



ឯកសារបញ្ជាក់ថាបច្ចុប្បន្នត្រឹមត្រូវតាមច្បាប់ដើម
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 du dossier:..... **S.A.N.N.RADA**

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
 Extraordinary Chambers in the Courts of Cambodia
 Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
 Nation Religion King
 Royaume du Cambodge
 Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
 Trial Chamber
 Chambre de première instance

សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៧/អវតក/អជសដ

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 du dossier:..... **S.A.N.N.RADA**

Before: Judge NIL Nonn, President
 Judge Silvia CARTWRIGHT
 Judge YA Sokhan
 Judge Jean-Marc LAVERGNE
 Judge THOU Mony

Greffiers: LIM Suy-Hong, Matteo CRIPPA, SE Kolvuthy,
 Natacha WEXELS-RISER, DUCH Phary

Duration of hearing: 30 March 2009 until 27 November 2009

Date: 26 July 2010

Classification: CONFIDENTIAL

JUDGEMENT

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crimes charged in the Amended Closing Order through his participation in a joint criminal enterprise.⁸⁶³

490. On 29 June 2009, the Chamber notified the Parties that the issue of the Accused's responsibility as a participant in a joint criminal enterprise was live before it and invited the Parties to respond to the OCP JCE Request. The Chamber further stated that it intended to rule on this Request in the Judgement.⁸⁶⁴

491. On 17 September 2009, co-counsel for the Accused filed a response to the OCP JCE Request ("Accused JCE Response"), claiming that the OCP JCE Request was inadmissible in light of the Pre-Trial Chamber's decision to exclude joint criminal enterprise from the Amended Closing Order. The Accused JCE Response further argued that the OCP JCE Request should be denied on grounds that there was an insufficient factual basis in the Amended Closing Order for a finding of joint criminal enterprise and that this mode of criminal liability had not been pleaded with sufficient specificity by the Co-Prosecutors. The Accused JCE Response added that, were the Chamber nevertheless to decide to apply joint criminal enterprise, the Accused must be invited to "make his submissions on the new legal characterisation contemplated before the case is adjourned for deliberation."⁸⁶⁵

2.7.1.3.2 *Internal Rule 98(2)*

492. As a preliminary matter, the Chamber notes that it is not bound by the legal characterisations adopted by the Co-Investigating Judges or the Pre-Trial Chamber in the Amended Closing Order. Indeed, Internal Rule 98(2) states:

[t]he judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced.

⁸⁶³ "Co-Prosecutors' Request for the Application of Joint Criminal Enterprise", E73; *see also* "Group 3 Civil Parties – Brief in Support of the co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/3.

⁸⁶⁴ T., 29 June 2009, pp. 8-9.

⁸⁶⁵ "Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2, paras 7-10, 15-27, 38.

493. The Parties do not dispute that Internal Rule 98(2) permits changes to the legal characterisation of both the crimes *and* the forms of responsibility included in the Amended Closing Order.⁸⁶⁶ While comparable provisions in the Cambodian legal system do not specifically address changes to a form of responsibility, the Chamber is satisfied that this type of change is permissible under Internal Rule 98(2).⁸⁶⁷

494. Internal Rule 98(2) mandates, however, that any legal re-characterisation made by the Chamber be limited to the facts set out in the Amended Closing Order. This approach accords with the powers conferred upon Trial Chambers in the Cambodian legal system,⁸⁶⁸ as well as in French legal system upon which it was originally modelled.⁸⁶⁹ The Chamber considers that the proviso of Internal Rule 98(2) that no new constitutive elements be introduced is a reiteration of this well-established limitation, namely that any re-characterisation must not go beyond the facts set out in the charging document.

495. The ICC's Regulations of the Court similarly permit its Trial Chambers to change the legal characterisation of facts following the start of the trial proceedings.⁸⁷⁰ Before the international *ad hoc* tribunals, however, Trial Chambers have generally required a formal amendment to the charges against the accused where the facts establish that the accused has committed a different or more serious offence than that indicated in the indictment.⁸⁷¹ It follows from the many structural differences between the international *ad hoc* tribunals and the ECCC that certain of the common law-inspired procedural mechanisms of the former have no counterpart in the civil law-oriented framework of the latter. In contrast to the ICTY and ICTR, no comparable mechanism exists within the ECCC that would

⁸⁶⁶ See e.g., "Defence Response to the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise Theory in the Present Case", E73/2, fn. 10.

⁸⁶⁷ See Regulation 55 (Authority of the Chamber to modify the legal characterisation of facts) of the ICC's Regulations of the Court (ICC-BD/01-01-04, entry into force 26 May 2004) (allowing for a change to the legal characterisation of facts to accord with a different form of participation).

⁸⁶⁸ See e.g., Article 348 of the 2007 Code of Criminal Procedure; Articles 10 and 175 of the 1993 (SOC) Code of Criminal Procedure.

⁸⁶⁹ See Cour de Cassation, Cass. Crim., 22 April 1986, Bulletin Criminel, No. 136 ("[I]l appartient aux juridictions correctionnelles de modifier la qualification des faits et de substituer une qualification nouvelle à celle sous laquelle ils leur étaient déférés [...] à la condition qu'il ne soit rien changé ni ajouté aux faits de la prévention et que ceux-ci restent tels qu'ils ont été retenus dans l'acte de saisine.').

⁸⁷⁰ See Regulation 55 (Authority of the Chamber to modify the legal characterisation of facts) of the ICC's Regulations of the Court (ICC-BD/01-01-04, entry into force 26 May 2004).

⁸⁷¹ See *Kupreškić et al.* Trial Judgement, para. 748.

allow either the Parties or the Chamber to formally amend a Closing Order. The basis for the re-characterisation of facts before the ECCC is instead Internal Rule 98(2), which expressly envisages this eventuality, subject to fair trial safeguards.

496. The Chamber thus considers that Internal Rule 98(2) enables it to change the legal characterisation of facts contained in the Amended Closing Order to accord with a new form of responsibility provided that it does not go beyond those facts. In doing so, the Chamber must also ensure that (i) no violation of the fair trial rights of the Accused is entailed and (ii) the form of responsibility in question is applicable before the ECCC.

2.7.1.3.2.1 Fair trial rights of the Accused

497. Article 35 (new) of the ECCC Law states in relevant part:

In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.

- a. to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;
- b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;

498. The European Court of Human Rights, whose founding document contains similar fair trial provisions,⁸⁷² has stated that while a criminal court may change the legal characterisation of facts over which it has jurisdiction, it must afford the accused the possibility of exercising his or her defence rights “in a practical and effective manner and, in particular, in good time.”⁸⁷³ In practice, it has found that this entails ensuring that

⁸⁷² See Article 6(3) of the ECHR (“Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his defence [...]”).

⁸⁷³ *Pélissier and Sassi v. France*, Judgment of 25 March 1999, ECtHR (no. 25444/94), 25 March 1999, para. 62; see also *I.H. and Others v. Austria*, Judgment of 20 April 2006, ECtHR (no. 42780/98), 20 April 2006, para. 34 (“in order that the right to defence be exercised in an effective manner, the defence must have at its disposal full, detailed information concerning the charges made, including the legal characterisation that the court might adopt in the matter. This information must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges. Mere reference to the abstract possibility that a court might arrive at a different conclusion than the prosecution as regards the qualification of an offence is clearly not sufficient.”)

the accused is aware of the possibility of the legal re-characterisation and provided with a sufficient opportunity to defend against it.⁸⁷⁴

499. Similarly, Regulation 55 adopted by the ICC allows that Court's Trial Chambers to change the legal characterisation of facts without a formal amendment of the charges in accordance with the following procedural safeguards:

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:

(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and

(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).⁸⁷⁵

500. The Appeals Chamber of the ICC has confirmed that a change in the legal characterisation of facts pursuant to Regulation 55 is not inherently in breach of an accused's right to a fair trial.⁸⁷⁶ It has further stated that the manner in which the

⁸⁷⁴ See *Abramyan v. Russia*, Judgment of 9 October 2008, ECtHR (no. 10709/02), 9 October 2008, paras 36-40; see also *Dallos v. Hungary*, Judgment of 1 March 2001, ECtHR (no. 29082/95), 1 March 2001, paras 47-53 (finding that a re-qualification of an offence did not impair the rights of the defence when the accused had sufficient opportunity to defend himself during the review proceedings); *Sipavičius v. Lithuania*, Judgment of 21 February 2002, ECtHR (no. 49093/99), 21 February 2002, paras 23-34.

⁸⁷⁵ Regulation 55 (Authority of the Chamber to modify the legal characterisation of facts) of the ICC's Regulations of the Court (ICC-BD/01-01-04, entry into force 26 May 2004).

⁸⁷⁶ *Situation in the Democratic Republic of the Congo, the Prosecutor v. Lubanga*, Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts

procedural safeguards provided for in Regulation 55(2) and (3) are to be applied, and whether any additional safeguards may be required to fully protect the rights of the accused, will depend on the circumstances of the case.⁸⁷⁷

501. In the present case, the Co-Prosecutors reiterated throughout the trial their request that the Chamber apply joint criminal enterprise, including in its systemic form, to the charges against the Accused.⁸⁷⁸ The Co-Prosecutors indicated the nature and purpose of the joint criminal enterprise, the period over which it existed, and the identity of those engaged in it.⁸⁷⁹ On 29 June 2009, following the OCP JCE Request, the Chamber provided notice to the Accused that the issue of the applicability of joint criminal enterprise was before it and that it intended to rule on the issue in the Judgement.⁸⁸⁰ The Accused was provided with an opportunity to respond to the OCP JCE Request and filed his Response on 17 September 2009.

may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, ICC Appeals Chamber (ICC-01/04-01/06 OA 15 OA 16), 8 December 2009, para. 87 (reversing the Trial Chamber’s interpretation of Regulation 55 but finding that changes made to the legal characterisation pursuant to that Regulation would not otherwise be inherently in breach of the accused’s fair trial rights).

⁸⁷⁷ *Situation in the Democratic Republic of the Congo, the Prosecutor v. Lubanga*, Judgement on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, ICC Appeals Chamber (ICC-01/04-01/06 OA 15 OA 16), 8 December 2009, paras. 85-87.

⁸⁷⁸ T., 17 February 2009, pp. 9-10; *see also* T., 31 March 2009, p. 56 (“As we have outlined from the very beginning of this process, we urge this Court to consider and apply Joint Criminal Enterprise, or JCE to the facts of this case.”); “Co-Prosecutors’ Request for the Application of Joint Criminal Enterprise”, E73; “Co-Prosecutors’ Final Trial Submissions with Annexes 1-5”, E159/9, paras 323-334; *see also* Section 2.7.1.3.1.

⁸⁷⁹ As regards the nature, purpose and time period, *see* “Co-Prosecutors’ Final Trial Submissions with Annexes 1-5”, E159/9, para. 331 (“The evidence before the Chamber establishes that the Accused committed the crimes described as a participant in a JCE. The JCE came into existence on 15 August 1975 when Son Sen instructed In Lorn *alias* Nat, and the Accused to establish S-21. The JCE existed until at least 7 January 1979 when the DK regime collapsed and S-21 was abandoned. The purpose of the JCE was the systematic arrest, detention, ill-treatment, interrogation, torture and execution of “enemies” of the DK regime by committing the crimes described in this Submission. An organised system of repression existed at S-21 throughout the entirety of the duration of the JCE. All crimes occurring in S-21 were within the purpose of this JCE.”); *see also* “Co-Prosecutors’ Request for the Application of Joint Criminal Enterprise”, E73, para. 24; “Rule 66 Final Submission Regarding Kaing Guek Eav *alias* ‘Duch’”, D96, 18 July 2008, para. 250. As regards the identity of those engaged in the joint criminal enterprise, *see* “Co-Prosecutors’ Final Trial Submissions with Annexes 1-5”, E159/9, para. 332 (“The Accused took part in the JCE throughout its entire existence, together with others who participated for various durations, including Nat, the former Secretary of S-21, and the other members of the S-21 Committee, namely Hor and Huy Sre, as well as their subordinates”); *see also* “Co-Prosecutors’ Request for the Application of Joint Criminal Enterprise”, E73, para. 25; “Rule 66 Final Submission Regarding Kaing Guek Eav *alias* ‘Duch’”, D96, para. 251.

⁸⁸⁰ T., 29 June 2009, pp. 8-9.