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# CASE 003 DEFENCE SUBMISSION IN INTERVENTION OR *AMICUS CURIAE BRIEF* ON JCE III APPLICABILITY

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# CASE 003 DEFENCE SUBMISSION IN INTERVENTION OR *AMICUS CURIAE* BRIEF ON JCE III APPLICABILITY

> ***"[T]wo rival theories – joint criminal enterprise and co-perpetratorship – hold sway in major parts of the world, but not generally; neither is therefore entitled to be regarded as customary international law."***[1]

The Case 003 Defence, pursuant to Rule 33 of the ECCC Internal Rules ("Rules"), hereby submits this brief on the applicability of joint criminal enterprise ("JCE") III liability at the ECCC and requests leave to participate in any oral arguments on this issue. Although the Case 003 Defence finds no form of JCE liability to be applicable, the focus of this brief is on JCE III, the form of liability the Co-Prosecutors have requested the Supreme Court Chamber to declare applicable.[2] For good reason, there is an overwhelming body of academic opinion highly critical of JCE III liability, in particular out of concerns relating to the principle of individual culpability. Commentators from a wide-range of legal traditions have criticized JCE III liability for attenuating the link to the underlying crime, essentially basing liability on membership in a group pursuing a JCE.[3] This reflects a virtually unanimous critical stance, rarely seen in international criminal law, which can only be explained by the profound discomfort created by this mode of liability because of its deeply unfair and unjust imputation of criminal results which fall entirely outside of the respective Accused's control.

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[1] Mohamed Shahabuddeen, *Judicial Creativity and Joint Criminal Enterprise*, *in* JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 202-03 (Oxford University Press, 2010).

[2] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Co-Prosecutors' Appeal Against the Judgment of the Trial Chamber in Case 002/01, 28 November 2014, F11 ("OCP Appeal").

[3] Through JCE III liability, an Accused can be found guilty of certain crimes even though he never had the requisite intent to commit such crimes and even though they were committed outside the common plan and by persons that he may have had no control over. Even though the Accused did not personally perpetrate the crime and never possessed the requisite intent that it be committed, he can be held liable. Therefore, he is being punished for his *association* with the perpetrators of the crime. *See*, *e.g.*, Mohamed Elewa Badar, *"Just Convict Everyone!" – Joint Perpetration: From* Tadić *to* Stakić *and Back Again*, 6 INT'L CRIM. L. REV. 293, 301 (2006); Shane Darcy, *An Effective Measure of Bringing Justice?: The Joint Criminal Enterprise Doctrine of the International Criminal Tribunal for the Former Yugoslavia*, 20 AM. U. INT'L L. REV. 153, 188-89 (2004); Kai Ambos, *Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" Dated 8 August 2008*, 20 CRIM. L.F. 353, 369-74 (2009); George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 550 (2005); Ciara Damgaard, *The Joint Criminal Enterprise Doctrine: A "Monster Theory of Liability" or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?*, *in* INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES 129, 238 (Springer, 2008); MIA SWART, JUDGES AND LAWMAKING AT THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA (2006), p. 221, *available at* https://openaccess.leidenuniv.nl/bitstream/handle/1887/5434/Thesis.pdf;jsessionid=D37584BB9AC39C7FA17CC5602223A5EA?sequence=1. *See also* Michael G. Karnavas, *Joint Criminal Enterprise at the ECCC: A Critical Analysis of Two Divergent Commentaries on the Pre-Trial Chamber's Decision against the Application of JCE*, 21 CRIM. L. F. 445 (2010).

## I. SUMMARY OF CASE 003 POSITION

1. The principle of *nullum crimen sine lege* prevents the application of JCE at the ECCC. No form of JCE liability existed in customary international law in 1975-79, nor does it today. International treaties do not support JCE III liability. World War II decisions do not support JCE III liability. Widespread and consistent state practice does not support JCE III liability. Furthermore, JCE liability cannot be applied at the ECCC since: **a**. it is not provided for in the Establishment Law; **b**. its application would not have been foreseeable to the Suspects and Accused at the ECCC; and **c**. it is not currently customary international law. Applying JCE III to specific intent crimes is additionally problematic since it effectively nullifies the specific intent requirement that makes these crimes unique.

2. The ICTY *Tadić* Appeals Chamber created JCE liability in 1999, claiming that it was based in customary international law.[4] Judge Shahabuddeen, the Presiding Judge of the *Tadić* Appeals Chamber, later admitted that this was "an error":

> Joint criminal enterprise has roots in the common law and co-perpetratorship has roots in the civil law. Neither, considered with the problem of intent, can claim the status of customary international law. It is recognized that universality of support is not needed for the development of customary international law; generality approaching universality will do, depending on the particular situation. But in this case such generality of support is lacking: each of the two theories is supported by a considerable part of the world. That is not consistent with either theory being regarded as customary international law.[5]

3. Although Judge Shahabuddeen recognizes that JCE III was not a part of customary international law, he argues that it is nonetheless acceptable to apply it through a process of "judicial creativity." He argues that judicial creativity may be resorted to whenever "there would be an intolerable gap in the law and in the capacity of the tribunal to deliver that justice which it was established to give."[6]

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[4] *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), paras. 187-229.
[5] Mohamed Shahabuddeen, *Judicial Creativity and Joint Criminal Enterprise*, *in* JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 188 (Shane Darcy & Joseph Powderly, eds., Oxford University Press, 2010). For the reference to this being "an error", *see* p. 202-03.
[6] *Id.*, p. 186. Professor Robinson questions this approach: "The proposition [that an Accused would have notice of "foreseeable judicial innovation"] has doctrinal support, but does it make sense? In light of past trends of ambitious interpretation in ICL, does a 'foreseeable innovation' test *exclude* anything?" Darryl Robinson, *Legality and Our Contradictory Commitments: Some Thoughts About How We Think*, 103 AM. SOC'Y INT'L L. PROC. 104, 104 (2009).

4. Adherence to the principle of *nullum crimen sine lege* cannot be abandoned through "judicial creativity." Judges are not legislators in robes.[7] "[T]he restraining function of the international principle of legality is of particular importance in international criminal law as it prevents international or hybrid tribunals and courts from unilaterally exceeding their jurisdiction by providing clear limitations on what is criminal."[8] ICTY judges were *not* elected to create law or contort the interpretation of jurisprudence to achieve political and *ad hoc* results – however noble or wanting.

5. Furthermore, recourse to "judicial creativity" is unwarranted even under Judge Shahabuddeen's test.[9] There is no "intolerable gap" in the applicable law that requires the application of JCE III. Were this the case, most of the world's legal systems (which do not apply JCE III liability) would have recognized the existence of this lacuna and would have addressed it by creating new laws. Instead, persons who intended crimes to be committed may be prosecuted under other forms of liability specifically set out in the Establishment Law,[10] while persons who did not intend crimes but merely foresaw the possibility of their commission should not be held liable for those crimes.

## II. ARGUMENT

### A. *Nullum Crimen Sine Lege*

6. The principle of *nullum crimen sine lege*[11] dictates that no individual may be prosecuted unless, at the time of the offense, the conduct was specified in law to be a crime. This

[7] "The Judge is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness." Benjamin Cardozo, *The Nature of the Judicial Process* 141 (Yale University Press, 1921), *available at* http://www.constitution.org/cmt/cardozo/jud_proc.htm.

[8] *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-SC, Appeal Judgement, 3 February 2012, F28, para. 90.

[9] *See* Nina H.B. Jørgensen, *On Being 'Concerned' in a Crime: Embryonic Joint Criminal Enterprise?*, *in* HONG KONG'S WAR CRIMES TRIALS 167 (Suzannah Linton, ed., Oxford University Press, 2013): "Judge Mohamed Shahabuddeen, one of the ICTY Appeals Chamber judges in *Tadić*, has written that as an exercise in judicial creativity he prefers JCE over co-perpetration, considering that one or the other theory is needed if the ICTY is to fulfil its mission of administering international criminal justice. He notes that, unlike co-perpetration, which 'restricts criminal liability to cases in which there was control', JCE 'does not know of that limitation and accordingly provides room for growth'. The prospect of growth of the capability of 'indefinite extension' is precisely what concerns critics of the JCE concept and tests the principle of legality."

[10] *See Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, 29 May 2013, p. 173; *Prosecutor v. Tolimir*, IT-05-88/2-T, Judgement, Separate and Concurring Opinion of Judge Antoine Kesia-Mbe Mindua, 12 December 2012, para. 6, for views from two ICTY Judges explaining that it is better to use the forms of liability actually expressed in the ICTY Statute.

[11] In particular, the principle of *nullum crimen sine lege* in civil law countries articulates four notions: i) criminal offenses may only be provided in written law ("*nullum crimen sine lege scripta"*); ii) criminal offenses must be provided for through specific legislation ("*nullum crimen sine lege stricta"*); iii) criminal offenses must be provided for in prior law ("*nullum crimen sine proevia lege*"); and iv) criminal offenses shall not be construed by analogy. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 141-42 (Oxford University Press 2003).

principle is enshrined in the Universal Declaration of Human Rights[12] and in the International Covenant for Civil and Political Rights ("ICCPR"),[13] whose standards the ECCC must fully respect.[14] It is also provided for in the 1956 Cambodian Penal Code.[15] This principle is "the very basis of the rule of law."[16] The purpose of the principle of *nullum crimen sine lege* is to protect individual rights, *inter alia* by "protect[ing] the individual against arbitrary exercise of political or judicial power by preventing legislative targeting or conviction of specific persons without stating legal rules in advance."[17] It applies "equally to offences as well as to forms of responsibility that are charged against an individual accused."[18] To respect the principle of *nullum crimen sine lege*, the ECCC must only apply legal concepts that existed in applicable law in 1975-79.

7. The OCP claims that application of JCE III liability does not violate the principle of *nullum crimen sine lege* because the *conduct* required for JCE III is identical to that required for JCE I (the application of which has been found by the Pre-Trial and Trial Chambers not to violate the principle of *nullum crimen sine lege*).[19] Absurd. The principle of *nullum crimen sine lege* requires that liability be *foreseeable*. A person may foresee that his conduct might make him liable for some crimes while failing to foresee that this same conduct could make him liable for other crimes, particularly where he never even intended that the other crimes occur. The Pre-Trial Chamber correctly found that the Cambodian law on co-perpetration would not put an accused on notice that he could be

[12] Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess. at 71, U.N. Doc. A/810 (1948).
[13] Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49, Art. 15.
[14] Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia, adopted by the National Assembly on 4 March 1999, Art. 31; Establishment Law, Art. 33 new; Agreement, Art. 13(1).
[15] 1956 Cambodian Penal Code, Art. 6. This strict prohibition of retroactive criminal legislation found in the 1956 Penal Code was also established by the Paris Peace Accords that led to the adoption of the 1993 Cambodian Constitution. *See* Principles for a New Constitution for Cambodia, to the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, 23 October 1991, Annex 5, Principle 2.
[16] *Prosecutor v. Fofana & Kondewa*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, Dissenting Opinion of Justice Robertson, 31 May 2004, para. 14.
[17] *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-SC, Appeal Judgement, 3 February 2012, F28, para. 90.
[18] *Id.*, para. 91.
[19] OCP Appeal, paras. 13-22.

held liable for crimes falling outside a criminal plan, since such liability has no underpinning in Cambodian law.[20]

8. The OCP claims that the offense or mode of liability does not need to have existed with the same precise definition at the time of occurrence, giving the example of an accused being held liable for rape for engaging in conduct that might have only made him aware that he would be liable for sexual assault.[21]

9. This example is inapposite. In the example, the accused *knew* his conduct would make him liable for a crime, he simply did not know the legal characterization of the crime for which he might be held liable. In contrast, an accused held liable through JCE III would not even be aware that he could be liable for crimes that were outside the common plan and that he never intended; such liability would not be *foreseeable*. The gravity of the crimes does not make such liability more foreseeable, as the OCP claims,[22] since the issue here is with the form of liability applied. A person could be aware that certain conduct exists as a crime without having any idea that he could be held liable for such a crime if he never intended the crime and did not carry it out.

10. The OCP also errs in claiming that for the purposes of the *nullum crimen sine lege* principle it is unnecessary to consider whether JCE III liability existed in customary international law at the relevant time.[23] One of the requirements of *nullum crimen sine lege* is that the crime or form of liability *existed* at the relevant time; it must be provided for in applicable law.[24] It is not sufficient to consider whether a different form of liability (JCE I) existed at the time. JCE III must have existed in applicable law for the principle of *nullum crimen sine lege* to be satisfied.

### B. JCE is not a part of customary international law

#### 1. Identification of customary international law

[20] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC38), Decision on the Appeals of the Co-Investigative Judges[’] on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9 (“PTC JCE Decision”), para. 87.
[21] OCP Appeal, para. 17.
[22] *Id.*, para. 19.
[23] *Id.*, para. 22.
[24] PTC JCE Decision, para. 43.

11. Customary international law can only be created through (a) general and consistent State practice which is an expression of (b) *opinio juris*.[25] State practice should be "extensive and virtually uniform in the sense of the provision invoked."[26] As for *opinio juris,* the International Court of Justice has held that States "must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[27]

12. The OCP claims that it is not necessary that a majority of states engage in a practice for that practice to be considered customary international law. It claims that the practice of less than a dozen states may suffice provided there is no evidence of significant dissent.[28] This may be true in situations where practice can only be carried out by a limited number of states (for example, to ascertain customary international law concerning space travel one need only consider the practice of those states that have performed space travel). However, *all* states have criminal provisions. As shown in Argument B(4) *infra*, state practice varies considerably when it comes to holding individuals liable for crimes that were unintended and fall outside a common plan. It would be manifestly insufficient to find that JCE III exists in customary international law based on the practice of less than a dozen states.

### 2. International treaties do not support the existence of JCE III

13. There is debate as to the extent to which treaties can be used as a source in the formation of customary international law. Treaties can codify customary international law that already exists, thus serving as evidence of customary international law.[29] However, there are no international treaties that demonstrate the existence of JCE III in customary international law. As noted by the Pre-Trial Chamber, the Nuremberg Charter and Control

[25] Professors Fletcher and Ohlin explain that "Customary law begins as a customary practice and then ripens into a binding rule when those who follow the rule begin to regard the practice as binding on them." George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 556 (2005). It must be noted that "[i]t is notoriously difficult to establish sufficient consensus to validate a rule as customary international law." *Id.* "*[O]pinio juris* is definitely not equivalent to simple 'legal opinions' either by judges or by legal experts in their collective works. In both cases, these 'opinions' do not amount to international custom in the meaning of Article 38(1)(b) of the ICJ Statute." Vladimir-Djuro Degan, *On the Sources of International Criminal Law*, 4(1) CHINESE J. INT'L L. 45, 79 (2005).
[26] *North Sea Continental Shelf Cases*, ICJ Reports (1969), para. 74.
[27] *Nicaragua v. United States*, (Merits), ICJ Reports (1986), para. 207.
[28] OCP Appeal, para. 47.
[29] Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 161-62 (2005).

Council Law #10 do not specifically offer support for JCE III,[30] nor can these instruments be considered to have codified customary international law in this area as it existed at the time. Common plan liability was formed from the Anglo-Saxon concept of "conspiracy,"[31] which was not known to civil law jurisdictions and was considered "barbarous" by the French.[32]

14. The *Tadić* Appeals Chamber relied upon only two treaties as evidence of JCE III's status in customary international law: the ICC Statute and the International Convention on the Suppression of Terrorist Bombing ("ICSTB").[33] The ICC Statute did not codify JCE liability, and indeed the ICC has rejected calls to apply JCE liability, finding that JCE liability is not provided for in the Statute.[34] The language in the ICC Statute mirrors and was taken from Article 2(3)(c) of the ICSTB.[35] Further, and more importantly, these statutes, as the Pre-Trial Chamber recognized,[36] cannot provide evidence of customary international law in 1975-79 since they were not in existence until much later.

### 3. World War II cases do not support the existence of JCE III

15. The judgements emanating from the post-World War II tribunals generally lack detailed legal reasoning, leaving one to infer the form of liability applied by the outcome of the case. They also come from an extremely limited number of jurisdictions, far too few to demonstrate the widespread and consistent state practice necessary for customary

[30] PTC JCE Decision, para. 78.
[31] Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. INT'L CRIM. JUST. 91, 93 (2007).
[32] Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 115 (2005): "During much of the discussion, the Russians and French seemed unable to grasp all the implications of the concept; when they finally did grasp it, they were genuinely shocked. The French viewed it entirely as a barbarous legal mechanism unworthy of modern law, while the Soviets seemed to have shaken their head in wonderment – a reaction, some cynics may believe, prompted by envy."
[33] *Tadić* Appeal Judgement, paras. 220-23.
[34] The *Lubanga* Pre-Trial Chamber, then presided by former ICTY President Judge Claude Jorda, "at the outset consciously departs from the ICTY's unique approach to resolving the same problem of shared responsibility" when it "rejected an explicit invitation by one of the victims' counsel to incorporate the concept of JCE into the ICC Statute's notion of 'commits such a crime … jointly with another….'" Thomas Weigend, *Intent, Mistake of Law and Co-perpetration in the* Lubanga *Decision on Conformation of Charges*, 6 J. INT'L CRIM. JUST. 471, 477-78 (2008).
[35] ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 145 (Oxford University Press, 2012). *See also* Kai Ambos, *Article 25: Individual Criminal Responsibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 475, 483 (Otto Triffterer ed., 1999).
[36] PTC JCE Decision, para. 78.

international law.[37] Furthermore, these decisions are not necessarily models to be emulated. They have been criticized for employing victor's justice rather than complying with customary international law.[38]

16. German Judge Otto Kranzbühler, who defended one of the Accused at the International Military Tribunal at Nuremberg ("IMT"), offered the following criticism:

> The rules that were applied in this trial were not, as is generally assumed, rules of international law… 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.[39]

17. The British World War II approach to individual criminal responsibility was particularly unworthy of emulation. The British charged the accused with being "concerned in" various crimes; a "grotesquely all-encompassing" concept that, according to Professor Linton, could encompass liability ranging from command responsibility to negligence to direct perpetration.[40] Professor Jørgensen studied the British Hong Kong cases with a view to assessing whether they provide support for *Tadić* or for the Pre-Trial Chamber's reappraisal of JCE's status in customary international law. She found that the phrase "concerned in" appears to have been used primarily to indicate that an accused was

[37] The decisions relied upon by the OCP to support JCE III come from the IMT and United States, British, and Dutch military tribunals.

[38] *See* RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL 16 (1971). "[W]here the present state of international law was unclear or unsatisfactory … then the Big Four would codify international law in such a way that German and Japanese acts became criminal and individual enemy leaders became accountable." *See also* Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 486-87 (2001). "It does not require deep immersion into the study of decisions rendered by post World War II military courts to realize that they are not the most obvious wellspring from which one would expect the demiurges of modern international law to drink for inspiration. That these courts faced unsavory individuals charged with horrendous crimes should not blind us to the fact that the legal standards they crafted (especially in the Far East) were deficient in terms of our current understanding of criminal law with humanitarian aspirations. As a well-known international scholar remarked long ago, these standards were frequently such as 'to make a lawyer wish to forget all about them at the earliest possible moment.' Their general characteristic, most relevant for present purposes, was an unabashed severity that can rightly be regarded as the principal source of the escalations of culpability inherent in imputed command responsibility."

[39] Otto Kranzbühler, *Nuremberg Eighteen Years Afterwards*, *in* PERSPECTIVES ON THE NUREMBERG TRIAL 436 (Guénaël Mettraux ed., Oxford University Press, 2008). *See also* Curt Hessler, *Command Responsibility for War Crimes*, 82 YALE L.J. 1274, 1275 (1972-1973). "Most 'decisions' were attempts by a trial forum to marshal *all* the possible legal, moral, and evidentiary support for its verdict."

[40] Suzannah Linton, *Rediscovering the War Crimes Trials in Hong Kong*, 1946-48, 13 MELBOURNE J. INT'L L. 284, 315-16 (2012).

implicated in crimes for which he was not necessarily exclusively liable, rather than crimes involving a joint venture/common plan.[41] She concluded that being "concerned in" was *not* a form of "embryonic JCE."[42]

18. The *Tadić* Appeals Chamber relied on the *Essen Lynching* and *Borkum Island* cases, as well as a number of unpublished, handwritten Italian decisions that are unavailable in English.[43] The OCP claims an additional eight decisions support the existence of JCE III liability in customary international law. Apart from these decisions, the Appeals Chamber of the Special Tribunal for Lebanon ("STL") (headed by Judge Cassese who drafted the *Tadić* Appeals Judgement) has found that an additional three cases support JCE III.[44] Each of these decisions, apart from the Italian decisions,[45] is considered below.

19. *Essen Lynching*: This was a case tried by a British military court in Essen. It involved the lynching of three British prisoners of war ("POWs") who were being taken for interrogation by the German army. An army captain instructed a soldier escorting the POWs not to interfere if civilians along the way molested them, stating that they would or ought to be shot. The POWs were beaten and killed. The army captain, the escort, and five German civilians were charged with being "concerned in" their killing.[46] The OCP and *Tadić* Appeals Chamber inferred that JCE III type liability was applied.[47] This is not the only inference available based on the evidence, as the Pre-Trial Chamber, Trial Chamber, and legal scholars have recognized.[48] The Court might have instead concluded that each of the Accused intended to kill the POWs.[49]

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[41] Nina H.B. Jørgensen, *On Being 'Concerned' in a Crime: Embryonic Joint Criminal Enterprise?*, *in* HONG KONG'S WAR CRIMES TRIALS 156 (Suzannah Linton, ed., Oxford University Press, 2013).
[42] *Id.*, p. 163.
[43] *Tadić* Appeal Judgement, paras. 205-19. Certain of these cases have been summarized in 5 J. INT'L CRIM. JUST. 230 (2007).
[44] STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, n. 355.
[45] As pointed out by Professor Dr. Kai Ambos concerning the Italian cases, "no international, but exclusively the national law (Art. 116 [1] of the Italian *Codice Penale*) was applied. In addition, this case law is not uniform, since the Italian Supreme Court (*Corte Suprema di Cassazione*) has adopted two dissenting decisions." Kai Ambos, *Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch" Dated 8 August 2008*, 20 CRIM. L.F. 353, 386 (2009). The Pre-Trial Chamber found that these decisions do not provide proper precedent for determining customary international law. PTC JCE Decision, para. 82. Domestic practice will be examined in Argument B(4) *infra.*
[46] *See* LAW REPORTS OF TRIALS OF WAR CRIMINALS, SELECTED AND PREPARED BY THE UNITED NATIONS WAR CRIMES COMMISSION, VOL. I, 91 (1947); Transcript, *in* PUBLIC RECORD OFFICE, London, WO 235/58, 65-68.
[47] OCP Appeal, para. 33; *Tadić* Appeal Judgement, para. 209.
[48] *See, e.g.*, PTC JCE Decision, para. 81; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, E100/6 ("TC JCE Decision"), para. 31; Kai

20. *Borkum Island*: In this case, a US aircraft was shot down over German territory and its crew was subjected to a death march. The crewmembers were escorted by German soldiers who encouraged civilians to beat them, and they were eventually shot and killed. The accused were charged with war crimes, in particular with "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in the killing' of … airmen and with 'wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in assaults upon the airmen'."[50] In the absence of a reasoned verdict (the case was decided by military officers who lacked legal training),[51] the OCP and *Tadić* inferred that all the accused who were found guilty were held responsible for pursuing a criminal common design (the intent being to assault the airmen), but that some of them were also found guilty of murder because they were in a position to have predicted that the assault would lead to the killing of the airmen.[52] This is not the only inference available based on the evidence, as the Pre-Trial Chamber, Trial Chamber, and legal scholars have recognized.[53] The Court may have instead concluded that the accused actually possessed the intent to kill rather than to have merely foreseen that possible outcome.

21. IMT Judgement: the OCP alleges that it is apparent that JCE III type liability was applied in the IMT Judgement because the convictions did not specify the particular crimes of which the accused were convicted; they only specified "war crimes" or "crimes against humanity." The OCP assumes that each accused was therefore convicted of *all* possible

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Ambos, *Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" Dated 8 August* 2008, CRIM. L.F. 353, 385 (2009).

[49] *Tadić* was also incorrect to state that the Accused were found guilty of "murder." The Court did not find the Accused guilty of "murder", but rather: "The … charge alleged that the accused were concerned in the killing of the three British airmen. That was the wording of the charge, but, the Prosecutor added, for the purpose of this trial he would invite the Court to take the view that this was a charge of murder and of nothing other than murder. The allegation would be 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. This proposition was not accepted by the Court. The legal member pointed out that this was not a trial under English Law. Murder was the killing of a person under the King's peace. The charge here was not murder and if Counsel spoke of murder he was not using the word in the strict legal sense, but in the popular sense." LAW REPORTS OF TRIALS OF WAR CRIMINALS, SELECTED AND PREPARED BY THE UNITED NATIONS WAR CRIMES COMMISSION, VOL. I, 91 (1947).

[50] *Tadić* Appeal Judgement, para. 210, quoting from *United States v. Goebell et al.*, Case No. 12-489, General Military Government Court at Ludwigsburg, Germany, 6 February – 21 March 1946, Charge Sheet, in U.S. NATIONAL ARCHIVES MICROFILM PUBLICATIONS, I.

[51] *See* Maximilian Koessler, *Borkum Island Tragedy and Trial*, 47 J. CRIM. L & CRIMINOLOGY 183, 190 (1956).

[52] OCP Appeal, para. 32; *Tadić* Appeal Judgement, para. 210.

[53] *See, e.g.*, PTC JCE Decision, paras. 79-80; TC JCE Decision, para. 30; Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 75 fn. 10 (2007).

crimes that resulted from the Nazi criminal enterprise.[54] This assumption is unsupported. It is just as likely that the Judgement failed to specify the particular war crimes and crimes against humanity of which each accused were convicted. The Judgement is deficient in failing to specify the particular crimes, just as it is deficient in failing to specify the particular mode of liability used for each accused. Furthermore, one of the IMT Judges, Henri Donnedieu de Vabres, in his later writings explained that a "common plan" in Article 6 of the IMT Charter involved a "meeting of intentions" between the participant in question and the physical perpetrator.[55] This does not equate to JCE III.

22. IMT Judgement, *Sauckel*: The OCP points in particular to the conviction of Sauckel.[56] The IMT found that Sauckel played a key role in the use of forced labor and cites Sauckel's assertions that he had not intended that the laborers be treated inhumanely. The OCP therefore concludes that the IMT convicted Sauckel of crimes he did not intend.[57] However, it appears that the IMT found that Sauckel *did* intend the laborer's treatment (his *motive* for this intention being irrelevant). The Judgement states that "[i]t does not appear that [Sauckel] advocated brutality for its own sake, or was an advocate of any programme such as Himmler's plan for extermination through work. His attitude was thus expressed in a regulation: 'All the men must be fed, sheltered and treated in such a way as to exploit them to the highest possible extent at the lowest conceivable degree of expenditure.'"[58] It also states that Sauckel "was aware of the ruthless methods being used to obtain labourers and vigorously supported them."[59] Alternatively, since the Judgement does not specify individual war crimes or crimes against humanity, it is unknown of which particular crimes Sauckel was convicted. The IMT may have found him guilty of the crime against humanity of enslavement[60] or the war crime of compelling prisoners of war to serve in the forces of a hostile power, rather than the crime of inhumane treatment. The Judgement states that the laborers were assigned work directly related to military

[54] OCP Appeal, para. 27.
[55] Henri Donnedieu de Vabres, *The Nuremberg Trial and the Modern Principles of International Criminal Law*, *in* PERSPECTIVES ON THE NUREMBERG TRIAL 213, 250 (Guénaël Mettraux ed., Oxford University Press, 2008).
[56] *Id.*, para. 28.
[57] *Id.*, para. 29.
[58] Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Judgement, 1946, p. 515.
[59] *Id.*
[60] Indeed, the Indictment refers specifically to Sauckel's involvement in "forcing the inhabitants of occupied countries to work as slave laborers in occupied countries and in Germany" rather than focusing on the treatment of the slave labor. *Id.*, p. 73.

operations, in violation of the Geneva Convention. It points out specifically that Sauckel was at a meeting where this was discussed.[61]

23. IMT Judgement, *Speer*: As with Sauckel, the OCP alleges that Speer was convicted via JCE III type liability because he was not directly concerned with the cruelty of the slave labor program but was "convicted of the abuses inflicted on workers" because he was aware of the existence of the cruelty.[62] It is speculative to assume that Speer was convicted not only of enslavement but also of abuses inflicted on the workers. The Judgement does not state this. The Judgement states that "[t]he evidence introduced against Speer in Counts Three and Four relates entirely to his participation in the slave labour programme."[63] Alternately, the IMT may have found that Speer *intended* the abuses inflicted on the laborers despite not being directly concerned in it.

24. *Hans Renoth and Three Others*: This case is similar to Essen Lynching in that it involved four accused charged with being "concerned in the killing" of a British pilot who crashed and was arrested. The accused Renoth arrested the pilot, then all four beat the pilot before Renoth shot him. All four were found guilty of being concerned in the killing.[64] The OCP concludes that the Court convicted the three men via JCE III because they could have foreseen that the beating would lead to the killing.[65] This is speculative. According to the "Notes on the Case," the case for the prosecution was that there was a common design of which all four were aware, and that all four acted in furtherance of the common design.[66] It appears that the Court accepted this theory. There is no evidence that the Court found that the three men, while beating the pilot, *did not intend* his death.

25. *Pohl*: In this case, Pohl and 17 other employees of the WVHA, the Economic and Administrative Department of the Schutzstaffel ("SS") that ran the concentration and extermination camps, were tried for war crimes and crimes against humanity. The

[61] *Id.*, at 515.
[62] OCP Appeal, para. 30.
[63] Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Judgement, 1946, p. 521.
[64] LAW REPORTS OF TRIALS OF WAR CRIMINALS, SELECTED AND PREPARED BY THE UNITED NATIONS WAR CRIMES COMMISSION, VOL. XI, p. 76 (1949).
[65] OCP Appeal, para. 34.
[66] LAW REPORTS OF TRIALS OF WAR CRIMINALS, SELECTED AND PREPARED BY THE UNITED NATIONS WAR CRIMES COMMISSION, VOL. XI, p. 76 (1949).

defendant Hohberg was an auditor employed by the WVHA.[67] The OCP asserts that JCE III type liability was applied because Hohberg was held liable for SS excesses that were a foreseeable part of the common plan,[68] but the Court said nothing about holding Hohberg liable for SS excesses outside of a common plan. The Court found that Hohberg's role went "far beyond" that of a simple auditor and that he was in charge of coordinating and directing at the top level. The Court further found that he was "definitely associated with concentration camps."[69] It found that Hohberg knew the WVHA used concentration camp labor and knew how the inmates were treated. He visited many of the concentration camps. Although Hohberg claimed he left the WVHA because of his disapproval with its activities, this was contested[70] and the Court found that he continued to work for Pohl (head of the WVHA) and to be involved in SS economic matters. It further found that while working for the SS, "it is not apparent that he did anything to slow up the juggernaut of oppression over concentration camp inmates."[71] The prosecution had alleged that Hohberg, *inter alia*, "acting pursuant to a common design, unlawfully, wilfully, and knowingly did conspire and agree together, and with each other, and with divers[e] other persons, to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, Article II"[72] and the Court appears to have agreed. There is no indication that Hohberg was held responsible for crimes outside of this common plan.

26. The OCP alleges that in this same case, the defendant Baier was convicted through JCE III type liability because he took part in the slave labor program and persecution and other crimes were a foreseeable consequence of the program.[73] Again, the Court made no such finding. It found that Baier knew about the concentration camps and was "as much involved as Hohberg in crimes against humanity arising out of his activities…."[74] It found that Baier was aware that the prisoners were unpaid for their labor and that they worked long hours. It stated: "That one as close as Baier to concentration camp activities could not know the real state of affairs is simply incredible unless it can be shown that

[67] TRIALS OF WAR CRIMINAL BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, VOL. V, p. 1040 (1950).
[68] OCP Appeal, para. 35.
[69] TRIALS OF WAR CRIMINAL BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, VOL. V, p. 1040 (1950).
[70] *Id.*, p. 857.
[71] *Id.*, p. 1042.
[72] *Id.*, p. 961.
[73] OCP Appeal, para. 36.
[74] TRIALS OF WAR CRIMINAL BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, VOL. V, p. 1042 (1950).

Baier is mentally deficient."[75] The Court did not find that Baier was liable for crimes outside a common plan that were merely foreseeable, but that "the systematic persecution, impoverishment, confinement, and eventual slaying of these persecutees could not have been possible without the vast machinery of the SS, of which the WVHA was one of the most important parts."[76] In other words, Baier knew of this common plan and through his work with the WVHA contributed to it. There is no evidence that the prosecution alleged or that the Court accepted that the common plan was actually narrower than this and that persecution and other crimes fell outside the common plan.

27. *RuSHA*: This case involved the prosecution of leaders of four organizations responsible for racial crimes against foreigners, including taking their infants away, forcing them to join the German army, and plundering their property. The OCP asserts that the accused Hildebrandt was found liable for deaths by hanging because he ordered "special treatment" for foreigners who had sexual intercourse with German women. The OCP concludes that Hildebrandt was held liable for hangings that he did not intend but that were reasonably foreseeable to him.[77] The OCP's analysis is flawed. The hangings were clearly not crimes that fell outside the common plan. Count One alleged a "systematic program of genocide" carried out by kidnapping of alien children, abortions of Eastern workers, taking away infants, punishment for sexual intercourse with Germans, hampering the reproduction of enemy nationals, forced evacuations and resettlement, and other means. In the section of the judgement in which the Court determined the participation or nonparticipation of each *organization* in each of the above acts,[78] the Court discussed the meaning of "special treatment" (under the heading "Punishment for Sexual Intercourse with Germans") and whether Hildebrandt, as chief of RuSHA, was aware of the "special treatment" and knew what it entailed. When turning to the individual accused's criminal responsibility, the Court found that:

> [b]y an abundance of evidence, it has been established beyond a reasonable doubt that the defendant Hildebrandt actively participated in and is criminally responsible for the following criminal activities: the kidnaping of alien children; forcible abortions on Eastern workers; taking away infants of Eastern workers; the

[75] *Id.*, p. 1045.
[76] *Id.*, p. 1046.
[77] OCP Appeal, para. 37.
[78] TRIALS OF WAR CRIMINAL BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, VOL. V, p. 102 (1950): "We shall now deal with the specific crimes charged in the indictment, and the participation or nonparticipation of each organization in the crimes charged; and, in part, we shall discuss the role played by certain defendants in the Germanization program and in connection with particular crimes."

> illegal and unjust punishment of foreign nationals for sexual intercourse with Germans; hampering the reproduction of enemy nationals; the forced evacuation and resettlement of populations; the forced Germanization of enemy nationals; and the utilization of the enemy nationals as slave labor.[79]

The Court did not specifically find Hildebrandt liable for deaths by hanging. Even if it had, it would appear that the Court was satisfied that Hildebrandt had intended such deaths (rather than merely foreseeing them) since it found that Hildebrandt admitted that he knew that "special treatment" could mean hanging and that he nonetheless handled "special treatment" cases.[80]

28. It appears from the judgements against some of the other accused in the *RuSHA* case that JCE III type liability was *not* applied. The Court determined that the organizations cooperated in various aspects of Hitler's program.[81] However, the officers of one organization, Lebensborn, were acquitted because the organization "did everything in its power to adequately provide for the children … placed in its care."[82] Had the Lebensborn defendants been tried under JCE III, once it was established that they agreed with the overall criminal objectives to *inter alia* take away infants from foreigners, they would have been responsible for all foreseeable crimes committed by any persons in furtherance of those objectives, including those in the other three organizations.[83]

29. *Einsatzgruppen*: this case involved the prosecution of 24 leaders of SS death squads who were alleged to be responsible for the deaths of more than a million people. The OCP alleges that one of the accused, Franz Six, was held liable through JCE III type liability because he did not take an active part in the murder program but was convicted for all crimes charged, including killings.[84] The fact that Franz Six may not have taken an *active part* in the murder program does not show that JCE III type liability was applied. The Court may have held him liable on the basis of command responsibility, considering that the prosecution alleged in its opening statement:

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[79] *Id.*, p. 161.
[80] *Id.*, p. 120.
[81] "The organizations worked in close harmony and cooperation, as will later be shown in this judgment, for one primary purpose in effecting the ideology and program of Hitler, which may be summed up in one phrase: The two-fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations." *Id.*, p. 90.
[82] *Id.*, p. 163.
[83] The Pre-Trial Chamber considered that this case could provide support for JCE I or II, but not JCE III. *See* PTC JCE Decision, para. 65.
[84] OCP Appeal, para. 38.

> As military commanders, these men were bound by laws well known to all who wear the soldier's uniform. Laws which impose on him who takes command the duty to prevent, within his power, crimes by these in his control.[85]

Alternately, the Court may have found that Franz Six *intended* the murder program, regardless of whether he took an active part in it.

30. *Sch. et al.*: in this case, the accused Sch. was the leader of men who searched victim N's house at night, took N to a police station and to a burning synagogue, where he was mistreated, and then took him back to the police station, where he was shot and kicked. N died four days later. Sch. was present during the events but there is no evidence he was involved in shooting or kicking N. The OCP concludes that JCE III type liability was applied because the Court found that even if Sch. did not intend the crimes he would be held liable for them.[86] The Jury Court found that Sch. intended and accepted that this mistreatment take place and that his very presence at the scene encouraged those mistreating N to continue to do so.[87] It is unclear exactly what form of liability the Jury Court applied, although it appears that it could have been instigation or aiding and abetting. The Supreme Court, reviewing the Jury Court decision, found that it was erroneous to consider that Sch.'s presence alone would make him liable. The Supreme Court found, *inter alia*, that N was in Sch.'s power and that Sch. had a legal obligation to prevent any attack of N, since N was in his custody. It stated: "If the Accused Sch., nonetheless, did have an obligation to prevent the mistreatment of the individual in his protective custody, then the mere failure to do so, contrary to his obligations, would constitute a cause for the result, if he had been able to act; and a sufficient contribution to a crime against humanity would have to be seen in his failure to act, if and to the extent that the other ingredients of the crime were satisfied."[88] This appears to show that the Supreme Court Chamber considered that Sch. could be liable because of his culpable omission since he had an obligation to protect N.

31. *United States v. Gottfried Weiss et al.*: this was a case against 42 officials of the Dachau concentration camp. The *Tadić* Appeals Chamber cited this case in support of JCE II,

[85] TRIALS OF WAR CRIMINAL BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, VOL. IV, p. 52.
[86] OCP Appeal, para. 39.
[87] DECISIONS OF THE SUPREME COURT FOR THE BRITISH ZONE, DECISIONS IN CRIMINAL CASES Vol. II (Berlin, 1950). The version attached by the OCP in its Table of Authority does not contain page numbers. The page cited is at ERN 01041020.
[88] *Id.*, at ERN 01041021.

rather than JCE III,[89] but explained that the case is "really a variant" of JCE I.[90] Although the OCP claims the Judge Advocate who prepared the Review Judgement used language declarative of JCE III liability,[91] it does not appear that JCE III type liability was actually applied. The prosecution had to prove "(1) that there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges (2) that each accused was aware of the system, (3) that each accused, by his conduct 'encouraged, aided and abetted or participated' in enforcing this system."[92] This is not consistent with JCE III. Rather, it is a higher standard than finding that the Accused merely foresaw the commission of crimes that fell *outside* the common purpose.

32. *Shoichi Ikeda*: in this case, Shoichi Ikeda was a Japanese officer in Indonesia who was charged with allowing civilians and soldiers subordinate to him to take a group of women to brothels to force them into prostitution and to be raped, while he knew or ought to have reasonably suspected that these crimes were being committed or would be committed.[93] Although the OCP concludes that JCE III type liability was applied since rape and enforced prostitution were not intended by Shoichi Ikeda but merely foreseeable to him,[94] this appears to be a classic case of command responsibility: the accused was aware of crimes committed by his subordinates, but failed to prevent the crimes or punish the perpetrators. Indeed, the judgement summary states: "the accused is highly culpable, because – as an older senior officer and the main and most influential advisor … he should have obstructed the pressure emanating from the officers' group at the cadets' school to get involved in the establishment of brothels staffed by women and girls from internment camps…. During the trial … he appeared to understand this very well and also to realize that this was mainly where his guilt lay."[95]

33. *United States v. Ulrich & Merkle*: this was another Dachau concentration camp case (which referred to the *United States v. Gottfried Weiss et al.* case as the "Parent case"). Ulrich and Merkle were factory supervisors who employed Dachau concentration camp prisoners at their factories. They were convicted of two counts of violating the laws and

[89] *See Tadić* Appeal Judgement, para. 202
[90] *Id.*, para. 203.
[91] OCP Appeal, para. 40.
[92] LAW REPORTS OF TRIALS OF WAR CRIMINALS, SELECTED AND PREPARED BY THE UNITED NATIONS WAR CRIMES COMMISSION, Vol. XI, p. 13 (1949).
[93] *Queen v. Shoichi Ikeda*, No. 72A/1947, Translated Judgement Summary, 30 March 1948, p. 1.
[94] OCP Appeal, para. 41.
[95] *Queen v. Shoichi Ikeda*, No. 72A/1947, Translated Judgement Summary, 30 March 1948, p. 10.

usages of war due to the mistreatment of the prisoners. The Review Judgement lists the charges, summarizes the evidence, and states that the evidence was sufficient to support the findings and the sentence of the Court. There is no indication that JCE III liability was alleged or applied. Much of the evidence focused on Ulrich's and Merkle's personal participation in the mistreatment of the prisoners. The Review Judgement states that "[b]oth of the accused were shown to have participated in the mass atrocity and the Court was warranted by the evidence [evinced], either in the Parent Case or in this subsequent proceeding, in concluding as to them that they not only participated to a substantial degree, but the nature and extent of their participation was such as to warrant the sentence imposed."[96]

34. *United States v. Wuelfert et al.*: This case, similar to the *Ulrich & Merkle* case, was a Dachau concentration camp case. Those convicted were factory owners or supervised factory work.[97] Again, there is no indication that JCE III liability was alleged or applied. Referring to one of the convicted persons, the Review Judgement states:

> The accused was shown to have participated in the common design to subject civilian nationals and surrendered and unarmed prisoners of war to cruelties and mistreatment. He took the fruits of their labor knowing they were inmates of Dachau, paying only slave labor wages therefor. That he was not shown to have personally inflicted cruelties was probably considered by the Court. Although his desire to co-operate in the common design may not have been strong, it was obviously stronger than other considerations. The findings of guilty are warranted by the evidence.[98]

The fact that the Accused participated in the common design to mistreat the prisoners indicates that JCE III was not applied; it shows that he did not merely foresee their

[96] *United States v. Ulrich & Merkle*, Case No. 000-50-2-17, Deputy Judge Advocate's Office, 7708 War Crimes Group - European Command, Review and Recommendations, 12 June 1947, Reviews of United States Army War Crimes Trials in Europe 1945-1948, p. 11, *available at* http://www.eccc.gov.kh/en/document/court/jurisprudence/15356.

[97] One Accused was acquitted and others were neither served nor tried. The records provide no information about these individuals.

[98] *United States v. Wuelfert et al.*, Case No. 000-50-2-72, Deputy Judge Advocate's Office, 7708 War Crimes Group - European Command, Review and Recommendations, 19 September 1947, Reviews of United States Army War Crimes Trials in Europe 1945-1948, p. 8, *available at* http://www.eccc.gov.kh/en/document/court/jurisprudence/15357. Concerning this case and *United States v. Ulrich & Merkle*, ICTY Judge Antonetti found: "These cases appear to fall into the first or category 2 of JCE, given that the accused was part of the concentration camp system and personally took part in the mistreatment of the prisoners. By contrast, the events to which these cases are directed make it difficult to affirm the theory of responsibility resulting from participation in an expanded JCE, namely responsibility for crimes which did not fall under the common plan but which were nevertheless a natural and foreseeable consequence thereof." *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, 29 May 2013, p. 168.

mistreatment. This quote also demonstrates that even the Review Judgement drafters had to guess at the court's reasoning ("That he was not shown to have personally inflicted cruelties was probably considered by the Court.").

35. *Tashiro Toranosuke et al.*: This was a Hong Kong Military Court case involving accused who were charged with the war crime of inhumane treatment of POWs. They were alleged to have been responsible for dispatching POWs who were unwell to work in a mine. The Accused were alleged to have been indifferent and negligent concerning the POWs and to have subjected the POWs to beatings and ill-treatment, despite their condition.[99] There is no particular indication that JCE III liability was applied in this case. It does not appear that there was a common plan alleged or that the inhumane treatment of the POWs was a foreseeable consequence of such common plan.

36. None of the above 13 judgements clearly states what form of liability was applied. One can *speculate* that a form of liability similar to JCE III may have been applied, since there is no detailed legal reasoning to refute such speculation.[100] One could just as easily speculate that various other forms of liability were applied. Speculation that JCE III type liability was applied in these cases cannot provide a firm basis to find that JCE III exists in customary international law.

### 4. State practice does not support the existence of JCE III

37. The OCP claims to have analyzed the domestic practices of 40 states and concludes, based on this analysis, that individual criminal responsibility for unintended but foreseeable crimes arising out of a joint criminal enterprise was a rule of customary international law by 1975.[101] The OCP failed to provide its methodology for selecting these particular 40 states or for determining that their domestic practice supports JCE III.

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[99] *Tashiro Toranosuke et al.*, Case No. W0235/905, Review Judgment, Hong Kong Military Court for the Trial of War Criminals No. 5, 14 October 1946.

[100] The OCP claims that the United Nations Law Commission and the United Nations General Assembly (through adopting the Nuremberg Principles) affirmed that the theory of individual criminal responsibility used in the World War II trials formed part of customary international law. OCP Appeal, para. 24. United Nations Law Commission Report cited is from 1996; well after the jurisdictional period of the ECCC. Furthermore, it simply states that "[t]he principle of individual responsibility for crimes under international law was clearly established at Nurnberg." *Report of the International Law Commission on the Work of its Forty-Fifth Session*, 6 May-26 July 1996, Official Records of the General Assembly, Fifty-First Session, Supplement No. 10, p. 19. This statement does not support an assertion that *JCE III* liability was established at Nuremberg. The Nuremberg Principles, like the Nuremberg Charter, do not include JCE III liability.

[101] OCP Appeal, para. 50.

38. It is ironic that the OCP claims that Cambodian law supports finding that JCE III exists as customary international law.[102] In the Cambodian legal system, co-perpetration is the theory of liability employed.[103] Co-perpetration and JCE have important differences. Judge Shahabuddeen explains:

> [T]he contribution of an accused to a JCE does not have to be a *sine qua non* of the commission of the crime. Indeed, the contribution does not have to be substantial, as it has to be in the case of aiding and abetting. By contrast, under the co-perpetratorship theory, since the non-fulfilment by a participant of his promised contribution would "ruin" the accomplishment of the enterprise as visualised, the making of his contribution would appear to be a *sine qua non*.
>
> Therefore, though the two theories overlap, they arrive at a point of incompatibility touching guilt or innocence: at that point one theory is wrong, the other right. This would seem to indicate that only one of the two theories can prevail in the same legal system.[104]

39. The Pre-Trial Chamber found that JCE III *does not* have an underpinning in Cambodian law.[105] Although it found that JCE I and II do resemble accountability in the civil law system,[106] it failed to address this important distinction between co-perpetration and JCE (or to reconcile the fact that most of the world favors co-perpetration). The Supreme Court Chamber should not similarly conflate JCE with co-perpetration.

40. Many of the other states the OCP relies on to claim JCE III liability exists in customary international law similarly employ the co-perpetration model and *do not* use a form of liability similar to JCE III. Interestingly, a study commissioned by the ICTY Office of the Prosecutor, carried out by the Max Planck Institute for Foreign and International Criminal Law, also analyzed the domestic practice of 40 states to determine whether, how, and to what extent various legal systems punish persons who participate in criminal offenses. Of the 40 states analyzed, 16 are the same as the states analyzed by the OCP (if Russia is equated with the former USSR).[107]

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[102] *Id.*, para. 53.
[103] *See* 1956 Cambodian Penal Code, Art. 82. This is true of the ICC as well, which has the support of 122 state parties.
[104] *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, Separate Opinion of Judge Shahabuddeen, 7 July 2006, para. 50.
[105] PTC JCE Decision, para. 87.
[106] *Id.*, para. 41.
[107] These overlapping states are: Australia, Austria, Botswana, Canada, France, Germany, Greece, Israel, Japan, Poland, Russia/USSR, South Africa, South Korea, Tanzania, the United Kingdom, and the United States of America.

41. The Max Planck study found that "a comparison of the rules governing participation in crime reveals a high degree of variance among the legal systems studied" and it determined that most States use co-perpetration rather than JCE liability.[108] The Max Planck study also noted that conspiracy, as a form of participation in crime, is frequently criticized in academic literature and case law and has no continental European counterpart.[109]

42. The Max Planck study, in addition to reviewing the law concerning criminal liability in 40 states, posed hypothetical case scenarios to country rapporteurs of the 40 states. In one hypothetical, the "Gang Boss Case," Person A is a leader of a criminal group who does not physically carry out criminal acts. A instructs group members B, C, D, E, and F to carry out certain serious crimes and assigns each group member a specific task in his precise criminal plan.[110] Certain hypothetical questions dealt with A's responsibility for crimes committed by B, C, D, E, and F beyond the scope of the offenses ordered by A.

43. One question relevant to JCE III was:

> Under what circumstances (paying special attention to intent requirements, *mens rea*) is the gang boss A criminally liable for excessive offenses committed by members of his gang at the crime scene if these offenses go beyond the scope of the offenses ordered by A, for example if, during the commission of the offense, E applies violence that was not part of the original offense plan (e.g., instead of

[108] *See* Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion, Commissioned by the United Nations – ICTY, Office of the Prosecutor Project Coordination: Prof. Dr. Ulrich Sieber, Priv. Doz. Dr. Hans Georg Koch, Jan Michael Simon, Max Planck Institut für ausländisches und internationales Strafrecht, Freiburg, Germany, Introduction, p. 3; Part 1: Comparative Analysis of Legal Systems, p. 16.

[109] *Id.*, Part 1, p. 20: "In common law systems (England, USA) and in Japan, the concept of conspiracy is also significant. In the United States, there are two different forms of conspiracy: The first, conspiracy as an inchoate offense (in which criminal liability attaches at an incipient stage of criminal activity if at least two persons agree to commit an unlawful act and one of them engages in an overt act, however insignificant, in pursuance thereof), is not relevant to the discussion here. The second, conspiracy as a form of participation, in which the criminal conduct of one party to an illegal agreement can be attributed to another party (who can then be held liable as a perpetrator), is relevant in the context of this study. In this conspiracy model, the attribution of the criminal conduct of one person to another is based on the existence of a common illegal agreement (conspiracy) and on the foreseeability, in the context of the conspiracy, of the criminal act committed. If the elements of the conspiracy model are satisfied, all members of the conspiracy can be held liable as perpetrators for crimes committed by their co-conspirators, despite the minimal requirements of the underlying (inchoate) conspiracy offense. Attribution is so broad and so easy to establish that, in practice, conspiracy as a form of participation often displaces other forms of participation recognized by Anglo-American criminal law. As a result, conspiracy as a form of participation is frequently criticized, both in the literature and in the case law. Attribution of foreseeable criminal activity, in particular, is very broad. While continental European criminal law recognizes offenses comparable to the inchoate offense of conspiracy, there is no continental European counterpart to conspiracy as a form of participation."

[110] *Id.*, Part 2: Comparative Analysis of Case Scenarios, p. 7-8.

simply stealing a car – i.e., simple theft, E employs physical violence to steal the car – i.e., robbery)?[111]

The study concludes that 23 states favor attributing the excessive acts to A, while 3 country rapporteurs did not provide a clear answer and 14 states tended to disfavor attribution of liability.[112] Where the act in question is more serious, for example if while committing the offense, E shoots an unexpected passer-by who tries to prevent the offense, nine states favored responsibility, while 10 rapporteurs did not provide a clear answer and 21 states disfavored attribution of liability.[113] These variations demonstrate that liability for crimes outside the scope of the criminal plan is not dealt with in a widespread, virtually uniform fashion. Thus JCE III liability cannot be found to exist in customary international law.

### C. Even if JCE *were* a part of customary international law in 1975-79, it cannot be applied at the ECCC

#### 1. JCE cannot be applied because it is not provided for in the ECCC Statute

44. The Establishment Law does not expressly provide for JCE liability. Nonetheless, the Pre-Trial Chamber found that the Establishment Law's drafters could have intended JCE liability, since the Establishment Law is worded similarly to the ICTY Statute and the drafters would have been aware that JCE liability was considered a form of "commission" at the ICTY.[114] The OCP similarly asserts that since Article 29 of the Establishment Law is nearly identical to provisions of the ICTY, ICTR, and SCSL Statutes and the drafters did not explicitly exclude JCE III liability from the Establishment Law, the Trial Chamber should have interpreted Article 29 to include JCE III liability.[115]

[111] Two related questions were: "3b. Under what circumstances (paying special attention to intent requirements, *mens rea*) is the gang boss A criminally liable for excessive offenses committed by members of his gang at the crime scene if these offenses go beyond the scope of the offenses ordered by A, for example if, while committing the offense, E shoots an unexpected passer-by who tries to prevent the offense?
3c. Under what circumstances (paying special attention to intent requirements, *mens rea*) is the gang boss A criminally liable for excessive offenses committed by members of his gang at the crime scene if these offenses go beyond the scope of the offenses ordered by A, for example if, while committing the offense, E rapes someone who just happens to pass by the scene of the crime?" *Id.*
[112] *Id.*, p. 79-80. For a chart listing each of the relevant states, see p. 81-85.
[113] *Id.*, p. 79-80.
[114] PTC JCE Decision, para. 49.
[115] OCP Appeal, para. 12.

45. This ignores the fact that the Establishment Law was passed by the National Assembly on 11 July 2001,[116] only two years after the *Tadić* Appeals Judgement was issued. JCE was not applied at the ICTY after *Tadić* until the August 2001 *Krstić* Judgement.[117] The OCP refers to the ICTR *Ntakrutimana* Appeals Judgement and the SCSL *Brima* Rule 98 Decision, but the *Ntakrutimana* Appeals Judgement was issued in December 2004[118] and the *Brima* Rule 98 Decision was issued in March 2006.[119] Thus, only *one* decision of *one* tribunal had applied JCE prior to the Establishment Law being drafted and passed. This would hardly have made the Establishment Law's drafters aware of a need to change the clear wording of Article 29 if they intended to ensure that JCE liability would not apply.

46. JCE III cannot be equated with "committed" in Article 29.[120] JCE III more closely fits within "otherwise aided and abetted," which differs in its *mens rea* from JCE III.[121] JCE III cannot be considered to fall within any of the forms of liability expressed in the Establishment Law and cannot be applied. The ICTY Statute has been interpreted as a *sui generis* legal instrument; neither as a treaty nor as a strictly penal statute.[122] The Establishment Law, in contrast, is domestic Cambodian legislation. Domestic criminal statutes, particularly in civil law jurisdictions, must be narrowly construed.[123] Forms of liability which are not set out explicitly cannot be applied. Any doubt as to whether a form of liability was intended by the Establishment Law's drafters must be resolved in

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[116] *See* ECCC website, *Establishment of the ECCC – Chronology*, *available at* http://www.eccc.gov.kh/en/about-eccc/chronologies.

[117] *Prosecutor v. Krstić*, IT-98-33-T, Judgement, 2 August 2001, para. 601. It was also discussed in *Prosecutor v. Brđanin & Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, but again, this was not until the middle of 2001, too late for the Establishment Law's drafters to have considered it when deciding on the wording of Article 29.

[118] *Prosecutor v. Ntakrutimana & Ntakrutimana*, ICTR-96-10-A, Judgement, 13 December 2004.

[119] *Prosecutor v. Brima et al.*, SCSL-04-16-T, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006.

[120] *See* Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 1 J. INT'L CRIM. JUST. 1, 14 (2007), arguing that JCE III cannot fall under the term "committed" in Article 7(1) of the ICTY Statute.

[121] *Id*.

[122] *See* Joseph Powderly, *Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?*, *in* JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 17, 33 (Shane Darcy & Joseph Powderly, eds., Oxford University Press, 2010).

[123] *See Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, 16 November 1998, para. 408: "To put the meaning of the principle of legality beyond doubt, two important corollaries must be accepted. The first of these is that penal statutes must be strictly construed, this being a general rule which has stood the test of time." *See also Prosecutor v. Martić*, IT-95-11-A, Judgement, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, 8 October 2008, para. 4: "Nowhere does the Statute mention the term 'joint criminal enterprise.'…. The primary question to be answered in relation to the scope of jurisdiction concerns the power vested in this International Tribunal. This power is limited by the Statute and its explicit and exhaustive wording. To go beyond the explicit and exhaustive wording of Article 7 of the Statute might even be seen as a violation of the principle *nullum crimen sine lege*."

favor of the Suspects and Accused, in accordance with the constitutionally recognized principle of *in dubio pro reo*.[124]

47. The *Tadić* Appeals Chamber erred by reading JCE into the ICTY Statute. This error should not be repeated by the ECCC. The *Tadić* Appeals Chamber read JCE into the Statute implicitly, relying on the ICTY Statute's object and purpose to extend jurisdiction of the Tribunal to perpetrators responsible for serious violations of international humanitarian law. This reasoning was circular and result-determinative. "A proper reading of Article 7(1) of the ICTY Statute must be offered first and then it must be applied in individual cases to determine culpability. This means that the basic elements of criminal law theory must be introduced at the beginning of the inquiry. But we cannot do the opposite: assume culpability in order to offer an interpretation of the statute. This turns the process of interpreting a penal statute on its head."[125]

48. Reading JCE liability into the Establishment Law also interferes with the Establishment Law's object and purpose by trivializing convictions, shifting the focus to an Accused's membership in a group and the actions of the group, rather than the Accused's own actions.[126] Civil Party groups in Cases 001 and 002 argued that JCE III should not be applied because it was not customary international law.[127] Presumably they had these concerns in mind. ICC Judge Van den Wyngaert explains that the principles of strict construction and *in dubio pro reo* are paramount when interpreting the ICC Statute (a view that equally applies to interpretation of the Establishment Law): "interpretation

[124] *See* Article 38 of the Cambodian Constitution. *See also Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, 16 November 1998, para. 413: "The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. This is why ambiguous criminal statutes are to be construed *contra proferentem*."

[125] Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 72 (2007). *See also* Thomas Weigend, *Intent, Mistake of Law and Co-perpetration in the* Lubanga *Decision on Confirmation of Charges*, 6 J. INT'L CRIM. JUST. 471, 477 (2008); Darryl Robinson, *Legality and Our Contradictory Commitments: Some Thoughts About How We Think*, 103 AM. SOC'Y INT'L L. PROC. 104, 104 (2009).

[126] *See* William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENGLAND L. REV. 1015, 1033-34 (2002-2003); *Prosecutor v. Martić*, IT-95-11-A, Judgement, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, 8 October 2008, para. 2, making this argument concerning the ICTY Statute.

[127] *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Response of Co-Lawyers for the Civil Parties on Joint Criminal Enterprise, 30 December 2008, D97/3/4; *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-OCIJ (PTC02), Response of Foreign Co-Lawyer for the Civil Parties to the *Amicus Curiae* Briefs, 17 November 2008, D99/3/32; *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript of Trial Proceedings - Kaing Guek Eav "Duch" Public – Redacted, 23 November 2009, E1/78.1, p. 5, l. 25 – p. 6, l. 9.

cannot be used to fill perceived gaps in the available arsenal of forms of criminal responsibility. Even if the 'fight against impunity' is one of the overarching *raisons d'être* of the Court which may be relevant for the interpretation of certain procedural rules, this cannot be the basis for a teleological interpretation of the articles dealing with criminal responsibility."[128] Since JCE is not included in the Establishment Law, it may not be applied.

### 2. JCE cannot be applied because its application was not foreseeable or accessible in 1975-79

49. Fairness and due process require that modes of liability must have been sufficiently foreseeable and accessible to the Accused at the relevant time in order to be applied.[129] Since JCE liability did not exist in customary international law or in Cambodian law, its application would not have been foreseeable or accessible to the Suspects and Accused before the ECCC. In *Ojdanić*, the ICTY Appeals Chamber assessed whether JCE liability would have been foreseeable to Ojdanić. In support of its conclusion that Ojdanić could incur criminal liability on the basis of his participation in a JCE, the Appeals Chamber noted that Article 26 of the Criminal Code of the Socialist Federal Republic of Yugoslavia contained a provision "strikingly similar" to JCE liability.[130] Thus, JCE liability's existence in domestic legislation was considered when assessing foreseeability and accessibility.[131]

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[128] *Prosecutor v. Ngudjolo Chui*, ICC-01/04-02/12, Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, para. 16. *See also* paras. 18-19.
[129] *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-SC, Appeal Judgement, 3 February 2012, F28, para. 96.
[130] *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, para. 40.
[131] *Id.*, para. 43. The Appeals Chamber did note, however, that "In the present case, and even if such a domestic provision had not existed, there is a long and consistent stream of judicial decisions, international instruments and domestic legislation which would have given him reasonable notice that, if infringed, that standard could entail his criminal responsibility." *Id.* However, as pointed out by Professor Damgaard: "[a] number of countries do not recognize [JCE] as a mode of liability, or only do so in limited circumstances. Does that mean that nationals of those states can successfully argue that [JCE] was not sufficiently foreseeable nor accessible to them, so they cannot be convicted on that basis, whereas nationals of England, the USA and Yugoslavia whose national laws do recognise some form of [JCE] cannot expect the same success when employing an identical argument? … [C]an it really be said that the JCE mode of liability for core international crimes is 'sufficiently foreseeable' and that the law providing for the same is 'sufficiently accessible'? In the author's view, it is doubtful…. [T]here seems to be an inherent unfairness in expecting an individual – in particular an uneducated and perhaps illiterate rebel – to comprehend [JCE], when many seasoned international criminal lawyers are still unclear as to its scope." Ciara Damgaard, *The Joint Criminal Enterprise Doctrine: A "Monster Theory of Liability" or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?*, *in* INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES 129, 240 (Springer,

50. JCE liability does not exist in Cambodian law. The Pre-Trial Chamber noted that JCE I and II resemble accountability in Cambodian law, but "[t]his is not to say that 'participation in a JCE' and 'co-perpetration' under the 1956 Cambodian Penal Code are exactly the same. While both require the shared intent by participants that the crime be committed, participation in a JCE, even if it has to be significant, would appear to embrace situations where the accused may be more remote from the actual perpetration of the *actus reus* of the crime than the direct participation required under domestic law."[132] Since Cambodian law required direct participation, an Accused would not have foreseen liability resulting from more remote participation. Thus, the Pre-Trial Chamber erred by finding that JCE I and II were sufficiently foreseeable and accessible. Concerning JCE III, the Pre-Trial Chamber was unable to identify *any* provision in Cambodian law that would have provided notice to the Accused that they could be liable for crimes by way of JCE III.[133] Since liability via JCE would not have been foreseeable in 1975-79,[134] it may not be applied.

### 3. JCE cannot be applied since it is not currently customary international law

51. Even if it *were* the case that JCE liability existed in customary international law in 1975-79, it is no longer customary international law. This is demonstrated by the decision of the States parties not to include JCE liability in the ICC Statute, as well as ICC jurisprudence rejecting JCE liability. If a later law abolishes an offense or provides for a less severe penalty, it will override a prior harsher law.[135] The same principle applies with respect to modes of liability. If JCE were ever a part of customary international law, since it has been replaced by co-perpetration, as demonstrated by ICC practice,[136] and

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2008). *See also* p. 241 for a further discussion of this author's view that the application of JCE violates the principle of *nullum crimen sine lege.*

[132] PTC JCE Decision, para. 41.

[133] *Id.*, para. 87.

[134] As Professor Jørgensen explains, "it is difficult to see how a mode of liability whose equivalent at common law is multi-faceted and in a state of flux can have been accessible and foreseeable to perpetrators pre-*Tadić*." Nina H.B. Jørgensen, *On Being 'Concerned' in a Crime: Embryonic Joint Criminal Enterprise?*, *in* HONG KONG'S WAR CRIMES TRIALS 166 (Suzannah Linton, ed., Oxford University Press, 2013).

[135] *See* New Cambodian Penal Code, Arts. 9-10. *See also* ICCPR, Art. 15(1): "If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."

[136] By admission of the *Tadić* Appeals Chamber, the ICC Statute is a "text supported by a great number of States [which] may be taken to express the legal position i.e. *opinio juris* of those States." *Tadić* Appeal Judgement, para. 223. The main aim of the Rome Conference was to achieve the broadest possible acceptance of the ICC by mainly adopting into the Statute provisions recognized under customary international law. *See* GERHARD

since co-perpetration is more favorable to the Accused, this is the form of liability that must be applied.[137]

52. Although the ICTY has not changed its position on the applicability of JCE III following Judge Shahabuddeen's admission or the ECCC Pre-Trial and Trial Chamber decisions, this appears to be based on reluctance to review its "well established case law" and on a misreading of the Pre-Trial Chamber's Decision.[138] This is unfortunate.

53. The ICTY *Đorđević* Appeals Chamber found that "the ECCC did not determine whether or not the third category of joint criminal enterprise liability was a part of customary international law," stating that the Pre-Trial Chamber found that the cases relied upon by *Tadić* were "not proper precedents for the purpose of determining the status of customary law in this area."[139] *Đorđević* then concluded erroneously that "[t]he ECCC Pre-Trial Chamber deemed it unnecessary to conduct an analysis as to whether or not the third category of joint criminal enterprise was a part of customary international law."[140]

54. The *Šainović* Appeals Chamber explained that "when interpreting a particular judgement, primary consideration should be given to positions expressly taken and clearly set out in the judgement concerned."[141] The *Đorđević* Appeals Chamber did not do this, opting instead to misstate the Pre-Trial Chamber's findings.

55. In fact, the Pre-Trial Chamber considered the cases relied upon by *Tadić* and found that of those cases, the *Italian cases* were not proper precedent because they were cases of

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WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 402, n. 108, (TMC Asser Press, 1st ed., 2005). *See also* p. 125, marginal no. 358, where Prof. Dr. Werle states that "[t]he provisions of Article 25(3)(b), second and third alternatives, of the ICC Statute reflect customary law." Judge Schomburg, commenting on Article 25, noted that given the wide acknowledgment of co-perpetratorship and indirect perpetratorship, the ICC Statute does not create new law in this respect, but reflects existing law. *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006, para. 21.

[137] As Judge Antonetti explains: "it is reasonable to conclude that the theory of joint criminal enterprise should be abandoned in the future in favour of **co-perpetration** within the meaning of the **Rome Statute** which supports establishing the criminal responsibility of the accused in strict and precise fashion in the context of his participation in the group's criminal acts. For this reason, legitimate questions abound: on what legal basis should the theory of joint criminal enterprise be enshrined in **customary international law** if it is not specifically acknowledged in the practice of the ICC, which is supposed to be the only criminal jurisdiction that is universal in character…." *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, 29 May 2013, p. 155 (emphasis in original).

[138] *See Prosecutor v. Đorđević*, IT-05-87/1-A, Judgement, 27 January 2014 ("*Đorđević* Appeal Judgement"), paras. 49-52.

[139] *Id.*, para. 50, *quoting* PTC JCE Decision, para. 82.

[140] *Đorđević* Appeal Judgement, para. 50.

[141] *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014, para. 1621.

domestic courts applying domestic law, and they "do not amount to international case law."[142] The Pre-Trial Chamber did analyze whether JCE III existed in customary international law and expressly concluded that it did not.[143] It then determined that it was unnecessary to consider whether JCE III might exist *as a general principle of law* because it was not satisfied that such liability would have been foreseeable.[144] Although *Đorđević* criticized the Pre-Trial Chamber for limiting its analysis to the same sources relied on by *Tadić*, the Trial Chamber reviewed additional sources before reaching the same decision as the Pre-Trial Chamber.[145]

56. The Pre-Trial and Trial Chambers' rejection of JCE III comes on the heels of a long line of judicial dissent at the ICTY concerning this mode of liability.[146] Indeed, Judge Schomburg praised the ECCC Pre-Trial Chamber's decision, stating that it was "more than welcome after years of dangerous confusion."[147] Latest in this line of dissenting opinions at the ICTY is that of Judge Antonetti, who, in 82 pages thoroughly examined the concept of joint criminal enterprise and found that "**JCE 3 does not validly exist and must be discarded.**"[148]

### D. JCE III cannot be applied with specific intent crimes

57. If the Supreme Court Chamber finds JCE III to be applicable, despite the decisions of the Pre-Trial Chamber and Trial Chamber, and the arguments made *supra*, it should specify

[142] PTC JCE Decision, para. 82.
[143] *Id.*, para. 77.
[144] *Id.*, para. 87.
[145] TC JCE Decision, para. 29.
[146] *See, e.g.*, *Prosecutor v. Stakić,* IT-97-24-T, Judgement, 31 July 2003, paras. 438–42; *Prosecutor v. Simić et al.*, IT-95-9-T, Judgement, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, 17 October 2003; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006; *Prosecutor v. Simić*, IT-95-9-A, Judgement, Dissenting Opinion of Judge Schomburg, 28 November 2006, paras. 12, 14; *Prosecutor v. Martić*, IT-95-11-A, Judgement, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, 8 October 2008; *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, 29 May 2013, p. 88-182. *See also Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, Separate Opinion of Judge Shahabuddeen, 7 July 2006, para. 47, where Judge Shahabuddeen states: "co-perpetratorship theory merits careful evaluation; there is much force in the logic of its underlying principles. If the matter were *res integra*, I would, for my part, give renewed consideration to it." He then explains that he does not feel it would be appropriate to do so in that case, considering that JCE was by that point well established in ICTR jurisprudence.
[147] Judge Wolfgang Schomburg, *Jurisprudence on JCE – Revisiting a Never Ending Story*, 3 June 2010, p. 1, *available at* http://www.cambodiatribunal.org/sites/default/files/resources/ctm_blog_6_1_2010.pdf. Professor Ohlin similarly noted that the Decision was "well-crafted and tightly argued." Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 747, 748 (2011).
[148] *Prosecutor v. Prlić et al.*, IT-04-74-T, Judgement, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, 29 May 2013, p. 100-82, esp. p. 173 (emphasis in original).

that JCE III cannot be applied with specific intent crimes. To allow an individual to be convicted of specific intent crimes via JCE III would lower the requisite *mens rea*; it would effectively remove the specific intent that makes the crimes distinct.

58. Although the ICTY has held that an Accused may be liable via JCE III for specific intent crimes,[149] the STL and the Special Court for Sierra Leone ("SCSL") have not followed this approach. The Appeals Chamber of the STL found that it would be "a serious legal anomaly" if JCE III were applied to convict someone of a specific intent crime, since a person could be convicted as a co-perpetrator for a *dolus specialis* crime without possessing the requisite *dolus specialis*.[150] The SCSL *Taylor* Trial Chamber noted that the ICTY allowed convictions via JCE III for specific intent crimes, but concurred with the reasoning of the STL Appeals Chamber that this was not the correct approach.[151]

59. Even the architect of JCE, Judge Cassese, has argued that JCE III should not be applied in such cases.[152] He explains that this would be "intrinsically ill-founded" because **a.** it is logically impossible to hold someone liable for committing a crime that requires specific intent unless that intent can be proved; and **b.** a person liable under JCE III has a distinct *mens rea* from the primary offender, but bears responsibility for the same crime as the primary offender, so "the 'distance' between the subjective element of the two offenders

[149] *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, paras. 5-10. *But see Prosecutor v. Krstić*, IT-98-33-A, Judgement, 19 April 2004, para. 134: "As has been demonstrated, all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Krstić, therefore, is not guilty of genocide as a principal perpetrator."

[150] STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras. 248-49.

[151] *Prosecutor v. Taylor*, SCSL-03-01-T, Judgement, 18 May 2012, para. 468: "The Trial Chamber notes that the jurisprudence of the ICTY allows for convictions under JCE III for genocide and persecution as a crime against humanity, even though those crimes require specific intent. However, the Appeals Chamber of the STL has diverged from this jurisprudence, on the basis that it results in the legal anomaly that 'a person could be convicted as a (co)perpetrator for a *dolus specialis* crime without possessing the requisite *dolus specialis*.' It held that 'the better approach under international criminal law is not to allow convictions under JCE III for special intent crimes like terrorism', and to instead treat such an offender as an aider and abettor. The Trial chamber concurs with the reasoning of the STL Appeals Chamber and accordingly finds that the Accused may not be held liable under the third form of JCE for specific intent crimes such as terrorism."

[152] Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109, 109, 121 (2007).

must not be so dramatic as in the case of crimes requiring special intent."[153] The Supreme Court Chamber should follow this approach.

## III. CONCLUSION

60. JCE III liability is akin to strict liability, in that it is used to hold accused liable for certain crimes they did not intend that were committed outside the common plan and by persons that they may have had no control over. It essentially punishes accused for their mere association with perpetrators of a crime.

61. The ECCC must not violate the principle of legality by applying this form of liability that did not exist in 1975-79 and does not exist today. It has been explained that "[t]he long-range value of the ICC is that it will teach countries of the world how to do justice as they seek to apply repressive measures in name of social protection. If the ICC deviates from the principles of due process and legality, it will become a teacher that will bring great harm to the world. The ICC must not only conform to the rules of fair trial; it must also exceed conventional practices of the nation states and set a model for the world of how a criminal court should function."[154] This statement is equally applicable to the ECCC, in terms of the ECCC's stated goal of acting as a role model for the courts of Cambodia.

## IV. RELIEF REQUESTED

WHEREFORE, for all of the reasons stated herein, the Case 003 Defence respectfully requests the Supreme Court Chamber to DECLARE that JCE III liability may not be applied at the ECCC.

Respectfully submitted,

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Co-Lawyers for a Suspect in Case 003

Signed in Phnom Penh, Kingdom of Cambodia on this **12th** day of **January, 2015**

[153] *Id.*, p. 121. *See also* Judge Shahabuddeen's Separate Opinion in *Prosecutor v. Brđanin*, where Judge Shahabuddeen states that in his opinion specific intent must always be proved, but he believes that the foresight required to hold someone liable via JCE III can be sufficient evidence to prove specific intent. *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, Separate Opinion of Judge Shahabuddeen.

[154] George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 540 (2005).