
[70] Appeal Brief, paras. 43-57.
[71] Appeal Brief, paras. 48-49.
[72] See, for example: Cambodia, Greece, Pakistan, Poland, South Korea, Soviet Union and Thailand cited in the table of authorities of the Appeal Brief (**F11.1**), p. 21, 23, 27, 28-32.

of them recognised the possibility that an accused could be held liable for a crime the possibility of which he had contemplated, they do not concern nor require the existence of a common criminal scheme, a shared criminal intent to commit the crimes intended by the scheme. Liability does not arise from the implementation of a common criminal purpose, but from the very acts of the accused. None of these systems in any way supports liability resulting from the implementation of a joint criminal enterprise during which crimes foreign to the common purpose are committed.

68. Furthermore, the State practice on which the Co-Prosecutors attempt to rely reveals a variability in the types, categories and forms of liability for foreseeable crimes, with totally different elements and requirements.[73] Significantly, the Co-Prosecutors cannot even establish that the majority of these systems used the same elements and criteria as JCE III. For example, some of them employ the term "*probable consequence*" as opposed to "*foreseeable consequences*".[74] Others totally reject the notion of liability for "*foreseeable*"[75] consequences or limit liability strictly to the person or persons who committed the crime that was not contemplated in the common purpose.[76] That is a far cry from the "*virtually uniform, extensive and representative*" State practice required for the establishment of a customary international law rule.[77]

69. In order to create the illusion that JCE III was provided for in domestic legislations, the Co-Prosecutors go so far as to overly mischaracterise the content of domestic legislations reading into them prohibitions which they do not contain.

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[73] For the effect of these differences and fluctuations on the existence of a customary rule, see, for example: Asylum Case (*Columbia v. Peru*), Judgment of International Court of Justice, 20 November 1950, I.C.J. Reports, p. 277.
[74] This is the case for at least 23 of the countries cited by the Co-Prosecutors.
[75] Appeal Brief, para. 53.
[76] See, for example: *Tadić* Appeal Judgement, para. 224. See also the practice of the Swiss Supreme Court, for example in Arrêts du Tribunal Fédéral Suisse, Recueil Officiel, Vol. 118, Partie IV, pp. 227 ff., considération 5d/cc, p. 232.
[77] Appeal Brief, para. 45 and footnote 90. See also: ICRC, Customary IHL, Assessment of Customary International Law (https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin).

70. For example, contrary to what the Co-Prosecutors assert,[78] Germany did not recognise a JCE III type mode of liability. Nor did it recognise what the Co-Prosecutors mysteriously refer to as "*core concepts*" underlying JCE III liability.

71. Their first authority is article II(2) of Allied Control Council Law No. 10 which was adopted "*to give effect to the 1943 Moscow Declaration, the London Agreement of 8 August 1945 and the attached Charter for the Nuremberg IMT, and to establish a uniform legal basis in Germany for the prosecution of war criminals and related offenders other than those dealt with by the IMT*".[79] Thus, this law never became a German law. Moreover, it does not provide for any JCE III type mode of liability and no court applying the law has ever claimed that that was the case.

72. The Co-Prosecutors' second authority is article 82 of the German Penal Code of 1871 which deals with high treason. In fact, it describes the *actus reus* of the crime as any act by which the purpose is implemented immediately.[80] Nothing to do with some "core concept" of JCE III.

73. The third authority is a decision of the Federal Court of Justice of 17 March 1967 (BGH 4 StR 33/67). This decision was issued in a single accused case and is completely silent on whether the court relied on a JCE III type mode of liability. In fact, this decision deals only with the characterisation of one particular location as "public space" within the meaning of §250-I(3) of the German Penal Code.

74. The fourth authority is a decision of the Federal Court of Justice of 11 May 1971 (BGH VI ZR 211/69). In that decision, the court deals with issues of civil liability in the context of a complaint alleging physical injury committed by several co-perpetrators. The decision is not a criminal law decision and does not concern JCE III. In fact, it deals with *dolus eventualis*. The rest of the decision deals only with the civil implications of co-perpetration for the purpose of assessing civil liability, which considerations are totally inapplicable in a criminal law context.

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[78] Appeal Brief, para. 53 and footnote 144.
[79] Cassese, Oxford Companion to International Criminal Justice, p. 281.
[80] http://de.wikisource.org/wiki/Strafgesetzbuch_f%C3%BCr_das_Deutsche_Reich_(1871)#.C2.A7._82.

75. The interpretation of Cambodian law by the Co-Prosecutors is equally misleading. As noted by Professor AMBOS, Cambodian law at the time never envisaged the possibility that one could incur liability for direct participation in furtherance of a common agreement for acts that fall outside the agreement. Accordingly, JCE III was "*clearly not*" encompassed by Cambodian law.[81]

76. In light of the foregoing, the Supreme Court cannot be assured that the descriptions of domestic legislations provided by the Co-Prosecutors honestly and correctly reflect the state of the law of the countries in question.

77. The bottom line is that, not only are the domestic legislations referred to by the Co-Prosecutors irrelevant for the purpose of establishing the existence of a JCE III type mode of liability, they are so eminently contradictory that the existence of a customary international law rule cannot be reasonably sought nor found in these systems.[82]

D. Absence of evidence of the required opinio juris

78. Customary international law requires the existence of two elements: evidence of State practice and evidence of *opinio juris*.[83] The Co-Prosecutors were unable to provide any proof of *opinio juris* concerning JCE III in 1975.

79. The Co-Prosecutors were content to claim that if JCE III existed in 1992 (*Tadić* case), it must perforce have existed in 1975.[84] To start with, customary international law may evolve over two decades. Moreover, be that as it may, in reality the "birth" of JCE III was triggered by legal-legislative action and is not the result of a combination between State practice and *opinio juris*. JCE III entered the legal arena only as a result of the legislative "push" provided by CASSESE, then Presiding Judge of the ICTY Appeals Chamber in *Tadić*. Before this judicial creation of

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[81] *Amicus Curiae* concerning Criminal Case File 001/18-07-2007/ECCC/OCIJ (PTC 02), 27 October 2008, p. 33-34.
[82] See generally: Clarke, p. 861; S. Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, JICJ 2 (2004), 606-619, p. 615; K. Heller, *The ECCC Issues a Landmark Decision on JCE III*, (http://opiniojuris.org/2010/05/23/the-eccc-issues-a-landmark-decision-on-jce-iii/).
[83] *Duch* Appeal Judgement, para. 93.
[84] Notice of Appeal, para. 8(3): "*the Co-Prosecutors can find no evidence of developments in customary international law between 1975 and 1992*".

JCE III, there was no customary prohibition of JCE III.[85] Accordingly, no inference can be drawn retroactively as to the state of the law in 1975 from what was decided in the Tadić Appeal Judgement 24 years later.

80. In the final analysis, there is no evidence of extensive and uniform State practice nor of *opinio juris* concerning the alleged existence of JCE III in 1975.

E. Conclusion

81. The Co-Prosecutors now desperately request the application of JCE III because they are perfectly aware of their inability to establish the liability of KHIEU Samphân on the basis of modes of liability requiring proof of *mens rea*. As the Closing Order in cases 002/01 and 002/02 clearly demonstrates, they were not authorised to prosecute KHIEU Samphân on the basis of this non-existent theory. If the Co-Prosecutors know that they will not be able to establish his liability without this legal artifice, they have a duty to request that the charges against him be dropped.

82. In any event, even assuming that their "appeal" is admissible, the Co-Prosecutors have failed to demonstrate that JCE III existed in customary international law at the time of the facts charged. This "appeal" must be dismissed.

2. THE ADDITIONAL REQUIREMENTS OF ACCESSIBILITY AND FORESEEABILITY ARE NOT SATISFIED

83. Even proceeding on the fiction that the theory of JCE III existed in customary international law at the time of the facts charged, the Supreme Court must still ensure that its applicability complies with the principle of legality. Because of their inability to demonstrate this compliance (B), the Co-Prosecutors are asking the Supreme Court to infringe this fundamental criminal law principle by submitting an absurd reasoning to it (A).

A. The Co-Prosecutors' absurd reasoning

84. The Co-Prosecutors' reasoning may be summed up as follows: 1) given that JCE III is incorporated within the ECCC Law, JCE III is applicable;[86] 2) given that JCE I has been found to

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[85] See, for example: Ohlin, footnote 106; E. van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP, 2012), p. 141; Sassoli and Olson; Danner and Martinez, p. 110.

be applicable at the ECCC, it would be "*incongruous*" not to find that JCE III is applicable.[87] These suggestions are inconsistent with the principle of legality and are simply dishonest.

85. First, the Supreme Court has already clearly indicated what ECCC judges have to do in order to comply with the principle of legality. Alleged crimes and modes of participation are applicable at the ECCC, if and only if the following three conditions are cumulatively satisfied. They must "*1) 'be provided for in the ECCC Law, explicitly or implicitly' and 2) have existed under Cambodian or international law between 17 April 1975 and 6 January 1979*" (emphasis in original).[88] If that is the case, they must still satisfy "*the additional requirement under the principle of legality that charged offences were sufficiently foreseeable and the law providing such liability was sufficiently accessible to the Accused at the relevant time*".[89]

86. Accordingly, the "incorporation" of JCE III within the ECCC Law, subsequently to the facts charged, does not dispense with the duty to demonstrate its existence, its accessibility and its foreseeability at the time of the facts.

87. Second, the reasoning by analogy between JCE I and JCE III is surrealistic. Firstly, the Co-Prosecutors were bold enough to state that "*[t]he conduct required for JCE III is* ***identical*** *to the conduct required for JCE I*" and that "*[t]he nullum crimen principle requires only that the accused be on constructive notice that his conduct is unlawful*".[90] However, the Co-Prosecutors ought to know that the "conduct" necessarily implies an *actus reus* and a *mens rea* and that the principle of legality applies to each of these two ingredients.

88. In fact, the Supreme Court has clearly stated that "*in light of the protective function of the principle of legality, Chambers in this Tribunal are under an obligation to determine that the holdings on elements of crimes or modes of liability therein were applicable during the temporal jurisdiction of the ECCC. Furthermore, they must have been foreseeable and accessible to the*

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[86] Appeal Brief, para. 12
[87] Appeal Brief, para. 13 et seq. See also paras. 4, 22, 58.
[88] *Duch* Appeal Judgement, para. 98. See also the process outlined at paras. 99-100 concerning crimes against humanity.
[89] *Duch* Appeal Judgement, para. 159 (emphasis added).
[90] Appeal Brief, para. 14 ("conduct" emphasis in original, emphasis added "identical").

Accused."[91] On the other hand and for example, the ICTY Appeals Chamber (whose temporal jurisdiction is different from that of the ECCC) held in *Stakić* that "*in this case, reliance on dolus eventualis in the context of joint criminal enterprise violates the principles of nullum crimen sine lege and in dubio pro reo*".[92]

89. As such, compliance of a mode of liability with the principle of legality cannot be inferred from that of another mode of liability, even if they have a few elements in common.

90. The Co-Prosecutors then brazenly assert that "*[t]he 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* ".[93] Essentially, this baseless argument means that, for the Co-Prosecutors, the principle of legality does not apply to modes of liability.[94] However, the Supreme Court has clearly specified that "*it applies equally to offences as well as to forms of responsibility that are charged against an individual accused*".[95]

91. The Co-Prosecutors go further in asserting that "*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*".[96] Still, the principle of legality should not be respected any less concerning international crimes than with respect to domestic crimes. Moreover, the case law cited in support by the Co-Prosecutors concerns crimes and not modes of liability. This jurisprudence does not apply to the latter.

92. Finally, contrary to what the Co-Prosecutors assert, this was not a matter of "*gradual clarification*" of a rule of criminal liability.[97] It concerns the creation of an entirely new rule that

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[91] *Duch* Appeal Judgement, para. 97 (emphasis added).
[92] *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement, 22 March 2006 ("Stakić Appeal Judgement"), para. 103.
[93] Appeal Brief, para. 16 (emphasis added).
[94] Appeal Brief, paras. 16-18 ("*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* ", para. 17).
[95] *Duch* Appeal Judgement, para. 91 (emphasis added).
[96] Appeal Brief, paras. 19-20.
[97] Appeal Brief, para. 18.

did not exist in the relevant law at the time. The Co-Prosecutors therefore request the Supreme Court to act as a lawmaker and to do so retroactively.

B. Impossibility for the accused to have access to and to foresee JCE III in 1975

93. In the final analysis, the Co-Prosecutors have not submitted any ground on the basis of which a so-called JCE III prohibition may be considered as having been foreseeable and accessible to the accused at the time of the facts charged. The reason for this failure is obvious: such a ground does not exist.

94. If decades later and despite all the resources at their disposal, the judges of the Pre-Trial Chamber and of the Chamber (professional jurists trained in this area) cannot determine that JCE III existed in 1975, how could the accused have done so? How and where could the accused have had access to the so-called "precedents" of *Tadić*? How could they have foreseen their relevance? These questions answer themselves.

C. Conclusion

95. Even on the assumption that their "appeal" is admissible and even assuming that JCE III existed in customary international law at the time of the facts charged, the Co-Prosecutors have not demonstrated that JCE III was foreseeable and accessible to the accused at the time. Accordingly, the Co-Prosecutors have, in any event, failed to demonstrate that the applicability of JCE III was consistent with the principle of legality.

FOR THESE REASONS

96. The Defence for Mr KHIEU Samphân request the Supreme Court Chamber:

- to DECLARE the Co-Prosecutors' appeal inadmissible;
- alternatively, to REJECT the Co-Prosecutors' appeal.

	Mr KONG Sam Onn	Phnom Penh	
	Ms Anta GUISSÉ	Phnom Penh	
	Mr Arthur VERCKEN	Paris	

GLOSSARY OF ABBREVIATIONS USED

ECCC	Extraordinary Chambers in the Courts of Cambodia
Chamber	Trial Chamber (of the ECCC)
Supreme Court	Supreme Court Chamber (of the ECCC)
JCE	Joint criminal enterprise
Judgement	Judgement in Case 002/01
Para. (or §)	Paragraph
IMT	International Military Tribunal (of Nuremberg)
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
STL	Special Tribunal for Lebanon
SCSL	Special Court for Sierra Leone