

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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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

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REQUEST FOR EXTENSION OF TIME TO RESPOND TO SUCH REQUESTS, SHOULD RESPONSES BE NECESSARY

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby requests the Trial Chamber to issue an expedited decision as to whether the OCP may raise requests for re-characterization at this stage in the proceedings. This Request is made necessary because the OCP has raised Requests¹ which concern the jurisdiction of the Chamber well beyond the deadline for such matters to be raised.² An expedited decision will assist the Trial Chamber and all the Parties because if the OCP Requests are inadmissible, no time need be expended addressing them. This will also prevent the Defence from suffering prejudice due to the OCP’s delay in raising these matters. The Defence further requests that the Trial Chamber grant an extension of time to respond to the OCP Requests until 22 August 2011, should it find the Requests admissible. An extension is necessary because the OCP has had over 5 months to prepare its Requests concerning Crimes against Humanity and has had over a year to prepare its Request concerning JCE. The Defence must be entitled to have adequate time to respond to these Requests.

I. BACKGROUND

1. On 20 May 2010, the Pre-Trial Chamber held that JCE III was not recognized as a form of customary international law in 1975-79 and may not be applied at the ECCC.³
2. On 13 January 2011, the Pre-Trial Chamber issued its Decision on IENG Sary’s Appeal against the Closing Order, in which it partially granted certain Defence grounds of appeal:

This ground of Appeal is granted in so far as the Co-Lawyers assert that the Co-Investigating Judges erred by failing to consider that during the temporal jurisdiction of the ECCC, international customary law required a nexus between the underlying acts of crimes against humanity and an armed conflict. The ‘existence of a nexus between the underlying acts and the armed conflict’ is added to the ‘Chapeau’ requirements in Chapter IV(A) of Part Three of the Closing Order.

This ground of Appeal is granted in so far as the Co-Lawyers argue that rape did not exist as a crime against humanity in its own right in 1975-1979. Therefore, the Pre-Trial Chamber decides to strike rape out of paragraph 1613 (Crimes Against Humanity, paragraph (g) of the Closing Order and to uphold the Co-Investigating Judges finding in paragraph 1433 of the Closing Order that the facts characterized

¹ See Co-Prosecutors’ Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes against Humanity, 15 June 2011, E95 (“CAH Armed Conflict Request”); Co-Prosecutors’ Request for the Trial Chamber to Recharacterize the Facts Establishing the Conduct of Rape as the Crime against Humanity of Rape Rather than the Crime against Humanity of Other Inhumane Acts, 16 June 2011, E99 (“CAH Rape Request”); Co-Prosecutors’ Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 17 June 2011, E100 (“JCE Request”) (together “OCP Requests”).

² See ECCC Internal Rules (“Rules”), Rule 89.

³ Decision on Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2011, D97/14/15, paras. 77-88.

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as crimes against humanity in the form of rape can be categorized as crimes against humanity of other inhumane acts.⁴

3. On 14 January 2011, the Trial Chamber became seized with the Case File. This started the time period for filing preliminary objections, making the original due date for such objections 15 February 2011.⁵
4. On 19 April 2011, the OCP submitted a list of legal issues it intended to raise at the Initial Hearing.⁶ In this list, it notified the Trial Chamber that it will "*Request to Recharacterize Charges in Indictment at Judgment to include: (a) that an armed conflict is not required to prove a crime against humanity; (b) rape as a crime against humanity; (c) commission of crimes by the third form of joint criminal enterprise (Rule 98).*"⁷
5. On 3 May 2011, the Defence filed observations on the OCP's list of legal issues.⁸ The Defence stated:

[T]he OCP could have only properly raised these matters no later than 30 days after the Closing Order became final [pursuant to ECCC Internal Rule 89]. It did not do so and it is now time-barred from raising these jurisdictional issues. Even if these issues could still be raised, Rule 98 does not allow the Trial Chamber to make these re-characterizations. Should the Trial Chamber determine that the OCP may raise these issues at the Initial Hearing, the Defence respectfully invites the Trial Chamber to order the OCP to provide a detailed written submission in advance of the Initial Hearing setting out its arguments as to why these re-characterizations should be permitted and to allow the Defence to file a written response.⁹

6. On 11 May 2011, the Trial Chamber issued a memorandum concerning the scheduling of the Initial Hearing. It set out the matters which would be addressed at the Initial Hearing, and did not include the issues raised in the OCP's "*Request to Recharacterize Charges.*" It stated:

The Chamber will not hear oral argument in relation to any issue other than those indicated above during the Initial Hearing. This is because the Chamber considers that all other issues raised by the parties in their various filings either

- have already been conclusively determined by the Chamber during the Trial Management Meeting and its consequent decision (E74); or
- will be the subject of further directives from the Chamber in due course; or

⁴ Decision on IENG Sary's Appeal Against the Closing Order, 13 January 2011, D427/1/26.

⁵ See Order to File Materials in Preparation for Trial, 17 January 2011, E9.

⁶ Co-Prosecutors' Indication of Legal Issues It Intends to Raise at the Initial Hearing, 19 April 2011, E9/30.

⁷ *Id.*, para. 9.

⁸ IENG Sary's Observations to the Co-Prosecutors' Notification of Legal Issues It Intends to Raise at the Initial Hearing, 3 May 2011, E9/30/1.

⁹ *Id.*, opening (internal citations omitted).

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- may instead be raised before the Chamber by the parties in the course of trial if and when relevant and necessary.¹⁰

The Trial Chamber did not explain whether it considered the issues raised in the OCP's "*Request to Recharacterize Charges*" to fall within the second or third of these categories.

7. On 18 May 2011, the OCP filed a "Response"¹¹ to the Defence's Observations of 3 May 2011.¹² It stated:

[T]he Co-Prosecutors notify the Trial Chamber and the Parties that it [sic] will file submissions requesting the re-characterization of charges in the indictment at judgment.... The Co-Prosecutors intend to file these submissions prior to the Initial Hearing or at the latest prior to the Substantive Hearing. This will give all the Defence the opportunity to respond as to the admissibility and merits of such a request as requested by this Defence in their Motion.¹³

8. On 6 June 2011, the Defence alerted the Trial Chamber (through a letter which was distributed to all Parties) of certain concerns, including the status of the proposed OCP intentions to make submissions on JCE III and Crimes against Humanity.¹⁴ In this letter, the Defence reiterated its position that the OCP may not submit requests to re-characterize the charges, as the matter is already time-barred. The Defence requested the Trial Chamber to issue an order to that effect. The Defence further requested that if the Trial Chamber were inclined to permit the OCP to file such submissions, it indicate a deadline and allow an appropriate time for responses, considering the busy period prior to the Initial Hearing and prior to trial.¹⁵
9. On 15 June 2011, the OCP filed the CAH Armed Conflict Request. This Request was notified on 16 June 2011.

¹⁰ Trial Chamber Memorandum: Scheduling of Initial Hearing, 11 May 2011, E86.

¹¹ Note that the Trial Chamber has informed the Defence that it considers such submissions to be Replies rather than Responses; therefore this filing should not have been accepted and placed on the Case File, since no leave from the Chamber to file a Reply had been previously granted. See email from Senior Legal Officer Susan Lamb to the IENG Sary Defence and other parties on 28 April 2011, where it was indicated that a Response to another Party's Observations to a Motion would be considered a Reply, not a Response.

¹² Co-Prosecutors' Response to "IENG Sary's Observations to the Co-Prosecutors' Notification of Legal Issues it Intends to Raise at the Initial Hearing", 18 May 2011, E9/30/2.

¹³ *Id.*, paras. 3-4. The OCP also argued that its "*Request to Recharacterize Charges*" cannot be considered a preliminary objection. *Id.*, paras. 5-6.

¹⁴ Letter from IENG Sary Defence to the Trial Chamber: Request for Information as to Supplementary Submission on Certain Preliminary Objections, Agenda and Information Concerning Initial Hearing, and Status of Proposed OCP Submissions on JCE III and Crimes against Humanity, 6 June 2011.

¹⁵ *Id.*, p. 3.

10. On 16 June 2011, the OCP filed the CAH Rape Request. On 17 June 2011, the OCP filed the JCE Request. Both of these Requests were notified to the Parties on 23 June 2011.
11. On 20 June 2011, the Trial Chamber Senior Legal Officer sent an email to all Parties, which stated that the Defence teams¹⁶ may have until 22 July 2011 to respond to the OCP Requests, and that the OCP and Civil Parties¹⁷ may have 10 days to reply.¹⁸

II. REQUEST FOR AN EXPEDITED DECISION

12. The Defence requests the Trial Chamber to issue an expedited decision as to whether the OCP may raise issues concerning the jurisdiction of the Chamber at this stage in the proceedings or whether such issues must now be considered waived. Such a decision will assist the Trial Chamber, the Defence, and indeed all the Parties. Should the Trial Chamber find the OCP Requests inadmissible, the Defence teams and possibly the Civil Parties will not waste their remaining time to prepare for trial responding to issues which are time-barred, and the OCP and possibly the Civil Parties¹⁹ need not draft Replies. The Trial Chamber will not need to analyze the substance of the OCP Requests, Responses and Replies.
13. An expedited decision rejecting the OCP Requests will spare the Defence from any prejudice caused by the OCP's lengthy delay in filing its Requests. An expedited decision is also necessary because the Defence must be informed as to whether such issues may still be raised at this stage. If such issues are not time-barred and if the OCP's interpretation of Rule 98 is correct, the Defence has several requests for re-characterization which it may choose to file.²⁰ As much notice as possible must be provided so that it may prepare these submissions and they may be resolved prior to trial.

¹⁶ Note that it is not only the Defence teams who may choose to respond to the OCP's request to re-characterize the Closing Order to include JCE III. Certain Civil Parties in Case 002 have opposed the application of JCE III at the ECCC. See Response of Co-Lawyers for the Civil Parties on Joint Criminal Enterprise, 30 December 2008, D97/3/4.

¹⁷ Note that the Civil Parties, no matter what this email may suggest, do not have the right to reply since they are not the Parties filing the original Requests. Only the OCP may reply to a Response directed to the OCP's filing.

¹⁸ Email from Senior Legal Office Susan Lamb to the Parties, Trial Chamber's proposed modification of deadlines in relation to three recent Prosecution findings; advance notice of deadline for supplementary document/exhibit lists (for first phases of trial), 20 June 2011.

¹⁹ Note that the Civil Parties should not generally be entitled to reply to responses which are directed to the OCP, but the Trial Chamber Senior Legal Officer's 20 June 2011 email appears to permit them to reply on this occasion.

²⁰ For example, the Defence may submit that Torture and Imprisonment were not enumerated Crimes against Humanity in 1975-79, but could only be considered "Other Inhumane Acts." It may also request the Trial

A. The OCP Requests are inadmissible because they were not raised as preliminary objections within 30 days of the Closing Order becoming final

14. The Defence submits that the Trial Chamber should reject the OCP Requests without considering their merits: Rule 89 requires jurisdictional issues to be raised within 30 days of the date the Closing Order becomes final so that they can be dealt with and settled well in advance of this busy period in the lead up to the Initial Hearing and substantive trial.²¹
15. According to Rule 89, an issue concerning the jurisdiction of the Chamber “shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible.”²² The Closing Order became final on 14 January 2011,²³ making the deadline for these issues to be raised 15 February 2011. The OCP did not raise these issues by the deadline; it is thus barred from doing so now. The OCP failed to act diligently in raising these issues as soon as the Trial Chamber became seized with the case and before the deadline imposed by the Rules.²⁴
16. The OCP asserts that the jurisdictional issues it seeks to raise are not preliminary objections and that the Trial Chamber rejected this position in Case 001,²⁵ but this is incorrect. The Trial Chamber simply stated that no preliminary objections were raised at the Initial Hearing in Case 001.²⁶ This is because the international Co-Prosecutor advised the Trial Chamber at the Case 001 Initial Hearing that “we do not intend to debate or to

Chamber to re-characterize JCE I to fit the most closely appropriate form of commission in applicable Cambodian law or even customary international law in 1975-79.

²¹ The OCP even notes that this is a busy period where the Parties are “heavily engaged” with trial preparation. See JCE Request, para. 31.

²² Emphasis added.

²³ “Pursuant to the Chamber’s Order to File Materials in Preparation for Trial (E9), the time limits set by Internal Rules 80(1) and (2) and 89 start to run from Friday 14 January 2011.” Interoffice Memorandum from Susan Lamb, Senior Legal Officer – Trial Chamber – to all Parties in Case 002, Advance Notification of Chamber’s disposition of Motions E14, E15, E9/2, E9/3, E/24 and E27, 3 February 2011, E35, p. 2.

²⁴ See Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3, para. 2, in which the Trial Chamber acknowledged the parties’ obligations of due diligence. See also *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 631, where the ICTY Appeals Chamber held that “[f]ailure of counsel to object will usually indicate that counsel formed the view at the time that the matters to which the judge was inattentive were not of such significance to his case that the proceedings could not continue without attention being called thereto.” This principle applies to the OCP as well as Defence counsel.

²⁵ See Co-Prosecutors’ Response to “IENG Sary’s Observations to the Co-Prosecutors’ Notification of Legal Issues it Intends to Raise at the Initial Hearing”, 18 May 2011, E9/30/2, para. 5.

²⁶ See *id.*, fn. 8, referring to the Case 001 Trial Judgement, where the Trial Chamber stated “The Trial Chamber held ‘no preliminary objection to the jurisdiction of the ECCC as such was raised at the Initial Hearing pursuant to Internal Rule 89.’”

raise any legal issue....”²⁷ Application of JCE was mentioned by the OCP at the Case 001 Initial Hearing, but was actually raised later. The OCP may have been allowed to raise the issue late because the *Duch* Defence did not object that it was not raised on time (the *Duch* Defence did not raise many legal issues during the trial proceedings, such as the argument that *Duch* was not a senior leader or one of those most responsible).²⁸ The Trial Chamber noted that “the OCP JCE request might have been presented in a more timely and coherent manner...”²⁹ The OCP is obviously aware that it is expected to make timely submissions. Nonetheless, for tactical reasons, the OCP has chosen to engage in unseemly maneuvering to gain an advantage. It has filed its three Requests only days before the commencement of the Initial Hearing and at a time when the Parties are preparing for the start of the substantive trial. Nothing prevented the OCP from making timely submissions. No explanations have been offered by the OCP as to why it could not have acted diligently.

B. Rule 98 does not allow the re-characterizations the OCP has requested

17. The OCP refers to Rule 98 as a basis for raising these issues at the Initial Hearing.³⁰ Rule 98(2) states in relevant part: “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.”³¹ This Rule refers to the competence of the Trial Chamber. It does not authorize the OCP to raise arguments at the Initial Hearing that it failed to raise within 30 days of the date the Closing Order became finalized, as required by Rule 89.

²⁷ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript, 17 February 2009, E1/3.1, p. 9.

²⁸ *See, e.g.*, Anne Heindel, Hearing on the Appeal of the Judgment Against Kaing Guek Eav *alias* “Duch”, available at

http://www.dccam.org/Projects/ECCC_Trial_Observation/pdf/Report_on_Appeal_of_Judgment_in_Case_001_Against_Kaing_Guek_Eav.pdf. “Throughout trial, Duch’s co-lawyers pursued a strategy of accepting most factual allegations, pleading guilty to most charges, expressing remorse, and cooperating with the Prosecution in the hope of receiving a reduced sentence. During the proceedings, Duch said that he would accept any sentence given by the Court and would not appeal the judgment. This approach was upended during closing arguments when Duch’s national counsel, Kar Savuth, radically shifted tactics, challenging the Court’s jurisdiction over Duch and arguing that he should be found not guilty. Shortly before the judgment was pronounced, Duch fired international co-counsel Francois Roux, the architect of his trial strategy, and replaced him with a second national lawyer, Kong Ritheary. The new co-counsel team appealed the Trial Chamber verdict on the basis of a lack of personal jurisdiction.”

²⁹ *Case of Kaing Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, para. 502.

³⁰ Co-Prosecutors’ Indication of Legal Issues It Intends to Raise at the Initial Hearing, 19 April 2011, E9/30, p. 9.

³¹ Emphasis added.

18. Even if the OCP Requests are not considered preliminary objections, the OCP Requests are still inadmissible as the Trial Chamber may not change the applicable law in the manner the OCP requests.
19. First, Rule 98(2) states that no new constitutive elements may be introduced. Removing the nexus with armed conflict requirement would broaden the scope of crimes against humanity and could only be prejudicial to the Accused. Thus, it would have precisely the same impact as introducing a new constitutive element to the offense, and must be considered as such. Re-characterizing the charges in the Indictment to include rape as an enumerated crime against humanity would require adding a new constitutive element to crimes against humanity. Re-characterizing the charges in the Indictment to include JCE III is also not permitted, since JCE III has constitutive elements distinct from JCE I and II.³²
20. The OCP concludes, based on European Court of Human Rights jurisprudence, that the legal characterization of facts may be subject to change and that applying the same standard, a restatement of the legal elements of a crime is permissible.³³ The OCP has stated that the “process of changing the legal characterization of crimes, by its very nature, involves a modification of legal elements.”³⁴ These re-characterizations would require altering the law applicable at the ECCC. Rule 98(2) must not be interpreted as allowing the Trial Chamber to re-characterize the applicable law itself by redefining it, through the introduction of “new constitutive elements,” but rather to allow a change to the legal characterization of the facts (through changing the “legal characterization of the crime”). Save for the Trial Chamber’s interpretation of “the proviso that no new constitutive elements be introduced” as a reiteration of the “well-established limitation ... that any re-characterisation must not go beyond the facts set out in the charging document,”³⁵ this is how the Rule was interpreted by the Trial Chamber in Case 001.³⁶

³² Unlike JCE I and II, JCE III ascribes individual criminal liability in situations “involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common plan, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose.” See *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, para. 99.

³³ CAH Armed Conflict Request, para. 8.

³⁴ CAH Rape Request, fn. 9.

³⁵ *Case of Kaing Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, para. 494. Although the Defence agrees that there is a well-established limitation that any re-characterization must not go beyond the facts set out in the charging document, it is submitted that this limitation is in fact articulated in the second sentence of Rule 98(2) through the words “as set out in the Indictment.” The restriction on the

21. If the OCP's interpretation were correct, this would affect all the Parties' ability to place any certainty in the applicable law. The Trial Chamber could wait until the end of a lengthy trial to decide to alter the elements of a crime, as long as the Accused's fair trial rights are not affected. The Trial Chamber could thus wait until the Judgement to add additional elements to the applicable law – which the OCP would not have been aware of during trial and may not have attempted to prove. This cannot be the proper interpretation of Rule 98. Any doubt in the proper interpretation of this Rule must be resolved in favor of the Accused.³⁷
22. Second, Rule 98(2) does not allow for re-characterization of forms of liability. Rather, it states that the Trial Chamber may “change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced.”³⁸ JCE is not a crime, but a form of liability. In Case 001, the *Duch* Trial Chamber determined that Rule 98(2) did allow the re-characterization of forms of liability, but noted that its ability to re-characterize forms of liability was never challenged by the Parties.³⁹ It concluded that it was authorized by Rule 98(2) to re-characterize forms of liability because the International Criminal Court's Regulations allowed “for a change to the legal characterisation of facts to accord with a different form of participation.”⁴⁰ The Trial Chamber stated, “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).”⁴¹ The Trial Chamber should reconsider this conclusion from Case 001 since applicable Cambodian law *does not* allow

addition of new “constitutive elements” relates to legal elements. Contrary to the OCP's submission, this interpretation ensures that not one single word of the second sentence of Rule 98(2) is rendered superfluous. See CAH Rape Request, fn. 9. By contrast, the OCP's interpretation (and the *Duch* Trial Chamber's interpretation) would render the words “as set out in the Indictment” in the second sentence of Rule 98(2) superfluous.

³⁶ “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.” *Case of Kaing Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, para. 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.” *Id.* (emphasis added).

³⁷ In cases of doubt, the Trial Chamber must respect the Constitutional principle of *in dubio pro reo*, in accordance with Article 38 of the 1993 Cambodian Constitution, as amended in 1999.

³⁸ Emphasis added.

³⁹ See *Case of Kaing Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, para. 493.

⁴⁰ *Id.*, fn. 867.

⁴¹ *Id.*, para. 493.

such re-characterization⁴² and since the wording of Rule 98(2) differs from the wording of the International Criminal Court's Regulations.

23. If the Trial Chamber finds that the OCP Requests are not preliminary objections and may be raised at this stage *and* that it has the jurisdiction to alter the applicable law at the ECCC, it may still only make re-characterizations where this would not violate the fair trial rights of the Accused.⁴³ It is axiomatic that it would violate fair trial rights to apply a crime or form of liability which did not exist in applicable law at the relevant time. These issues will be addressed in the Defence's Responses to the OCP Requests, should such Responses be necessary.

III. REQUEST FOR AN EXTENSION OF TIME

24. The Defence requests the Trial Chamber to grant an extension of time to respond to the OCP Requests until 22 August 2011, should the Trial Chamber find that the OCP Requests are admissible at this stage. This extension of time is necessary because the Defence must respond to the three OCP Requests as well as prepare other filings⁴⁴ which have deadlines during the time period the Trial Chamber has allotted for responses and must further prepare for and present its oral submissions which will be raised at the Initial Hearing concerning *ne bis in idem*, amnesty and pardon, the statute of limitations for grave breaches, and the applicability of Establishment Law Article 3 new national crimes. These oral submissions deal with extremely important issues to the Defence, as they could cause the Trial Chamber to determine that it has no (or limited) jurisdiction to try Mr. IENG Sary. As such, a considerable amount of time must be spent preparing. Moreover, the OCP must have intended to file its Requests concerning Crimes against Humanity ever since 13 January 2011 when the Pre-Trial Chamber informed the Parties that a nexus with armed conflict was a chapeau element to Crimes against Humanity and rape was not an enumerated Crime against Humanity at the relevant time.⁴⁵ It must have

⁴² The Trial Chamber noted that "comparable provisions in the Cambodian legal system do not specifically address changes to a form of responsibility..." *Id.*

⁴³ *Id.*, para. 496.

⁴⁴ The Defence's Response to the Co-Prosecutors' Submission on Statute of Limitation for National Crimes, 27 May 2011, E51/7/1 was due on 17 June 2011, the Defence's list of expert witnesses in order of relevance and reasons why these experts have been listed in this order is due 20 June 2011, the Defence's Response to the Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements before the Trial Chamber, 15 June 2011, E96, is due 22 July 2011, and the Defence's list of documents for the first four trial topics is due 22 July 2011.

⁴⁵ Decision on IENG Sary's Appeal against the Closing Order, 13 January 2011, D427/1/26.

intended to file its Request concerning JCE since 20 May 2010, the date it was informed that JCE III is not applicable at the ECCC.⁴⁶ Had the OCP filed its Requests in a timely manner, the Defence would not be in this predicament. It appears that the OCP filed at this precise time immediately prior to the Initial Hearing in order to gain an advantage. The extension requested, unlike the OCP Requests, will not cause any undue delay or prejudice to any Party.

IV. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to:

- a. ISSUE an expedited decision as to whether the OCP may raise the OCP Requests at this stage;
- b. FIND the OCP Requests inadmissible; or
- c. GRANT an extension of time to file Responses to the OCP Requests until 22 August 2011.

Respectfully submitted,



 ANG Udom Michael G. KARNAVAS
 Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 24th day of June, 2011

⁴⁶ Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15.