

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**IENG THIRITH SUBMISSIONS ON THE APPLICATION AT THE ECCC OF THE FORM OF
LIABILITY KNOWN AS JOINT CRIMINAL ENTERPRISE PURSUANT TO THE
ORDER OF THE CO-INVESTIGATING JUDGES OF 16 SEPTEMBER 2008**

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I INTRODUCTION

Chronology

1. On 28 July 2008 defence for Ieng Sary filed its 'Ieng Sary's Motion against the Application at the ECCC of the Form of Liability Known as *Joint Criminal Enterprise*',¹ ("**Ieng Sary Motion**") in which it requested the Office of the Co-Investigating Judges ("**OCIJ**") to declare that joint criminal enterprise ("**JCE**") is not a form of liability applicable to the jurisprudence of the ECCC.
2. On 11 August 2008, the Co-Prosecutors filed their 'Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise' ("**OCP Response**").² In their response, the OCP's primary submission is that the Ieng Sary Motion is inadmissible, and in the alternative that the motion should be dismissed on its merits, as JCE is applicable before this court.
3. On 16 September 2008, the OCIJ invited the other Charged Persons to present their observations on this matter before 31 December 2008,³ given that

"the issue raised (...) is not of concern only to IENG Sary's defence, but also to that of the other Charged Persons; that it is also of interest to Civil Parties; and that, accordingly, it is appropriate to invite all of the parties to provide observations in order for the [OCIJ] to make a fully informed decision".
4. The Ieng Sary team filed 'Ieng Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC' on 24 November 2008 ("**Ieng Sary Supplementary Observations**").⁴ In the meantime, the Pre-Trial Chamber has dealt with the issue of JCE in the case against Duch. In

¹ Ieng Sary's Motion against the Application at the ECCC of the Form of Liability Known as *Joint Criminal Enterprise*, 28 July 2008, Doc. No. D97.

² Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise, 11 August 2008, Doc. No. D97/2.

³ Order on Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, 16 September 2008, Doc. No. D97/3.

⁴ Ieng Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC, 24 November 2008, Doc. No. D97/7.

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Case No. 001, the OCP appealed from the Duch Closing Order on 5 September 2008 (“**OCP Duch Closing Order Appeal**”).⁵ One of the grounds of appeal concerned the Closing Order’s failure to mention JCE as a form of liability. On this particular issue, the Pre-Trial Chamber decided to invite three *amici curiae* to provide guidance on the applicability of JCE before the ECCC.⁶ The three *amici* filed their respective *amicus* briefs by end of October 2008.⁷ The Charged Person, Duch, as well as the Civil Parties responded to the *amici curiae* briefs.⁸

5. On 5 December 2008, the Pre-Trial Chamber issued its ‘Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias “DUCH”’,⁹ (“**PTC Decision**”) in which it ruled against the application of JCE in Case File 001.
6. The Charged Person herewith files its ‘Ieng Thirith Submissions against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise pursuant to the Order of the Co-Investigating Judges of 16 September 2008’ (“**Defence Submissions**”).

⁵ Co-Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav “Duch” Dated 8 August 2008, 5 September 2008, Doc. No. D99/3/3 (Case File 001).

⁶ Invitation to *Amicus Curiae*, 23 September 2008, Docs. No. D99/3/12, D99/3/13, and D99/3/14 (Case File 001).

⁷ *Amicus Curiae* Brief of Professor Antonio Cassese and Members of the *Journal of International Criminal Justice* on Joint Criminal Enterprise Doctrine, 27 October 2008, Doc. No. D99/3/24 (Case File 001) (“**Antonio Cassese Amicus Brief**”); *Amicus Curiae* Brief Submitted by the Centre for Human Rights and Legal Pluralism, undated, Doc. No. D99/3/25 (Case File 001); and *Amicus Curiae* Concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ(PTC02), 27 October 2008, Doc. No. D99/3/27 (Case File 001) (“**Kai Ambos Amicus Brief**”).

⁸ Response of Foreign Co-Lawyer for the Civil Parties to the *Amicus Curiae* Briefs, 17 November 2008, Doc. No. D99/3/32 (Case File 001); Response to the Submissions of *Amicus Curiae*, 17 November 2008, Doc. No. D99/3/33 (Case File 001); and Réponse de la Défense aux Mémoires d’*Amicus Curiae*, 25 November 2008, Doc. No. D99/3/37 (Case File 001).

⁹ Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias “DUCH”, 5 December 2008, Doc. No. D99/3/42 (Case File 001).



II THE APPLICABLE LAW

7. The 1956 Penal Code of Cambodia sets out the forms of liability applicable during the time relevant for the crimes alleged in the Introductory Submission.

Article 82 thereof provides:

“Any person participating voluntarily, either directly or indirectly, in the commission of a crime or infraction, is liable for the same punishment as the principle perpetrator. Direct participation constitutes co-perpetration, indirect participation constitutes complicity.”¹⁰

8. Article 83 of the 1956 Penal Code provides:

“Indirect participation or complicity is only punishable if it is committed by provocation, instruction, means supplied, aid or assistance.”¹¹

9. Article 29 of the ECCC Law provides, insofar relevant:

“Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.”

10. Article 2 New of the Establishment Law provides the following, insofar relevant:

“Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

11. Rule 21(1)(d) of the Internal Rules provides for the Charged Person’s right to be informed of the charges against her; this provision reads:

“Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her (...).”

12. Internal Rule 51(1) provides finally:

“For the needs of the inquiry, the Co-Prosecutors may order the Judicial Police to take into police custody a person suspected of having participated in a crime within the jurisdiction of the ECCC as a perpetrator or accomplice. Such a person shall be informed of the reasons for the custody and of his or her rights under Rule 21(1)(d).”



¹⁰ Unofficial translation, see Ieng Sary Motion, footnote 41.

¹¹ Unofficial translation, see Ieng Sary Motion, footnote 41.

III ARGUMENTS

3.1 Summary Arguments

13. The Charged Person adopts the arguments set out in the Ieng Sary Motion and the Ieng Sary Supplementary Observations; the arguments set out in those briefs form part of these submissions. By way of primary submission, it is contended that JCE is not part of customary international law, If, which is not conceded , this is wrong and JCE is now considered to be part of customary international law, it is not applicable at the ECCC.

14. In the alternative, as set out in the amicus brief presented by Kai Ambos, the defence argues that only the first, basic, form of JCE is applicable; thus excluding from the ECCC's jurisdiction the second and third forms of JCE. The defence will elaborate on this alternative argument in the course of these submissions.

3.2 Requirements for Applicability of JCE

15. The Co-Prosecutors hold that in order to be applicable before the ECCC, the form of liability of JCE must fulfill four criteria: (i) it must be provided for in the ECCC Law, either explicitly or implicitly; (ii) it must have existed under customary international law at the time; (iii) the law providing for it must have been sufficiently accessible to the defendants at the relevant time; and (iv) the defendants must have been able to foresee that they could be criminally liable for their actions.¹² However, Kai Ambos's *amicus curiae* brief sets out different, broader requirements, which it is submitted more accurately reflect the legal requirements of the applicability of JCE, and are based on the ICTY appeals judgment in the case against Milutinovic.¹³ Kai Ambos sets out the following requirements:



¹² See OCP Response, para. 8.

¹³ Kai Ambos *Amicus* Brief, p. 21.

- (i) JCE must have existed under customary international law at the relevant time;
- (ii) It must have formed part of Cambodian law at the relevant time;
- (iii) It must have been sufficiently accessible and foreseeable to the defendants at the relevant time; and
- (iv) In addition to the foregoing, the law applicable to the ECCC must provide for this form of liability.

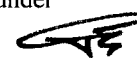
16. The OCP Response omits the second requirement mentioned by Ambos from its arguments, namely the necessity that JCE formed part of Cambodian law at the relevant time, which, as stated by Kai Ambos, is crucial in the determination of the underlying issue.

17. Kai Ambos concludes that only the first form of JCE was unambiguously part of Cambodian law at the relevant time. The applicability of the second form of JCE is ambiguous and uncertain, and should therefore not be relied upon to the detriment of the Charged Person; thirdly, the extended, form of JCE did not form part of Cambodian law at the relevant time.¹⁴

3.3 JCE Not Properly Pleaded in the Introductory Submission

18. In the PTC Decision, the Pre-Trial Chamber held that “the formulation of the S-21 JCE set out by the Co-Prosecutors in paragraph 72 of the OCP Duch Closing Order Appeal is vague, particularly as it concerns the pleading of the three different forms of joint criminal enterprise.”¹⁵ The Chamber continued to state that:

“Precision is necessary, in order to analyse whether the three different forms of joint criminal enterprise may be applied and to distinguish the concept of joint criminal enterprise from other comparable forms of liability which may be applicable under Cambodian law.”



¹⁴ Kai Ambos *Amicus* Brief, p. 30.

¹⁵ PTC Decision, para. 135.

19. The defence submits that the JCE pleaded in the Introductory Submission in Case File 002 is likewise vague and imprecise. The different forms of JCE pleaded in the OCP Duch Closing Order Appeal are more particularized and precise than the JCE pleaded in the Introductory Submission in Case File 002. The details of the forms of JCE pleaded in the Introductory Submission will be elaborated upon below.

20. Whilst the OCP seems to rely on the second form of JCE in paragraphs 5-16 of the Introductory Submission, paragraph 116 thereof seems to refer to the first or third forms. The relevant paragraphs of the Introductory Submission read as follows:¹⁶

5. A common criminal plan, or a joint criminal enterprise (JCE), came into existence on or before 17 April 1975 and continued at least until 6 January 1979.
6. The object of this common criminal plan was the systematic persecution of specific groups within the Cambodian population, purportedly in order to establish a classless, atheistic and ethnically homogenous society, abolishing all ethnic, national, religious, racial, class and cultural differences, through the commission of crimes punishable under Articles 3(new), 4, 5, 6 and 7 of the ECCC Law. Anything or anyone that the CPK perceived as a threat or an obstacle to its policies and ideology would be killed or destroyed, including all religions, ethnic differences, the “feudalist,” “capitalist,” and “bourgeoisie” classes and all perceived “traitors” in the population or amongst the CPK cadre.
7. The object of this common criminal plan also included the denial of fundamental rights, such as the rights to liberty, security of person and property; the right to freedom of opinion, expression, thought, conscience and religion; and the right to a family and personal life, to members of the population who were not identified as members of these targeted groups.
8. Individuals who participated knowingly and wilfully in the JCE throughout its duration, or alternatively at different times in its duration, included but were not limited to NUON Chea, IENG Sary, KHIEU Samphan, IENG Thirith and KANG Keck Iev (DUCH) (...). These individuals participated in the JCE as co-perpetrators, either directly or indirectly. They intended the criminal results, even if they did not physically perpetrate all crimes as described in paragraphs 37 – 72.
9. The suspects were aware of a systemic plan of ill-treatment and persecution of the Democratic Kampuchea population, as reflected in the systematic, Democratic Kampuchea-wide creation of numerous security centres, forced labour camps, re-education centres and co-operatives. The suspects knew the nature of the system of repression, participated in its enforcement, and intended to further the systemic



¹⁶ Footnotes are omitted.

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plan of ill-treatment and persecution, thereby knowingly and willingly advancing the common purpose of the JCE.

10. Each of the suspects, acting individually or with other named and unnamed co-perpetrators, contributed to the JCE using their *de jure* and *de facto* authority. The suspects knew about and exercised effective control over the crimes committed by their subordinates because a functioning civilian and military chain of command existed, reporting to the highest levels of administration and monitoring the work of all the lower levels of administration.
16. NUON Chea, IENG Sary, KHIEU Samphan, IENG Thirith and DUCH committed the criminal acts described in paragraphs 37 – 72 by orchestrating and participating in the JCE in the ways set out herein. Their actions resulted in the death of between 1.7 million and 2.2 million people from a population of about seven million, by overwork, starvation, disease or execution. Even those not killed were victims of the CPK's criminal policies and suffered torture, forced labour, unlawful detention, religious persecution, forcible transfer and other inhumane treatment.
116. Where these suspects committed these crimes they did so by participating in a joint criminal enterprise with other co-perpetrators. These crimes were the object of the JCE or alternatively the natural and foreseeable consequences of the JCE. The suspects were or should have been aware that such crimes were a natural and foreseeable consequence of the execution of the JCE and decided to participate in the enterprise. Other members of the JCE acted on the basis of the common purpose, with shared intent.
21. Whilst paragraphs 5-16 of the Introductory Submission refers solely to the second form of JCE, in paragraph 116, that is in the concluding part of the Introductory Submission, the Co-Prosecutors, rely on the first and third forms of JCE, without making any reference to the specific evidence which would support those two forms of JCE.
22. The fact that the first and third forms of JCE are only pleaded in the concluding remarks of the Introductory Submission, and have no factual evidential basis in the charging document, supports the contention that these forms of JCE are insufficiently pleaded in the Introductory Submissions. They lack the precision required by the Pre-Trial Chamber.
23. It is submitted that the Co-Prosecutors Response does not sufficiently plead JCE and fails to meet the strict test formulated by the Pre-Trial Chamber. Thus



infringing the Charged Person's right to be informed of the charges against her, as set out in Internal Rule 21(1)(d).


3.4 Cambodian Law instead of Ambiguous International Law

24. Kai Ambos concludes in his *amicus curiae* brief that "only JCE I existed unambiguously while JCE III was clearly not encompassed by the Code of 1956. As to JCE II, it depends if one construes it as a sub-category of JCE I or rather an extension of responsibility within the meaning of JCE III".¹⁷

25. As is demonstrated by the Kai Ambos *Amicus* Brief, there exists ambiguity as to whether the second form of JCE was embedded in customary international law and Cambodian law in the relevant time period. Ambos concludes that the third, extended form, clearly did not form part of Cambodian law in 1975-1979, whilst he finds the first form of JCE applicable at that time.

26. Consequently, and taking into account the principle that "judges are required to interpret the criminal law strictly, favouring the defendant in case of doubt",¹⁸ if the primary defence argument does not succeed, only the first form of JCE, the basic form, should be held applicable at the ECCC, with the exclusion of the second and third forms.

27. Further the defence submits that the applicability and interpretation of JCE is widely disputed and the exact content thereof, if applicable, is open to many different and contradictory interpretations, as evidenced by the many views brought forward in the discussion of the applicability thereof in Case File 001. The Penal Code of 1956 provides for two different forms of liability, co-perpetration and complicity, which largely coincide with joint criminal enterprise in its basic and second forms. The ECCC should first and foremost apply



¹⁷ Kai Ambos *Amicus* Brief, p. 30.

¹⁸ Kai Ambos *Amicus* Brief, p. 20.

Cambodian law, and as such should rely on the 1956 Penal Code, instead of falling back on contested forms of liability under international law.

3.5 Conclusion

28. Primarily, and adopting the arguments set out in the Ieng Sary Motion and the Ieng Sary Supplementary Observations, the defence submits that the form of liability known as JCE is not applicable to the ECCC proceedings as that form of liability was not applicable in customary international law and in Cambodian national law at the relevant time.
29. Secondly, and in the alternative, the defence submits that the requirements for applicability of JCE as set out by the OCP are insufficient. As submitted by Kai Ambos, only the first form of JCE was unambiguously applicable in Cambodian law at the relevant time; consequently, the second and third forms are not applicable before the ECCC.
30. Thirdly, with particular reference to the first and third forms of JCE, these are insufficiently pleaded in the Introductory Submission, as a result of which the Co-Prosecutors have violated the Charged Person's right to be informed of the charges against her.
31. Given that Rule 21(1)(d) is deemed to apply from the time of arrest onwards,¹⁹ such omission is irreparable, and must lead to exclusion of these forms of liability from the Introductory Submission. Internal Rule 51(1) provides in this respect:

“For the needs of the inquiry, the Co-Prosecutors may order the Judicial Police to take into police custody a person suspected of having participated in a crime within the jurisdiction of the ECCC as a perpetrator or accomplice. Such a person shall be informed of the reasons for the custody and of his or her rights under Rule 21(1)(d).”



¹⁹ PTC Decision, para. 140.


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IV PRAYER

32. For the reasons set out herein, the Charged Person respectfully submits that:

- (i) Primarily, the OCIJ should declare that the ECCC has no jurisdiction over JCE as a form of liability;
- (ii) In the alternative, that the ECCC only has jurisdiction to apply the first form of JCE, and that the second and third forms are not recognised and inadmissible;
- (iii) Furthermore, the Co-Prosecutors have insufficiently pleaded the first and third forms of JCE in the Introductory Submission, and as a result none of the forms of JCE can be applied to Case File 002.

Done in Phnom Penh, this 30th day of December 2008.



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