

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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RESPONSE TO THE CO-PROSECUTOR'S REQUEST CONCERNING JCE III

Filed by:

Lawyers for Mr KHIEU Samphan

SA Sovan
Jacques VERGÈS

Assisted by:

SENG Socheata
Marie CAPOTORTO
Shéhérazade BOUARFA
Marianne SABATIER

Before:

The Trial Chamber

Judge NIL Nonn
Judge Silvia CARTWRIGHT
Judge THOU Mony
Judge Jean-Marc LAVERGNE
Judge YA Sokhan

Co-Prosecutors

CHEA Leang
Andrew CAYLEY

Civil Party Lawyers

PICH Ang
Elisabeth SIMONNEAU FORT

MAY IT PLEASE TRIAL CHAMBER**I - Introduction**

1. On 18 January 2010, Mr KHIEU Samphan filed an Appeal against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise.¹
2. On 19 February 2010, after the Chamber had granted their applications for extension of time and page limits,² the Co-Prosecutors filed their Response.³
3. On 25 March 2010, Mr KHIEU Samphan filed his reply.⁴
4. On 20 May 2010, the Trial Chamber rendered its Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise, in which it considered that JCE III could not be applied as a form of liability before the ECCC.⁵
5. On 14 February 2011, Mr KHIEU Samphan filed his preliminary objections, challenging the Chamber's jurisdiction with regard to all forms of Joint Criminal Enterprise.⁶
6. On 21 March 2011, the Co-Prosecutors filed their joint response to all the preliminary objections.⁷
7. On 17 June 2011, the Co-Prosecutors requested the Trial Chamber to find that an accused may incur criminal liability by virtue of his/her participation in JCE III.⁸ The Chamber granted the Defence teams and the Civil Parties until 22 July to respond.⁹

¹ Appeal against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 18 January 2010, D97/16/1.

² Decision on the Co-Prosecutors' Applications for Extension of Time and Page Limits to File a Joint Response to Ieng Thirith, Khieu Samphan, Ieng Sary and Certain Civil Parties' Appeals against the Order on Joint Criminal Enterprise, 20 February 2010, D97/16/4.

³ Co-Prosecutors' Joint Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise, 19 February 2010, D97/16/5.

⁴ Reply of Mr Khieu Samphan's Defence to the Co-Prosecutors' Joint Response on Joint Criminal Enterprise, 25 March 2010, D97/16/9.

⁵ Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15 ("Pre-Trial Chamber Decision").

⁶ Preliminary Objections to Jurisdiction, 14 February 2011, E46 ("Preliminary Objections").

⁷ Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, 21 March 2011, E51/3/1.

⁸ Co-Prosecutors' Request for the Trial Chamber To Consider JCE III as an Alternative Mode of Liability, 17 June 2011, E100 ("Co-Prosecutors' Request"). The Co-Prosecutors' Request was notified on 23 June 2011 in English and Khmer, and on 14 July 2011 in French.

⁹ Decision on Extension of Time, 7 July 2011, E107.

8. On 24 June 2011, Mr IENG Sary requested the Trial Chamber to issue an expedited decision as to whether the Co-Prosecutors' Request (amongst others) could be raised at this stage of the proceedings.¹⁰

9. To date, the Chamber has not yet disposed of Mr IENG Sary's Request.

II – Argument: Inadmissibility of the Co-Prosecutors' Request

10. The Co-Prosecutors' Request is inadmissible and should therefore be rejected *in limine*. The Request was filed “pursuant to Internal Rules 92 and 98(2)”,¹¹ which are not applicable, unlike Rule 89, pursuant to which the Co-Prosecutors are estopped from proceeding.

11. Rule 98, entitled “The Judgment”, provides no legal basis for the admissibility of their Request. Rule 98 states in relevant parts that:

“2. The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced. (...)

3. The Chamber shall examine whether the acts amount to a crime falling within the jurisdiction of the ECCC, and whether the Accused has committed those acts.

(...)

7. Where the Chamber considers that the crimes set out in the Indictment do not fall within the jurisdiction of the ECCC, it shall decide that it does not have jurisdiction in the case”.

12. Paragraph 2 permits the Trial Chamber, and not the Co-Prosecutors, to change the legal characterisation of facts at the trial stage “as long as no new constitutive elements are introduced”. In the Judgement in Case 001, the Trial Chamber considered that this proviso 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”.¹² It added: “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”.¹³

¹⁰ Ieng Sary's Request for an Expedited Decision as to Whether the OCP May Raise Requests for Re-Characterization at this Stage in the Proceedings & Request for Extension of Time to Respond to Such Requests, Should Responses Be Necessary, 24 June 2011, E103. See procedural background to Mr IENG Sary's numerous requests to this effect.

¹¹ Co-Prosecutors' Request, para. 1.

¹² Duch Judgement, 26 July 2010, E188, para. 494.

¹³ Duch Judgement, para. 495 (emphasis added).

13. Regulation 55 of the ICC Regulations, which is cited in reference, states in relevant parts:

“1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles (...) 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 Chambers 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. (...)”¹⁴

14. It is abundantly clear from a reading of Internal Rule 98, Regulation 55 of the ICC Regulations and Article 74 of the ICC Statute that it is permissible for the Chamber to re-characterise facts during the trial on the merits. Legal re-characterisation of facts while evidence is being heard makes it possible to **accord** the facts with a more appropriate characterisation, it being understood, of course, that the more appropriate legal characterisation is provided by law and is within the jurisdiction of the court, otherwise the Chamber must purely and simply decline jurisdiction.

15. Legal re-characterisation of facts is the process by which the court re-categorises an act or a fact under its proper characterisation; it is not a process by which the court can change the legal definition of crimes, over which it has jurisdiction.

16. Yet, it is precisely this latter process that the Co-Prosecutors are asking the Trial Chamber to undertake in their Request. By asking the Chamber to determine whether JCE III applied as a mode of liability during the period from 17 April 1975 to 6 January 1979, what they are actually seeking is for the Chamber to determine **the law applicable before the ECCC**.

17. In the Duch Judgement, the Trial Chamber held that under Rule 98(2), legal re-characterisation of facts could also apply to a form of responsibility.¹⁵ In reference thereto, the Co-Prosecutors contend that there is prior precedent for their Request.¹⁶ However, a careful reading of the Judgement leads rather to the conclusion that their Request is inadmissible.

¹⁴ Article 74(2) of the Rome Statute (“Requirements for the decision”) provides: “The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial”.

¹⁵ Duch Judgement, para. 493.

¹⁶ Co-Prosecutors' Request, para. 8.

18. In fact, the Chamber adopted a three-step analysis. First, it interpreted Rule 98(2) and made sure that applying it entailed no violation of the fair trial rights of the accused.¹⁷ It then went on to determine whether Joint Criminal Enterprise is applicable at the ECCC, in order to satisfy itself that the principle of legality was being respected (since this issue had not been settled while dealing with the preliminary objections).¹⁸ Finally, having answered both questions in the affirmative, the Chamber concluded that based on the evidence before it, the Accused could be held responsible by virtue of this form of participation.¹⁹

19. It is clear, therefore, that in determining the applicability of Joint Criminal Enterprise before the ECCC, the Chamber did not proceed based on Rule 98(2), but rather on the principle of legality.²⁰ Rule 98(2) only served as a basis for the legal re-characterisation of the facts, after evidence had been heard.

20. Rule 98(2) is therefore not applicable in this instance, and neither is Rule 92.²¹ However, there is a specific provision under which the parties may request the Chamber to change the legal definition of the crimes or forms of participation set out in the amended Indictment, in other words, the law applicable before the Chamber; that provision is Rule 89 on preliminary objections concerning the jurisdiction of the Chamber. It is only on the basis of that rule and the principle of legality that the Chamber can determine whether or not the crimes or forms of participation set out in the Indictment are within its jurisdiction.

21. In fact, requesting the Chamber to rule on the applicability of JCE III under customary international law is tantamount to requesting it to rule on the law applicable before the Chamber, and is thus properly within its jurisdiction. This is even clearer in light of international jurisprudence.²²

¹⁷ Section 2.7.1.3.2 “Internal Rule 98(2)”, Duch Judgement, paras. 492-503.

¹⁸ Section 2.7.1.3.3 “Applicability of joint criminal enterprise before the ECCC”, Duch Judgement, paras. 504-513.

¹⁹ Section 2.7.1.4 “Findings on committing through participation in a joint criminal enterprise”, Duch Judgement, paras. 514-517.

²⁰ Duch Judgement, para. 512.

²¹ Rule 92 permits the parties to file written submissions up until the closing statements, but does not specify the nature of such submissions. It is therefore a general provision which only applies in the absence of a special provision.

²² See for example: International Criminal Tribunal for Rwanda (ICTR) *Karemera et al. v. The Prosecutor*, ICTR-98-AR72.5 and ICTR-98-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, and Decision on Validity of Joseph Nzirorera’s Appeal of Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal Enterprise, 14 October 2005, para. 9. In this decision, the Appeals Chamber considered that the applicability of Joint Criminal Enterprise before the Tribunal was a jurisdictional matter; International Tribunal for the former Yugoslavia (ICTY) *Prosecutor v. Enver Hadžihasanović et al.*, IT-

22. In this instance, the Co-Prosecutors failed to discharge their Rule 89 obligation to raise their preliminary objections concerning the jurisdiction of the Chamber no later than 30 days after the Closing Order became final, “failing which [the preliminary objections] shall be inadmissible”. In fact, they filed their Request on 17 June 2011, i.e. more than four months after the prescribed time limit had expired. It is therefore inadmissible.

23. The fact of the matter is that the Co-Prosecutors are trying to lodge a “disguised” appeal against the Pre-Trial Chamber’s Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise.²³ This is clear from the wording employed by the Co-Prosecutors when they contend that “the Pre-Trial Chamber erred in law”.²⁴

24. However, decisions of the Pre-Trial Chamber are not subject to appeal (Internal Rule 77(13)). Indeed, this was acknowledged by the Co-Prosecutors on 31 January 2011 at the hearing on the application for release, when they stated that:

“(…) this request is inadmissible before this Court. It is inadmissible because it seeks this Trial Chamber to review a decision of the Pre-Trial Chamber. In effect, it seeks for you to determine the validity of that decision of the 13th of January 2011. And the rules of this Court are very clear. Rule 77(13), that Pre-Trial Chambers are not subject to review. And indeed I hardly need to point out, and I do so most respectfully, that the Trial Chamber was not established under the rules as an appellate body. So our submission is this: even if you find merit in the arguments of Nuon Chea, simply put, this decision of the Pre-Trial Chamber cannot be reviewed by you, and you have no authority to review it.”²⁵

25. Furthermore, Mr KHIEU Samphan wishes to recall that the issue of Joint Criminal Enterprise has been raised numerous times before the Pre-Trial Chamber. It was recently raised by the Defence in the Appeals against the Closing Order.²⁶ In fact, the Co-Prosecutors responded that “the Appellants are also barred from raising the applicability of (...) joint criminal enterprise as a mode of liability (...) as the Pre-Trial Chamber has already heard and determined these arguments. On the ground of *res judicata*, the grounds 1 and 9 should, therefore, be dismissed.”²⁷ There is therefore no explanation why they are raising the same issue several months later.

01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003. In this decision, the ICTY Appeals Chamber also considered that the existence of a mode of responsibility under customary law is a jurisdictional matter.

²³ Pre-Trial Chamber Decision.

²⁴ Co-Prosecutors’ Request, para.31.

²⁵ Transcript of Hearing on Application for Release: NUON Chea, KHIEU Samphan, IENG Thirith, 31 January 2011, E1/1.1, pp. 47-48 (emphasis added).

²⁶ IENG Sary’s Appeal against The Closing Order, 20 October 2010, D427/1/6, paras. 249-263.

²⁷ Co-Prosecutor’s Joint Response to NUON Chea, IENG Sary and IENG Thirith’s Appeals against the Closing Order, 19 November 2010, D427/3/6, paras. 11 and 45-51.

26. The issue of Joint Criminal Enterprise as a mode of liability has also been raised by the Defence before the Trial Chamber pursuant to Internal Rule 89,²⁸ and the Co-Prosecutors have exercised their right to respond.²⁹ The matter is now pending before the Trial Chamber, which has not invited the parties to file new submissions. The Co-Prosecutors cannot therefore circumvent Rule 89 and use their present Request as an opportunity to make new submissions which would supplement their Response well after the time limit has elapsed and in excess of the page limit.

27. Mr KHIEU Samphan will not respond to the new submissions that the Co-Prosecutors are attempting to introduce by means of their inadmissible Request, and the Chamber should disregard them when considering the preliminary objections.

FOR THESE REASONS

28. The Trial Chamber is requested:

- TO DECLARE the Co-Prosecutors' Request inadmissible;
- In any event, TO DISREGARD the arguments raised in the Co-Prosecutors' Request when considering the preliminary objections.

**WITHOUT PREJUDICE,
AND IT WILL BE JUSTICE**

	SA Sovan Jacques VERGÈS	Phnom Penh Paris	
Date	Name	Place	Signature

²⁸ Preliminary Objections. IENG Thirith Defence's Preliminary Objections, 14 February 2011, E44, paras. 33-38.

²⁹ Prosecutors Response to Preliminary Objections, paras. 22-26.