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BEFORE THE PRE-TRIAL CHAMBER OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG THIRITH DEFENCE APPEAL AGAINST 'ORDER ON THE APPLICATION AT THE ECCC OF THE FORM OF LIABILITY KNOWN AS JOINT CRIMINAL ENTERPRISE' OF 8 DECEMBER 2009

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I INTRODUCTION AND PETITION

1. On 8 December 2009 the Office of the Co-Investigating Judges filed the 'Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise' (Impugned Order).[1] The defence herewith files an appeal against the Impugned Order, requesting the Pre-Trial Chamber (PTC) to quash the Impugned Order and find that the ECCC has no jurisdiction over joint criminal enterprise (JCE) as a form of liability in Case 002.[2] If, contrary to the defence contention, the PTC finds that there is jurisdiction, the defence requests the Pre-Trial Chamber directs that the ECCC has no jurisdiction to apply the third form of JCE to this case. Further, the defence submits that the Co-Prosecutors have insufficiently pleaded the first and third forms of JCE in the Introductory Submission. As a result the liability form known as JCE cannot be applied to Case File 002.

2. The doctrine of joint criminal enterprise is highly controversial. Several critical analyses have been written in the years since the inception of the JCE doctrine in 1999.[3] Significantly, Judge Lindholm of the International Criminal Tribunal for the former Yugoslavia (ICTY) has called for the abandonment of this form of liability and he wrote a separate and partly dissenting opinion to the *Blagoje Simic* trial judgment, where he dissociates himself from the concept of joint criminal

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[1] OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, Document No. D97/13.
[2] The defence filed a timely notice of appeal; see Ieng Thirith Record of Appeals, 15 December 2009, Document No. D97/15.
[3] See for instance, A.M. Danner & J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', March 2004. See also, *inter alia*, K. Hamdorf, 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime', Journal of International Criminal Justice 5 (2007) 208-226, J.D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', Journal of International Criminal Law 5 (2007) 69-90, E. van Sliedrecht, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', Journal of International Criminal Law 5 (2007)184-207, G. Sluiter, 'Guilt by Association: Joint Criminal Enterprise on Trial', Journal of International Criminal Justice 67 (2007). See also A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', Journal of International Criminal Justice 5 (2007) 109-133, p. 114-123. William Schabas characterised JCE as the 'magic bullet' of the prosecution. See A.M. Danner & J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', March 2004p. 60.

enterprise in general.[4] The International Criminal Court (ICC) has taken in different route from the ICTY in the interpretation of forms of liability; more specifically it has taken a different position towards the doctrine of joint criminal enterprise. In the *Lubanga* case the Pre-Trial Chamber of the ICC rejected an explicit invitation by one of the victims' counsel to incorporate JCE in the charges against the accused person.[5] In describing the ICC decision in *Lubanga*, Weigend states in this respect:

> But the Chamber also voices substantive reservations against accepting JCE as a form of 'primary' liability under the ICC Statute: It associates JCE with a 'subjective approach' toward distinguishing between principals and accessories, an approach that moves the focus from the objective level of contribution to the 'state of mind in which the contribution to the crime was made'.[6]

3. Professor Antonio Cassese, who was a member of the *Tadic* appeals panel which created the theory, has subsequently acknowledged that this doctrine is subject to controversy,[7] and has suggested clarifications to and limitations on the use of JCE III since its inception.[8] In analysing the jurisprudence on JCE since *Tadic*, he makes the following recommendation:

> I submit that the latitude that the notion leaves to judges should induce them to proceed gingerly and with utmost prudence when appraising the evidence and establishing the existence of both actus reus and mens rea. In case of doubt, they should arguably opt for a not-guilty determination. Furthermore, should prosecutors intend to charge persons with criminal liability for crimes committed under the third category of JCE, they could envisage, where appropriate, the possibility of charging the 'secondary defendants' with a lesser crime than that with which the 'primary defendant' stands accused.[9]

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[4] *Prosecutor v. Blagoje Simic*, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, 17 October 2003, Case No. IT-95-9-T, para. 2.

[5] *Prosecutor v. Lubanga*, Decision on Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007 Case No. ICC 01/04-01/06.

[6] T. Weigend, 'Intent, Mistake of Law, and Co-Perpetration in the *Lubanga* Decision on Confirmation of Charges', Journal of International Criminal Justice 6 (2008), 471-478, p. 478.

[7] A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', Journal of International Criminal Justice 5 (2007) 109-133, p. 110.

[8] A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', Journal of International Criminal Justice 5 (2007) 109-133.

[9] A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', Journal of International Criminal Justice 5 (2007) 109-133, p. 133.

4. Cassese moreover contends that the International Criminal Court is probably barred from applying the third, extended form of JCE.[10] The defence submits that the application of joint criminal enterprise as a doctrine should be dealt with cautiously, especially in the context of the ECCC, and especially the third, extended form thereof. Whilst the legal basis for this form of liability is, to say the least, weak, its application is not limited to those senior leaders and those most responsible for the crimes committed during the Democratic Kampuchea,[11] but to a much wider group of persons. This therefore allows for a political process of selecting indictees under this form of liability. The doctrine of JCE should be approached cautiously, especially the extended form thereof, the applicability of which under the scrutiny of academics has become controversial in international criminal jurisprudence.

5. In the current Appeal, the defence will mainly concentrate on the arguments raised in the Ieng Thirith JCE Motion.[12] However, since that Motion supported the Ieng Sary JCE Motions, the defence also makes references to the documents filed by the Ieng Sary defence.

II APPLICABLE STANDARD FOR APPEAL

6. In the Pre-Trial Chamber's 'Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive' of 18 November 2009, the PTC set out the criteria for overturning a discretionary decision by the OCIJ, whilst referring to a decision by the ICTY Appeals

[10] A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', Journal of International Criminal Justice 5 (2007) 109-133, p. 132.
[11] Article 1 of the Agreement between the UN and the Royal Government of Cambodia specifies that the purpose of the ECCC proceedings is to bring to trial 'senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia'.
[12] Ieng Thirith Submissions on the Application of 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, 30 December 2008, Document No. D97/3/2, para. 13.

Chamber in the case against Slobodan Milosevic.[13] The PTC has therefore found three possible grounds for overturning a first instance judges' discretionary decision, namely if the challenged decision was:

(i) based on an incorrect interpretation of governing law;

(ii) based on a patently incorrect conclusion of fact; or

(iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[14]

7. The defence submits that the Impugned Order is substantially based on the first of the three elements, namely on an incorrect interpretation of governing law. It is on this basis that the defence submits this appeal.

8. Internal Rule 74(3)(a) provides a legal basis for this appeal, which provision provides a basis for appeals against orders confirming the jurisdiction of the ECCC.

III APPEAL GROUND 1 – INADEQUATE FORMULATION OF APPLICABILITY JCE III

3.1 Introduction

9. The first ground of appeal relates to the language employed by the OCIJ in defining its conclusions. The formulation of the third form of JCE lacks clarity and is ambiguous and the Impugned Order should be quashed.

3.2 Relevant Legal Standard

10. Each judicial decision must provide reasons for the conclusions reaches. This is a general principle of law, which has been acknowledged by the European Court, which held in *Hadjianastassiou v. Greece*:

[13] PTC, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, Document No. D164/4/13 (SMD Decision), para. 26.
[14] See: *Prosecutor v. Slobodan Milosevic*, quoted in para. 26 of the SMD Decision.

> The national courts must (...) indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him.[15]

11. The OCIJ has failed to abide by this principle of law.

3.3 Submission

12. The OCIJ formulates its conclusion regarding the applicability of the third form of JCE to international crimes as follows:

> Partially grants the request insofar as the only *mens rea* for JCE 3 applicable before the ECCC is the subjective acceptance of the natural and foreseeable consequences of the implementation of the common plan.[16]

13. The defence submits that it is unclear what 'request' is referred to by the OCIJ. Whilst Ieng Sary's original submission on JCE (Ieng Sary JCE Motion)[17] is defined on page 2 of the Impugned Order as 'Request', the Impugned Order refers to the requests made by the other parties as well and the Impugned Order appears to cover the Ieng Thirith JCE Motion as well.[18] In fact several requests have been formulated by the various defence teams, especially in relation to the third form of JCE. It is unclear to what specific aspect of the defence requests the OCIJ refers to in the above quotation. Therefore, it is impossible to ascertain which part of the 'request' is granted by the Impugned Order.

14. Further, the wording of the abovementioned citation from the Order is unclear, where it states that the request is partially granted where it concerns the third form of JCE, and specifically where it mentions the 'subjective acceptance' of the consequences. The *Kvocka* Appeals Chamber of the ICTY made the following observation:

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[15] *Hadjianastassiou v. Greece*, Judgment, European Court, Appl. No. 12945/87, 16 December 1992, para. 33.
[16] Impugned Order, p. 10.
[17] Ieng Sary's Motion against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 28 July 2008, Document No. D97 (Ieng Sary JCE Motion). Ieng Sary filed a supplementary document later, Ieng Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC, 24 November 2008, Document No. D97/7 (Ieng Sary Supplementary Motion, together referred to as Ieng Sary JCE Motions).
[18] Impugned Order, p. 2-3.

> The Appeals Chamber notes, however, that the Trial Chamber did not hold any of the Appellants responsible for crimes beyond the common purpose of the joint criminal enterprise. Nonetheless, the Appeals Chamber wishes to affirm that an accused may be responsible for crimes committed beyond the common purpose of the systemic joint criminal enterprise, if they were a natural and foreseeable consequence thereof. However, it is to be emphasized that this question must be assessed in relation to the knowledge of a particular accused. This is particularly important in relation to the systemic form of joint criminal enterprise, which may involve a large number of participants performing distant and distinct roles. What is natural and foreseeable to one person participating in a systemic joint criminal enterprise, might not be natural and foreseeable to another, depending on the information available to them. Thus, participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for *all* crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.[19]

15. The *Kvocka* Appeals Judgment explains that JCE III only applies if it can be established that the accused person had actual knowledge of the common purpose, and that whether or not the consequences are natural and foreseeable depends on the actual person's perception of this knowledge, which varies from one person to the other. Interpretation of knowledge is thus a subjective act. Not only knowledge needs to be proven for JCE III, but also that the person indeed interpreted that knowledge in a way that establishes that it was a natural and foreseeable consequence *to that person* that further crimes would be committed outside the scope of the enterprise.

16. The proper approach as set out by the *Kvocka* Appeals Chamber is not reflected in the Impugned Order. The language employed by the OCIJ in its conclusion is unclear and ambiguous, and the Impugned Order thus leaves the parties and the investigating authorities themselves with an ambiguous interpretation of this doctrine.

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[19] *Prosecutor v. Kvocka et al.*, Appeals Chamber, Judgement, 28 February 2005, Case No. IT-98-30/1-A, para. 86. This paragraph is referred to in footnotes 34 and 40 of the Impugned Order, but the relevant part of the above quote necessary in explaining the wording employed by the OCIJ ('subjective acceptance') is not referred to. The Kvocka explanation of JCE III provides a narrower scope for JCE III than the *Tadic* Appeals Judgement provides, see *Prosecutor v. Dusko Tadic*, Appeals Chamber, Judgement, 15 July 1999, Case No. IT-94-1-A, para. 228.

17. The controversy and criticism surrounding JCE, the specific interpretation of the doctrine applicable before the ECCC must be formulated carefully and precisely.[20] The Impugned Order, however, leaves the parties without a proper definition. Doing so ignores the complexity of the doctrine which has been defined and interpreted differently by the various chambers and tribunals which have made use of it.

18. Further, it is unclear from the Impugned Order what the sentence 'subjective acceptance of the natural and foreseeable consequences of the implementation of the common plan' from the citation in paragraph 12 above means.[21] This absence of a scope delineating the boundaries of the particular joint criminal enterprise propagated in the Introductory Submission prevents the defence from properly preparing its defence, and fails to provide proper guidance to the investigative authorities.

19. In addition to the aforementioned ambiguity, the Impugned Order states that the defence request is partially granted.[22] This language suggests that the defence arguments opposing JCE III are partially granted. It is not made clear what part of the defence objections, which are extensive with regard to JCE III, have been accepted by the OCIJ. However, given the partial acceptance, the OCIJ has acknowledged that the particular definition of JCE III it employs is less wide than the generally accepted concept employed by the ICTY. The exact difference between the OCIJ formulation and the ICTY formulation remains unclear, and needs to be resolved at this appeals stage.

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[20] Elies van Sliedrecht states: 'The Tadic Appeals Chamber treated JCE ambivalently. On the one hand, the chamber brought the concept under the heading 'committing' and distinguished it from aiding and abetting a crime, which, it held, is generally couched in terms of 'participating' in an offence27 and which was found to '[u]nderstate the degree of criminal responsibility'. On the other hand, it referred to common purpose/JCE as 'a form of accomplice liability'. To complicate matters even further, the Appeals Chamber used the terms 'perpetrator'and 'co-perpetrator' to refer to a participant in a JCE.' See: E. van Sliedrecht, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', Journal of International Criminal Law 5 (2007)184-207 at p. 189-190.

[21] Impugned Order, p. 10.

[22] Impugned Order, p. 10.

3.4 Conclusion

20. This results in an incorrect interpretation of the governing law, or at least to an interpretation that is insufficiently reasoned and impossible to understand. The OCIJ have thus failed to indicate with sufficient clarity the grounds on which they based their decision, as required by *Hadjianastassiou v. Greece*, and the Impugned Order should be quashed on this basis.

IV APPEAL GROUND 2 – FAILURE TO REASON DISMISSAL OF DEFENCE ARGUMENTS AGAINST *TADIC*

4.1 Introduction

21. The Ieng Sary JCE Motions argued that the *Tadic* Appeals Chamber Judgment's reasoning underlying the formulation of JCE in that case should not be similarly applied to the ECCC's jurisdiction.[23] These Motions were supported by the Ieng Thirith defence in the Ieng Thirith JCE Motion.[24] The OCIJ failed to provide reasons for its implicit rejection of this argument.

4.2 Relevant Legal Standard

22. Each judicial decision should provide reasons for the conclusions it reaches. As argued in Section 3.2 above, this is a well-recognised and established general principle of law, and this has been acknowledged by the European Court in the case of *Hadjianastassiou v. Greece*.[25]

23. The OCIJ have failed to abide by this principle of law, which forms the legal basis for this Appeal Ground.

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[23] See Ieng Sary JCE Motion, *inter alia* paras. 1 and 5.
[24] Ieng Thirith Submissions on the Application of 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, 30 December 2008, Document No. D97/3/2, para. 13.
[25] *Hadjianastassiou v. Greece*, Judgment, European Court, Appl. No. 12945/87, 16 December 1992, para. 33.

4.3 Submission

24. The Ieng Sary JCE Motions and the Ieng Thirith JCE Motion argued that the *Tadic* case forms an insufficient precedent in international criminal law to rely on JCE, relying *inter alia* on the Kai Ambos Amicus Curiae Brief,[26] the OCIJ has not rebutted this argument. Instead, the OCIJ without further explanation and almost solely relied on the *Tadic* and *Kvocka* Appeals Judgments and concluded on that basis that:

> [C]onsidering that the jurisprudence relied upon in articulating JCE pre-existed the events under investigation at the ECCC, the Co-Investigating Judges find that there is a basis under international law for applying JCE as set out above in paragraphs 14-17, including the relevant footnotes, highlighting the subjective assessment of natural and foreseeable consequences.[27]

25. The Impugned Order fails to provide a reasoned decision as to why it circumvented the defence arguments in that respect, and decided to rely on the challenged case law without reference to the particular challenges. Where the Co-Investigating Judges have rejected the submissions which were advanced by the defence and supported by case law and international jurisprudence. In the circumstances the OCIJ are obliged to provide their reasons as formulated by the aforementioned European Court of Human Rights case law.[28]

4.4 Conclusion

26. The defence submits that the failure to address the defence arguments objecting to the *Tadic* and related ICTY case law provides a basis for the current appeal. On this basis, the Impugned Order must be quashed.

27. In Appeal Ground 7 below, the defence will elaborate on the substance of the JCE arguments and will argue separately why the *Tadic* and related ICTY case law is not applicable to the proceedings of the ECCC. This forms a separate appeal ground relating to the substance of the law.

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[26] 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).
[27] Impugned Order, para. 21.
[28] *Hadjianastassiou v. Greece*, Judgment, European Court, Appl. No. 12945/87, 16 December 1992, para. 33.

V APPEAL GROUND 3 – FAILURE TO ADDRESS DEFENCE ARGUMENT THAT JCE I AND III HAVE IMPROPERLY PLEADED

5.1 Introduction

28. In the Ieng Thirith JCE Motion the defence has argued extensively and in detail that JCE was improperly pleaded in the Introductory Submission.[29] The OCIJ failed to address this argument in the Impugned Order, and the conclusions drawn by the OCIJ thus amount to an error of law.

5.2 Relevant Legal Standard

29. The legal standard for this Appeal Ground is a combination of both insufficient reasoning, the legal basis of which is addressed in Section 3.2 above, and an incorrect interpretation of the law that governs the ECCC proceedings, which falls within the first ground for overturning an OCIJ decision as previously formulated by the Pre-Trial Chamber.[30]

30. The OCIJ have failed to abide by this principle of law, which forms the legal basis for this Appeal Ground.

5.3 Submission

31. Whilst referring to the Pre-Trial Chamber's decision on the appeal against the Closing Order in the case against Duch,[31] where the Pre-Trial Chamber held that the Closing Order's formulation of this form of liability was 'vague', the defence argued in its initial motion that likewise the JCE pleaded in the Introductory Submission in Case 002 was vague and imprecise. It argued that:

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[29] Ieng Thirith JCE Motion, Section 3.3 'JCE Not Properly Pleaded in the Introductory Submission', paras. 18-23.
[30] SMD Decision, para. 26.
[31] Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias 'Duch', 5 December 2008, Case File 001, Document No. D99/3/42 (PTC Decision on Appeal Duch Closing Order).

> 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.[32]

32. The Pre-Trial Chamber in that decision further held:

> Precision is necessary, in order to analyse whether the 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.[33]

33. Whilst referring to the stage of the Closing Order, the same applies to the investigative stage. For the Co-Investigating Judges themselves have correctly held in paragraph 10 of the Impugned Order:

> [T]he Co-Investigating Judges find it necessary to respond to the Request for the purpose of providing sufficient notice relating to a mode of liability which is not expressly articulated in the Law or Agreement.

34. The Pre-Trial Chamber decided that since the joint criminal enterprise liability had not been properly pleaded until at the Final Submissions, i.e. after the investigative stage, the 'JCE did not form part of the factual basis for the investigation and for this reason the Pre-Trial Chamber will not add it to the Closing Order at this stage'.[34] This is likewise applicable to the proceedings in Case 002.

35. The defence argument underlying this Appeal Ground is that the Introductory Submission fails to specify the factual basis for the first and third forms of joint criminal enterprise. Whilst paragraphs 5-16 of the Introductory Submission refer solely to the second form of JCE, the conclusion of the Introductory Submission in paragraph 116 also relies on the first and third forms of JCE, without making any reference to the specific evidence which would support those two forms of JCE. They are thus improperly pleaded and lack the precision and specificity required by the Pre-Trial Chamber. The defence arguments set out in paragraphs 18-23 of the Ieng Thirith JCE Motion are incorporated by reference.

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[32] Ieng Thirith JCE Motion, para. 19.
[33] PTC Decision on Appeal Duch Closing Order, para. 135.
[34] PTC Decision on Appeal Duch Closing Order, para. 141.

5.4 Conclusion

36. The Impugned Order failed to give sufficient reasons for its decision in that it failed to address the defence argument that the first and third forms of joint criminal enterprise have been improperly pleaded in the Introductory Submission. There is a requirement for the Charged Person to have sufficient notice regarding this mode of liability at this stage of the proceedings. The Impugned Order is thus insufficiently reasoned and constitutes an error of law and needs to be quashed.

37. The defence requests the Pre-Trial Chamber to determine that the first and third forms of joint criminal enterprise have been insufficiently pleaded in the Introductory Submission and that therefore these forms of JCE cannot be applied to Case File 002.

VI APPEAL GROUND 4 – FAILURE TO ADDRESS DEFENCE ARGUMENT: JCE II AND III NOT APPLICABLE

6.1 Introduction

38. The Ieng Thirith JCE Motion[35] argues that there was no basis for JCE III in Cambodia in 1975-1979, and that the basis for the second form of JCE was ambiguous. This was also argued in the Kai Ambos *Amicus* Brief.[36] However, the Impugned Order fails to address this defence argument, which results in the Impugned Order being insufficiently reasoned.

6.2 Relevant Legal Standard

39. Each judicial decision should provide reasons for the conclusions it reaches. As argued in Section 3.2 above, this can be considered a general principle of law, and

[35] Ieng Thirith JCE Motion, Section 3.4.
[36] See Kai Ambos *Amicus* Brief, Sections II.3 and II.4.

this has been acknowledged by the European Court in the case of *Hadjianastassiou v. Greece*.[37]

40. The OCIJ have failed to abide by this principle of law, which forms the legal basis for this Appeal Ground.

6.3 Submission

41. In Section 3.4 of the Ieng Thirith JCE Motion the defence submitted that the applicability of JCE in Cambodia in 1975-1979 is uncertain in relation to the second form, and non-existent in respect of the third form. The basis thereof in Cambodian law and customary international law is similarly ambiguous and non-existent. The defence further argued that any ambiguity must be resolved in favour of the Charged Person, in accordance with the principle of *in dubio pro reo*, which provides that where there is any doubt in the correct interpretation of a legal provision in criminal law, it should be resolved in favour of the accused person.[38]

42. The OCIJ decided that the jurisprudence relied upon by the *Tadic* Appeals Chamber pre-dated the events under investigation at the ECCC, the OCIJ found all three forms of JCE applicable to the underlying proceedings. However, it failed to address the defence arguments relating to the absence of a judicial basis thereof in the specific context of Cambodia in 1975-1979.

6.4 Conclusion

43. The OCIJ failed to address the arguments raised by the defence in this respect. As such, the Impugned Order is insufficiently reasoned, and should be quashed on this point.

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[37] *Hadjianastassiou v. Greece*, Judgment, European Court, Appl. No. 12945/87, 16 December 1992, para. 33.

[38] *Prosecutor v Tadic*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, para. 73.

VII APPEAL GROUND 5 – ERROR OF LAW: NO JURISDICTION OVER JCE II AND III: NO NATIONAL LEGAL BASIS

7.1 Introduction

44. By finding the second and third forms of joint criminal enterprise applicable, the OCIJ have incorrectly interpreted the law governing the ECCC proceedings. Whilst JCE III was not enacted in Cambodian national law in 1975-1979, JCE II's basis was ambiguous, and should thus not be relied upon in proceedings against the Charged Person. The Impugned Order ignores or misinterprets this element and the Order must thus be quashed.

7.2 Relevant Legal Standard

45. The defence submits that the Impugned Order's conclusion on the applicability of the three forms of JCE is based on an incorrect interpretation of the law that governs the ECCC proceedings. As such it falls within the first ground for overturning an OCIJ decision as previously formulated by the Pre-Trial Chamber.[39]

46. The OCIJ have failed to abide by this principle of law, which forms the legal basis for this Appeal Ground.

7.3 Submissions

47. It is the defence submission that the second and third forms of joint criminal enterprise are not applicable to the underlying proceedings.

48. One of the requirements for applying *any* form of liability is that the law providing for such form of liability 'must have been sufficiently accessible at the relevant time to anyone who acted in such a way' and 'such person must have been able to foresee that he could be held criminally liable for his actions if

[39] SMD Decision, para. 26.

apprehended'.[40] This requires that the form of liability is embedded in the national law at the relevant time.[41]

49. The defence submission is that JCE III was not part of Cambodian domestic law in 1975-1979, and that the status of JCE II was ambiguous.

50. The Impugned Order has failed to address this argument. It is the defence argument that, as set out in the Kai Ambos *Amicus* Brief Section II.4, only the first basic form of JCE was unambiguously embedded in the Cambodian Penal Code of 1956 which was applicable at the relevant time. With regard to the second form, Ambos describes that it is ambiguous whether the Cambodian Penal Code of that time provided a basis for that form. Ambiguity should be resolved in favour of the accused, keeping in mind the international legal principle of *in dubio pro reo*. With regard to the third extended form of JCE. Ambos held that it is no ambiguity; JCE did not form part of the Cambodian Penal Code of 1956, as such, it should not be applied before the ECCC.

7.4 Conclusion

51. The Impugned Order must be quashed because the reasoning employed by the OCIJ is in contravention of the law that requires that the form of liability pleaded forms part of the national law at the relevant time. The Impugned Order violates this principle, and should thus be quashed on the content as well. The Pre-Trial Chamber is requested to order that the ECCC does not have jurisdiction on this basis to apply the second and third forms of joint criminal enterprise.

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[40] *Prosecutor v. Milutinovic*, Decision on Draguljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR2, 21 May 2003, para. 21.
[41] Kai Ambos *Amicus* Brief, p. 21, 29-30. See Ieng Thirith JCE Motion, para. 15.

VIII APPEAL GROUND 6 – FAILURE TO ANALYSE CUSTOMARY BASIS FOR JCE

8.1 Introduction

52. The Impugned Order fails to conclude that the three forms of joint criminal enterprise were part of customary international law at the relevant time. This is a requirement for finding joint criminal enterprise, or any form of liability for that matter, applicable. By failing to do so, the OCIJ have failed to sufficiently reason their decision and made an error of law, as a result of which the Impugned Order needs to be quashed.

8.2 Relevant Legal Standard

53. The legal standard for this Appeal Ground is a combination of both insufficient reasoning, the legal basis of which is addressed in Section 3.2 above, and an incorrect interpretation of the law that governs the ECCC proceedings, which falls within the first ground for overturning an OCIJ decision as previously formulated by the Pre-Trial Chamber.[42]

54. The OCIJ have failed to abide by these principles of law, which forms the legal basis for this Appeal Ground.

8.3 Submission

55. The OCIJ has failed to find a customary basis for joint criminal enterprise in the Impugned Order. The only reference the Impugned Order makes to customary international law is in paragraph 21 where it states that: 'The Co-Investigating Judges find that the application of international customary law before the ECCC is a corollary from the finding that the ECCC holds indicia of an international court applying international law'.[43] This is nothing more than a finding that the ECCC is an international court and can therefore apply customary international

[42] SMD Decision, para. 26.
[43] Footnote omitted.

law. The OCIJ fails to further address whether or not there is a basis for JCE in customary international law; whether this alleged rule of customary law indeed also applies to Cambodia, and whether that alleged rule was applicable in the period of 1975-1979. The OCIJ fails to address this necessary step in the analysis of the applicability of JCE to the current proceedings against the Charged Person.

56. The OCIJ continues to state in paragraph 21 that:

> Considering the international aspects of the ECCC, and considering that the jurisprudence relied upon in articulating JCE pre-existed the events under investigation at the ECCC,[39] the Co-Investigating Judges find that there is a basis under international law for applying JCE as set out above in paragraphs 14-17, including the relevant footnotes, highlighting the subjective assessment of natural and foreseeable consequences.[40]

Footnote 39 IT-94-1-A, *Tadic* Appeal Judgement, paras. 185 *et seq.*

Footnote 40 *IT-98-30/1-A, Kvocka and others* Appeal Judgement, para. 86: "[...] A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes *were a natural and foreseeable consequence to him.*" (emphasis added).

57. After stating that customary international law plays a role in the ECCC, the OCIJ then refers to the *Tadic* case, concludes that the case law referred to in *Tadic* pre-dates the events underlying this tribunal, and concludes that JCE is thus applicable. No analysis of that specific case law is presented, no notice is made of the fact that the case law addressed in *Tadic* is not from near South-East Asia, let alone from Cambodia. No mention is made that the case law there all refers to crimes committed in Germany during the Second World War. No attempt is made to show the relevance of that case law to the underlying proceedings. Mere reference to *Tadic* is deemed sufficient for showing the applicability of JCE to the underlying proceedings and such reasoning is clearly defective.

58. Paragraphs 205-218 of the *Tadic* Appeals Judgment contain and explain the asserted customary law basis for the application of JCE III in the specific context of the case before the ICTY. This is an insufficient basis for concluding that this can be applied *mutatis mutandis* to the ECCC proceedings.

8.4 Conclusion

59. The Impugned Order has failed to find a customary basis for joint criminal enterprise in Cambodia in 1975-1979. The defence argues separately, and has done so in the Ieng Thirith JCE Motion, that such basis indeed does not exist, but this Appeal Ground focuses on the absence of such deliberation in the Impugned Order. By failing to find a customary basis for JCE, the Impugned Order must be quashed.

IX APPEAL GROUND 7 – ABSENCE OF CUSTOMARY BASIS FOR JCE

9.1 Introduction

60. In addition to appealing from the Impugned Order on insufficient reasoning by failing to address whether JCE was embedded in customary international rules which were applicable to Cambodia in 1975-1979, the defence also appeals from the inferred conclusion that all three forms of JCE formed part of customary international law at the time. Whilst the OCIJ skipped this step in its analysis, such finding is necessary for concluding applicability of JCE, and thus the OCIJ reached this conclusion defectively but implicitly, and the defence must address it.

9.2 Relevant Legal Standard

61. The Impugned Order's conclusion on the applicability of the three forms of JCE is based on an incorrect interpretation of the law that governs the ECCC proceedings. As such it falls within the first ground for overturning an OCIJ decision as previously formulated by the Pre-Trial Chamber.[44]

62. The OCIJ have failed to abide by this principle of law, which forms the legal basis for this Appeal Ground.

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[44] SMD Decision, para. 26.

9.3 Submission

63. The *Tadic* Appeals Chamber considered that customary rules are discernable that provide a basis for joint criminal enterprise,[45] which were applicable during the relevant time of the conflict in the former Yugoslavia and in that region of the world. In deliberating this, the ICTY Appeals Chamber relied on certain case law which is, arguably, applicable to the ICTY proceedings. However, this material cannot be deemed to apply similarly to the ECCC proceedings.

64. Whilst it is first of all controversial whether the *Tadic* Appeals Chamber's Judgment's conclusions on the customary basis of JCE were in accordance with the principle of legality,[46] the defence submits that even if this was the case for the ICTY jurisdiction, this does not *mutatis mutandis* apply to the ECCC's jurisdiction.

65. The *Tadic* Appeals Chamber refers to the customary basis of joint criminal enterprise, relying mostly on post-World War II military courts jurisprudence,[47] dealing with crimes committed on the European territory. According to Danner and Martinez, 'the cases cited in *Tadic* do not support the sprawling form of JCE, particularly the extended form of this kind of liability'.[48]

66. This case law cannot be transposed to the territory of Asia, especially since JCE III finds no basis in the 1956 Penal Code.[49] JCE III was not embedded in Cambodian law, and the *Tadic* case law refers to crimes committed in Europe and was dealt with by the military post-World War II courts in North America and Europe, and mention is made of the legal systems of Australia and Zambia. The

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[45] *Prosecutor v. Dusko Tadic*, Appeals Chamber, Judgement, 15 July 1999, Case No. IT-94-1-A, para. 194.
[46] A.M. Danner & J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', March 2004, p. 31.
[47] A.M. Danner & J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', March 2004, p. 28.
[48] A.M. Danner & J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', March 2004, p. 38.
[49] See for this requirement, *Prosecutor v. Milutinovic*, Decision on Draguljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR2, 21 May 2003, para. 41.

defence submits that the case law underlying the case law provided by the *Tadic* Appeals Chamber cannot be deemed to have formed part of customary international law which was applicable to the specific context of Cambodia.

67. The ICTY Appeals Chamber in *Milutinovic* further held that, besides a basis in domestic law, a form of liability needs to have a basis in customary international law as well. Domestic law alone is not enough. It held:

> Although domestic law (in particular the law of the country of the accused) may provide some notice to the effect that a given act is regarded as criminal under international law, it may not necessarily provide sufficient notice of that fact.[50]

68. The OCP indeed also conceded in its Response to the Ieng Sary JCE Motion:

> However, in [the *Tadic* Appeals Chamber's] review of domestic systems that apply some form of "common purpose" liability, *Tadic* emphasized that "reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems," not to support the holding that the doctrine exists in customary international law. *Milutinovic* later held that the recognition of JCE-type liability in domestic legislation helps support a finding that an accused had sufficient notice that he or she could be convicted under such a form of liability.[51]

69. In that specific case the Appeals Chamber had held that besides the domestic provision there was sufficient basis in customary international law, which is contested by the defence in the underlying case (see Appeal Ground 7 below).

70. In the oft-quoted *Tadic* case, the ICTY Appeals Chamber made the following consideration about the customary basis of JCE after analysing national case law from different countries on similar modes of liability:

> It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to

[50] *Prosecutor v. Milutinovic*, Decision on Draguljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR2, 21 May 2003, para. 41.
[51] Co-Prosecutors' Response to Ieng Sary Motion on Joint Criminal Enterprise, 11 August 2008, Document No. D97/2, para. 28 (footnotes omitted).

> show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case. Nor can reference to national law have, in this case, the scope and purport adumbrated in general terms by the United Nations Secretary-General in his Report, where it is pointed out that "suggestions have been made that the international tribunal should apply *domestic law* in so far as it *incorporates* customary international humanitarian law". In the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation.[52]

71. This implies that if there is no national rule available on a certain form of liability, international law cannot fill this gap. As a consequence this form of liability should not be applied. The OCIJ completely ignored this argument in its Impugned Order.

72. Since the customary basis of JCE for the ICTY is already highly controversial,[53] it should not be transposed to Cambodia in the 1970s without any basis in South East Asia's case law, let alone Cambodian legal practice.

73. Three out of four of the necessary requirements for applicability of a form of liability as laid down in *Prosecutor v. Milutinovic* accordingly cannot be fulfilled. These are:
    (a) The form of liability must have existed under customary international law;
    (b) That specific form of liability must have been sufficiently accessible and foreseeable at the relevant time; and
    (c) That person must have been able to foresee that he would have been held criminally liable if apprehended. One cannot substantiate the allegation

[52] See for an attempt to explain the logic behind this citation: M. Sassoli & L.M. Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case', International Review of the Red Cross No. 839, p. 7.
[53] See for instance, M. Sassoli & L.M. Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case', International Review of the Red Cross No. 839, p. 7. These authors address the controversy as to why the *Tadic* Appeals Chamber described the Italian case law, in support of the JCE theory, in detail, whilst mostly ignoring Dutch and German case law, which are not in support of the JCE Theory. See moreover A.M. Danner & J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', March 2004.

that the Charged Person was able to foresee the applicability of JCE III in Cambodia in 1975-1979.[54]

74. The *Tadic* Appeals Chamber held that two international treaties provided a further basis for the customary nature of JCE III, namely the International Convention for the Suppression of Terrorist Bombing of 1997 and the ICC Statute of 1998,[55] which both obviously post-date by decades the events under scrutiny before this tribunal. Also, as pointed out by Kai Ambos, the third form of JCE has no basis in Cambodian domestic law applicable in 1975-1979 and the basis for the second form is ambiguous.[56] It can therefore not be maintained that JCE II and III are applicable before this tribunal, and any other interpretation would contravene international law. Hence, the interpretation provided by the Impugned Order is in violation of international law, and needs to be quashed.

9.4 Conclusion

75. The defence thus submits that the customary international basis for JCE II and III applicable to the ICTY is in conflict with the jurisdiction of the ECCC. The Impugned Order has failed to address this aspect, on which basis the Order must be quashed. The Pre-Trial Chamber is requested to find that the second and third forms of JCE are not applicable to the ECCC proceedings, as they have no basis in customary international law.

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[54] *Prosecutor v. Milutinovic*, Decision on Draguljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR2, 21 May 2003, para. 21.
[55] Tadic Appeals Judgment, paras. 221-222.
[56] Kai Ambos *Amicus* Brief, Section II.4.

X REQUEST FOR AN ORAL HEARING

76. Given the complexity of the underlying issues, as well as the importance and fundamental nature thereof, not just for the participants in Case File 002, but to the ECCC's credibility and international legal society, the defence seeks an oral hearing. Any questions which arise regarding this complex and important area may then be addressed orally.

77. In the 'Decision on "Request for an Oral Hearing" on the Appeals PTC 24 and 25'[57] the Pre-Trial Chamber has held that as a general rule it would not hold public hearings relating to investigative requests because of their confidential nature. The defence submits that this consideration is irrelevant in relation to the issues raised in this appeal which by their very nature should be dealt with in a transparent manner; no reference need be made to matters which are under investigation. The defence submits that the nature of the argument is appropriate for a public hearing, and it would assist the judges in dealing with any issues which may arise and provide transparency for the public and the international legal community as to the conduct of these important proceedings.

XI PRAYER

78. For the above reasons, the defence respectfully requests the Pre-Trial Chamber to quash the Impugned Order and to find instead that:
    (i) Primarily, the ECCC has no jurisdiction over JCE as a form of liability;

[57] Pre-Trial Chamber, Decision on "Request for an Oral Hearing" on the Appeals PTC 24 and 25, 20 August 2009, Document No. D164/4/3.

(ii) In the alternative, that the ECCC has no jurisdiction to apply the second and third forms of JCE;

(iii) Furthermore, the Co-Prosecutors have insufficiently pleaded the first and third forms of JCE in the Introductory Submission, and as a result these forms of JCE can be applied to Case File 002.

Party	Date	Name Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	18 January 2010	PHAT Pouv Seang Diana ELLIS, QC	Phnom Penh