

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

**FILING DETAILS**

**Case No:** 003/07-09-2009-ECCC/OCIJ      **Party Filing:** The Defence for MEAS Muth

**Filed to:** Co-Investigating Judges      **Original language:** ENGLISH

**Date of document:** 28 October 2013

**CLASSIFICATION**

**Classification of the document  
suggested by the filing party:** PUBLIC

**Classification by OCIJ  
or Chamber:** សម្ងាត់/Confidential

**Classification Status:** Declassified to Public

**Review of Interim Classification:**

**Records Officer Name:**

**Signature:**

---

**MEAS MUTH'S MOTION AGAINST THE APPLICATION OF JCE III**

---

Filed by:

**The Co-Lawyers:**  
ANG Udom  
Michael G. KARNAVAS

Distribution to:

**Co-Investigating Judges:**  
Judge YOU Bunleng  
Judge Mark B. HARMON

**Co-Prosecutors:**  
Chea LEANG  
Nicholas KOUMJIAN

**All Civil Parties**

Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant Rule 21 of the ECCC Internal Rules (“Rules”), hereby moves against the application of Joint Criminal Enterprise (“JCE”) III in his case. This Motion is made necessary because the Introductory Submission alleges that Mr. MEAS Muth is alternately responsible for committing crimes through JCE III, a form of liability not recognized at the ECCC. This Request is admissible pursuant to Rule 21, which requires that “[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations *shall* be interpreted so as to always safeguard the interests of Suspects.... In this respect: a) ECCC proceedings shall be fair and transparent....” The Defence requests to file this Motion in English with the Khmer translation to follow because the Interpretation and Translation Unit cannot timely complete the translation due to other priorities.<sup>1</sup>

## I. BACKGROUND

1. On 28 July 2008, in Case 002, the IENG Sary Defence filed a submission to the OCIJ against the application of all forms<sup>2</sup> of JCE.<sup>3</sup> The IENG Sary Defence argued that JCE is inapplicable because: **a.** it is not specified in the Establishment Law; **b.** it is not part of Cambodian law; **c.** it is not recognized in customary international law and even if it were today, it was not customary international law in 1975-79, nor is customary international law directly applicable in Cambodian courts; and **d.** it is not recognized by an international convention enforceable at the ECCC. Therefore applying JCE at the ECCC would violate the principle of *nullum crimen sine lege*.
2. On 8 August 2008, the OCIJ issued the Case 001 Closing Order without applying JCE as a form of liability.<sup>4</sup>

<sup>1</sup> See Email from Interpretation and Translation Unit to Defence, “RE: translation request,” 28 October 2013.

<sup>2</sup> Appeals Chambers at the International Criminal Tribunal for the former Yugoslavia (“ICTY”) have identified three forms of JCE: The basic form (JCE I) ascribes individual criminal liability when “all co-defendants, acting pursuant to a common design, possess the same criminal intention ... even if each co-perpetrator carries out a different role within it.” *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 196. The systemic form (JCE II) ascribes individual criminal liability when “the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan.” *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 202. The extended form (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.” *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, para. 99.

<sup>3</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, IENG Sary’s Motion Against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 28 July 2008.

<sup>4</sup> *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/OCIJ, Closing Order, 8 August 2008, D99.

3. On 5 September 2008, the OCP appealed the Case 001 Closing Order, arguing that JCE should have been applied.<sup>5</sup>
4. On 23 and 25 September 2008, faced with this significant issue of first impression, which would impact all Charged Persons at the ECCC, the Pre-Trial Chamber sought outside assistance by requesting *amicus curiae* briefs from Professor Antonio Cassese, the Centre for Human Rights and Legal Pluralism of McGill University, and Professor Dr. Kai Ambos of the Georg-August Universität Göttingen. The *amici curiae* were asked to give their opinions on **a.** the development of the theory of joint criminal enterprise and the evolution of the definition of this mode of liability, with particular reference to the time period 1975-79, and **b.** whether joint criminal enterprise as a form of liability could be applied before the ECCC, taking into account the fact that the alleged crimes were committed in the period 1975-79.<sup>6</sup>
5. On 5 December 2008, the Pre-Trial Chamber issued its Decision on the OCP's Appeal of the Case 001 Closing Order. The Pre-Trial Chamber declined to decide the applicability of JCE in Case 001, finding that the Accused did not have sufficient notice that it might be applied.<sup>7</sup>
6. On 8 June 2009, the OCP filed a request to the Trial Chamber in Case 001 to declare that all three forms of JCE are applicable at the ECCC and to apply JCE against Duch.<sup>8</sup>
7. On 29 June 2009, during the trial in Case 001, the Trial Chamber stated:

[T]he Chamber has taken note of conclusions submitted by the Co-Prosecutors on the 8th of June, 2009 whereby the Chamber is requested to, on the hand, state that the legal concept of joint criminal enterprise in its three forms is applicable before the Extraordinary Chambers and on the other hand, to apply this notion in its judgment as regards the commission of crimes charged against the accused as well as his responsibility as a participant in a joint criminal enterprise. The Trial Chamber recalls that the Co-Prosecutors have indicated their intention to rely on the notion of joint criminal enterprise during the initial hearing. Consequently, the

<sup>5</sup> *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/OCIJ(PTC), Co-Prosecutors' Appeal of the Closing Order against KAING Guek Eav "Duch" dated 8 August 2008, D99/3/3, 5 September 2008, paras. 43-72.

<sup>6</sup> *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/OCIJ (PTC02), Invitation to Amicus Curiae, 23 September 2008, D/99/3/12; *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/OCIJ (PTC02), Invitation to Amicus Curiae, 25 September 2008, D/99/3/13; *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/OCIJ (PTC02), Invitation to Amicus Curiae, 25 September 2008, D/99/3/14.

<sup>7</sup> *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/OCIJ(PTC 02), Decision on Appeal against Closing Order indicting KAING Guek Eav alias "Duch", 5 December 2008, D99/3/42, paras. 141-42.

<sup>8</sup> *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 8 June 2009, E73.

Trial Chamber considers that the issue of the mode of responsibility of the accused, including as a participant in a JCE, is currently before it and invites the parties to make submissions on the filing by the Co-Prosecutors in accordance with the practice directives and, in particular, following notification in the languages which they require. Finally, the Trial Chamber clarifies that at this stage it considers rendering its decision on this matter at the same time as the judgement on merits.<sup>9</sup>

8. On 7 September 2009, the OCP initiated the Case 003 judicial investigation of Mr. MEAS Muth based on the OCP's 20 November 2008 Second Introductory Submission Regarding the Revolutionary Army of Kampuchea.<sup>10</sup> Paragraph 97 of the Introductory Submission states:

Where SOU Met and MEAS Mut committed these crimes they did so individually or by participating in a JCE with other co-perpetrators identified in paragraphs 33 to 41 of this Submission. These crimes were the object of the JCE *or alternatively the natural and foreseeable consequences of the JCE*. Other members of the JCE acted on the basis of the common purpose, with shared intent.<sup>11</sup>

9. On 8 December 2009, the OCIJ issued an Order in Case 002 finding that JCE could be applied in each of its three forms.<sup>12</sup> While acknowledging that JCE is *not* a form of criminal liability under Cambodian law,<sup>13</sup> the Co-Investigating Judges found that JCE – in all its forms as articulated by the ICTY in *Tadić* and its progeny – is applicable at the ECCC, it being a form of “commission” under customary international law.<sup>14</sup> The Order was appealed.<sup>15</sup> The IENG Sary Defence, in particular, extensively challenged JCE as form of liability applicable at the ECCC.<sup>16</sup>

<sup>9</sup> *Case of KAIING Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript, 29 June 2009, E1/39.1, p. 8-9.

<sup>10</sup> Co-Prosecutors' Second Introductory Submission Regarding the Revolutionary Army of Kampuchea, 20 November 2008, D56/3.1 (“Introductory Submission”).

<sup>11</sup> Emphasis added.

<sup>12</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13.

<sup>13</sup> *Id.*, para. 22.

<sup>14</sup> *Id.*, para. 13.

<sup>15</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC37), IENG Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, with 2 accompanying Annexes, 22 January 2010, D97/14/5; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC37), [Civil Party] Appeal Brief Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Responsibility, 8 January 2010, D97/17/1; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC37), Ieng Thirith Defense Appeal Against “Order on the Application at the ECCC of the form of Liability Known as Joint Criminal Enterprise” of 8 December 2009, 18 January 2010, D97/15/1; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC37), [KHIEU Samphan] Appeal Against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 3 February 2010, D97/16/1.

<sup>16</sup> See Annex for a list of filings by the IENG Sary Defence concerning JCE.

10. On 20 May 2010, the Pre-Trial Chamber decided on the appeals against the OCIJ's Order finding that JCE could be applied at the ECCC. It held that JCE III is not reflective of customary international law and cannot be applied at the ECCC.<sup>17</sup> The Pre-Trial Chamber examined the authorities relied upon by the ICTY *Tadić* Appeals Chamber for the existence of JCE III. It found that the London Charter and Control Council Law No. 10 do not provide support for the existence of JCE III. It further found that the draft International Criminal Court Statute and the International Convention on the Suppression of Terrorist Bombing do not support the existence of JCE III in customary international law in 1975-79 as these instruments post-date that period.<sup>18</sup> The Pre-Trial Chamber found that, although the facts of the two post-World War II cases relied upon by the *Tadić* Appeals Chamber (*Essen Lynching* and *Borkum Island*) could be relevant to JCE III, the lack of reasoned judgements in those cases precluded certainty as to the form of liability applied.<sup>19</sup> It noted that the *Tadić* Appeals Chamber had relied upon some Italian cases, but did not find that national jurisprudence could be a proper precedent for this international form of liability. This landmark decision<sup>20</sup> earned praise for the depth of its analysis from former ICTY/ICTR Appeals Chamber Judge Wolfgang Schomburg, who found the decision "admirable in its thorough analysis of some post WW II decisions" and the result to be "more than welcome after years of dangerous confusion."<sup>21</sup> Professor Jens David Ohlin of Cornell University Law School noted that the decision was "well-crafted and tightly argued."<sup>22</sup>
11. On 26 July 2010, the Trial Chamber issued the Case 001 Judgement.<sup>23</sup> In the Judgement, the Trial Chamber indicated that it was not bound by findings of the Co-Investigating Judges or the Pre-Trial Chamber.<sup>24</sup> The Trial Chamber noted that Rule 98(2) allowed it to change the legal characterization of the crimes and forms of responsibility that were set

<sup>17</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC35), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010.

<sup>18</sup> *Id.*, para. 78.

<sup>19</sup> *Id.*, paras. 79-81.

<sup>20</sup> Kevin Jon Heller, *The ECCC Issues a Landmark Decision on JCE III*, OPINIO JURIS, 23 May 2010.

<sup>21</sup> Judge Wolfgang Schomburg, *Jurisprudence on JCE – Revisiting a Never Ending Story*, 3 June 2010, p. 28, available at [http://www.cambodiatribunal.org/sites/default/files/resources/ctm\\_blog\\_6\\_1\\_2010.pdf](http://www.cambodiatribunal.org/sites/default/files/resources/ctm_blog_6_1_2010.pdf).

<sup>22</sup> Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693, 748 (2011): "In a well-crafted and tightly argued opinion that bodes well for the young tribunal, the Pre-Trial Chamber examined all of the historical precedents in the post-World War II era and went well beyond the cases cited by the ICTY in *Tadic*."

<sup>23</sup> *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188.

<sup>24</sup> *Id.*, para. 492.

out in the Indictment, provided it did not go beyond the facts laid out in the Indictment.<sup>25</sup> As such, the Trial Chamber re-characterized the forms of responsibility in the Indictment so as to apply JCE as a form of liability.<sup>26</sup> In so doing, it found that JCE liability was applicable before the ECCC<sup>27</sup> and that re-characterizing the Indictment to include JCE liability would not violate the Accused's fair trial rights.<sup>28</sup> Because the OCP had indicated that it would rely principally on JCE I and II, and only rely on JCE III as an alternative form of liability, the Trial Chamber did not pronounce on the customary status of JCE III from 1975 to 1979.<sup>29</sup>

12. On 15 September 2010, the Co-Investigating Judges issued the Case 002 Closing Order.<sup>30</sup> The Co-Investigating Judges, citing the Pre-Trial Chamber's Decision in Case 002, noted that JCE I and II were applicable at the ECCC,<sup>31</sup> and applied JCE I.<sup>32</sup>
13. On 17 June 2011, the OCP, rather than appealing the Case 002 Closing Order, filed a Request to the Trial Chamber to re-characterize the facts set out in the Closing Order to include JCE III liability.<sup>33</sup> Each of the Defence teams responded, arguing that the Request should be found inadmissible or dismissed.<sup>34</sup>
14. On 12 September 2011, the Trial Chamber issued its Decision on the OCP's Request, upholding the Pre-Trial Chamber's decision that JCE III is inapplicable at the ECCC. The Trial Chamber observed that the Pre-Trial Chamber had extensively – and properly –

<sup>25</sup> *Id.*, paras. 493, 496.

<sup>26</sup> *Id.*, para. 496.

<sup>27</sup> *Id.*, paras. 511-12.

<sup>28</sup> *Id.*, paras. 502-03.

<sup>29</sup> *Id.*, para. 513.

<sup>30</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427.

<sup>31</sup> *Id.*, para. 1318, n. 5217.

<sup>32</sup> *Id.*, para. 1541.

<sup>33</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 17 June 2011, E100.

<sup>34</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, [IENG Thirith] Defence Response to Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 22 July 2011, E100/1; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, IENG Sary's Response to the Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability & Request for an Oral Hearing, 22 July 2011, E100/2; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, [KHIEU Samphan] Response to the Co-Prosecutors' Request Concerning JCE III, 22 July 2011, E100/3; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, [NUON Chea's] Response to the Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 22 July 2011, E100/5. The IENG Sary Defence argued that the OCP's Request should be dismissed because it is an untimely preliminary objection, or, in the alternative, should be dismissed for lack of merit as all of the OCP's assertions had already been raised before the Pre-Trial Chamber. The Request failed to show any discernible errors in the Pre-Trial Chamber's decision that JCE III is inapplicable at the ECCC which would warrant a reversal by the Trial Chamber.

reviewed pre-1975 legal instruments and the post-World War II jurisprudence relied upon by the *Tadić* Appeals Chamber. The Trial Chamber noted that it would not “issue lengthy decisions in circumstances where it can find no cogent reasons to depart from the Pre-Trial Chamber’s analysis and where it concurs in the result.”<sup>35</sup> The Trial Chamber then considered the post-World War II cases cited in the *Tadić* Appeals Judgement as well as two additional World War II era cases cited in a Special Tribunal for Lebanon decision which concerned the applicability of JCE.<sup>36</sup> Since the legal basis for conviction was not clear in either of the cases, the Trial Chamber found that the cases could not support a conclusion that JCE III had emerged as a principle of customary international law by 1975-79.<sup>37</sup> The Trial Chamber finally considered whether JCE III existed as a general principle of law in 1975-79 by surveying the legal systems of various States. The Trial Chamber found that there was a “considerable divergence of approach between various national jurisdictions” and it therefore could not conclude that JCE III was a general principle of law.<sup>38</sup> The OCP did not appeal the Trial Chamber’s decision.

## II. LAW AND ARGUMENT

### A. The Co-Investigating Judges are bound by Pre-Trial Chamber and Trial Chamber jurisprudence holding that JCE III is inapplicable at the ECCC

15. The Introductory Submission in Case 003 requests the Co-Investigating Judges to consider JCE III liability as an alternative form of liability for the crimes alleged.<sup>39</sup> At the time the Introductory Submission was prepared, the Pre-Trial and Trial Chambers had yet to hold that JCE III was inapplicable at the ECCC. After the Pre-Trial Chamber and Trial Chamber decisions on JCE III were rendered, the OCP did not seek to amend the Introductory Submission to accord with the established applicable law at the ECCC.

<sup>35</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, E100/6, para. 26.

<sup>36</sup> *Id.*, paras. 30-34. In the Special Tribunal for Lebanon Decision, the Appeals Chamber, in which Judge Cassese was the Presiding Judge and Judge Rapporteur, considered several questions submitted to it by the Pre-Trial Chamber, including a question regarding the modes of liability for crimes prosecuted before the Tribunal. Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/1, 16 February 2011, Headnote, p. 1. The Appeals Chamber reaffirmed the post-World War II jurisprudence cited by the *Tadić* Appeals Chamber and, additionally, referenced *Ulrich and Merkle* and *Wuelfert* as cases that support JCE III as a mode of liability. *Id.*, para. 237, n. 355.

<sup>37</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, E100/6, para. 35.

<sup>38</sup> *Id.*, para. 37.

<sup>39</sup> Introductory Submission, para. 97.

16. The Pre-Trial Chamber's decision is binding on the OCIJ. The Co-Investigating Judges have no discretionary authority to selectively apply the jurisprudence established by the Chamber to which it is subordinated. The Pre-Trial Chamber was specifically established as a higher reviewing body of OCIJ actions and decisions.<sup>40</sup> It has reviewed, and reversed, many past decisions of the OCIJ. For example, it reversed a decision refusing to allow Mr. IENG Sary to visit his wife and a decision refusing to allow the IENG Sary Defence to video record its meetings with Mr. IENG Sary.<sup>41</sup> Implicitly recognizing that it is bound by Pre-Trial Chamber jurisprudence from other cases, the OCIJ has previously cited and relied upon such jurisprudence. For example, in Case 004 the International Co-Investigating Judge referred to Pre-Trial Chamber jurisprudence from Case 002 on the obligation to provide reasoned decisions, finding that a decision made by Reserve International Co-Investigating Judge Kasper-Ansermet should be reconsidered because the decision was not reasoned.<sup>42</sup>

17. According to Pre-Trial Chamber Judges Downing and Chung:

With regard to the binding character of the Pre-Trial Chamber's decisions on the Co-Investigating Judges, we consider that the principles of legal certainty and equality before the law, enshrined in the Internal Rules and forming part of international standards, require the Co-Investigating Judges to follow, as a matter of principle, the *ratio decidendi* of decisions of the Pre-Trial Chamber, that is the legal principle on which a decision is based and which shall apply in similar or substantially similar cases. This is supported by the jurisdictional hierarchy of the Pre-Trial Chamber over the Co-Investigating Judges under the ECCC legal system and is also in the interest of judicial economy and expediency in the proceedings given that decisions of the Co-Investigating Judges are subject to appeal before the Pre-Trial Chamber which, in principle, follows its previous decisions according to the standard set out above and will therefore overturn decisions of the Co-Investigating Judges departing from its existing jurisprudence.<sup>43</sup>

The Pre-Trial Chamber's decision on JCE III is persuasive and binding authority.

<sup>40</sup> See Rule 73.

<sup>41</sup> See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC05), Decision on Appeal Concerning Contact Between the Charged Person and his Wife, 30 April 2008, A104/II/7; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC64), Decision on IENG Sary's Appeal against the Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12.

<sup>42</sup> Case No. 004/07-09-2009-ECCC/OCIJ, Decision on the [REDACTED] Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4, n. 66.

<sup>43</sup> Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant [REDACTED], 13 February 2013, D11/3/4/2, para. 17.



18. In addition to the Pre-Trial Chamber, the Trial Chamber also acts as an indirect appellate body for the OCIJ due to the procedural system in place at the ECCC, which allows issues raised at the pre-trial stage to be addressed again at trial.<sup>44</sup> The Trial Chamber, in keeping with its past jurisprudence, will not apply JCE III against Mr. MEAS Muth at trial.
19. It is in the interests of justice, judicial economy, and expediency for the Co-Investigating Judges to faithfully follow and apply the Pre-Trial and Trial Chamber jurisprudence on the applicability of JCE III. Any inclusion of JCE III liability in the Case 003 Closing Order would constitute judicial abuse of process. Judges have an obligation to apply the jurisprudence of higher chambers.<sup>45</sup> As explained by ICTY Appeals Chamber Judge Hunt, concerning an ICTY Trial Chamber's failure to follow a decision of the Appeals Chamber:

[T]he Trial Chamber refused to follow a decision of the Appeals Chamber (by which it was bound) because it thought that that decision was wrong.... The Trial Chamber was bound by that ruling of the Appeals Chamber, and it erred in law by refusing to follow it. It is open to a Trial Chamber to express a reasoned disagreement with such a decision of the Appeals Chamber (as indeed the Trial Chamber did here), and such reasoned disagreement may in the appropriate case lead to a reconsideration by the Appeals Chamber of its earlier decision. But the Trial Chamber is in the meantime required to accept loyally the decision by which it is bound.<sup>46</sup>

<sup>44</sup> As Documentation Center of Cambodia Legal Advisors John Ciorciari and Anne Heindel have explained: “[Q]uestions can be raised at least four times—before the CIJs, PTC, Trial Chamber, and SCC—before being resolved. For example, the issue of Ieng Sary’s 1996 pardon and amnesty was addressed by the CIJs twice, reviewed by the PTC twice on appeal, then reviewed *de novo* by the Trial Chamber before it was appealed to the SCC prior to his death.” John D. Ciorciari & Anne Heindel, *Experiments in International Criminal Justice: The Khmer Rouge Tribunal*, MICH. J. INT’L L. (forthcoming). See also Michael Karnavas & Ang Udom, *The Diligent Defense of Ieng Sary Is Not a Delaying Tactic*, CAMBODIA DAILY, 11 July 2011; Andrew Cayley, *IENG Sary Defence Team Need Not Apologise for Doing Its Job*, CAMBODIA DAILY, 12 July 2011.

<sup>45</sup> This is in accordance with their obligation to “respect and comply with the law and [] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” California Code of Judicial Ethics, Canon 2(A), available at [www.courts.ca.gov/documents/ca\\_code\\_judicial\\_ethics.pdf](http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf). If a judge ignores established legal authority from a higher chamber, this is inconsistent with his obligation of diligence. See ECCC code of Judicial Ethics, Art. 5; Cambodian Code of Ethics for Judges, Ch. 6. See also Canon 2 of the American Bar Association Model Code of Judicial Ethics: “A judge shall perform the duties of judicial office impartially, competently, and diligently.”

<sup>46</sup> *Prosecutor v. Blagojević & Jokić*, IT-02-60-PT, Decision on Provision Release or Vidoje Blagojević and Dragan Obrenović, Separate Opinion of Judge David Hunt, 3 October 2002, paras. 3, 5. See also *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 113: “The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers for the following reasons: (i) the Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers. Under Article 25, the Appeals Chamber hears an appeal on the ground of an error on a question of law invalidating a Trial Chamber’s decision or on the ground of an error of fact which has

20. Not only would the Co-Investigating Judges be violating their judicial obligation to apply established jurisprudence, but assuredly the Pre-Trial Chamber would reverse a decision to include JCE III in the Closing Order and such liability would not be considered by the Trial Chamber at trial. The Co-Investigating Judges simply cannot charge Mr. MEAS Muth with committing any of the crimes alleged in the Introductory Submission on the basis of JCE III liability.

**B. Application of JCE III would violate MR. MEAS Muth's right to equal treatment**

21. Mr. MEAS Muth has the fundamental right to be treated equally before the law. This right is guaranteed to him by Article 31 of the Cambodian Constitution, which provides in part that “[e]very Khmer citizen shall be equal before the law....”<sup>47</sup> This right is also enshrined in the Universal Declaration of Human Rights<sup>48</sup> and the International Covenant on Civil and Political Rights (“ICCPR”),<sup>49</sup> both of which the ECCC must respect pursuant to the Cambodian Constitution,<sup>50</sup> the Agreement,<sup>51</sup> and the Establishment Law.<sup>52</sup> This

---

occasioned a miscarriage of justice, and its decisions are final; (ii) the fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law; and (iii) the right of appeal is, as the Chamber has stated before, a component of the fair trial requirement, which is itself a rule of customary international law and gives rise to the right of the accused to have like cases treated alike. This will not be achieved if each Trial Chamber is free to disregard decisions of law made by the Appeals Chamber, and to decide the law as it sees fit. In such a system, it would be possible to have four statements of the law from the Tribunal on a single legal issue - one from the Appeals Chamber and one from each of the three Trial Chambers, as though the Security Council had established not a single, but four, tribunals. This would be inconsistent with the intention of the Security Council, which, from a plain reading of the Statute and the Report of the Secretary-General, envisaged a tribunal comprising three trial chambers and one appeals chamber, applying a single, unified, coherent and rational corpus of law. The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced.”

<sup>47</sup> This right is further set out in the Cambodian Code of Criminal Procedure which states in Article 3 that “Criminal actions apply to all natural persons or legal entities regardless of race, nationality, color, sex, language, creed, religion, political tendency, national origin, social status, resources or other status.”

<sup>48</sup> Article 7 of the Universal Declaration of Human Rights states: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>49</sup> International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49, Arts. 14(1), 26. Article 14(1) states in part that “[a]ll persons shall be equal before the courts and tribunals.” Article 26 states in part that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

<sup>50</sup> Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia which was adopted by the National Assembly on the 4<sup>th</sup> of March 1999, Art. 31.

right is also set out in the statute of the International Criminal Tribunal for the former Yugoslavia<sup>53</sup> and features prominently in a number of regional instruments<sup>54</sup> and in the Constitutions of many States.<sup>55</sup> Mr. MEAS Muth's right to equal treatment before the ECCC would be violated by the application of JCE III against him.

22. The obligation to respect rights set out in the ICCPR has been affirmed by a 2007 Constitutional Council Decision in which the Constitutional Council instructed:

a judge shall not only rely on [the law at issue], but also relies on law. The term law here refers to the national law including the Constitution which is the supreme law and other applicable laws as well as the international conventions that Cambodia has recognized....<sup>56</sup>

23. The United Nations Office of the High Commissioner for Human Rights issued a public statement after this Constitutional Council Decision was issued, stating:

The Constitutional Council's ruling ... decisively affirms the position of the international human rights treaties as part of Cambodian law, protected by the Constitution, and makes the important point that trial judges should take basic human rights concerns into account when considering cases.<sup>57</sup>

24. The right to equal treatment before the law requires that objectively equal cases be treated equally. The Human Rights Committee, a body of independent experts that monitors the implementation of the ICCPR by State parties (such as Cambodia),<sup>58</sup> has stated that "[t]he

<sup>51</sup> Article 12(2) of the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea ("Agreement") states: "The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party"; Article 13(1) states: "The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process."

<sup>52</sup> Article 33 new of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("Establishment Law") states: "The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights."

<sup>53</sup> ICTY Statute, Art. 21(1).

<sup>54</sup> See Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Inter-American Convention on Human Rights, Art. 24.

<sup>55</sup> See, e.g., United States Constitution, 14<sup>th</sup> amendment; French Constitution, adopted 1958, Art. 1; Constitution of the Federal Republic of Austria, Art. 7; New Zealand Bill of Rights Act of 1990, Part 2, para. 27; Constitution of the Republic of Poland, 2 April 1997, Art. 32; Constitution of the Democratic Socialist Republic of Sri Lanka, Art. 12; First Draft Constitution of the Republic of Zambia, 30 April 2012, Art. 45.

<sup>56</sup> Constitutional Council Decision No. 092/003/2007, 10 July 2007 (unofficial English translation provided by OHCHR Cambodia).

<sup>57</sup> UNOHCHR, Public Statement: Decision of the Constitutional Council regarding the Law on Aggravating Circumstances for Felonies and the Convention on the Rights of the Child, 25 July 2007.

<sup>58</sup> See Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, website, available at <http://www2.ohchr.org/english/bodies/hrc/>. Cambodia signed the ICCPR on 17 October 1980 and

right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.”<sup>59</sup>

The Human Rights Committee has further stated that any differential treatment must be “based on reasonable and objective criteria.”<sup>60</sup>

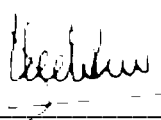
25. Mr. MEAS Muth’s case is objectively equal to Case 002 as regards the applicability of JCE III. There is no reasonable or objective criteria which would permit applying JCE III against Mr. MEAS Muth when it was found not to be applicable at the ECCC as a matter of law in Case 002.

26. Mr. MEAS Muth’s right to a fair trial by an independent and impartial tribunal<sup>61</sup> supports the conclusion that Mr. MEAS Muth may not be treated differently from the Accused in Case 002. This right requires not only that proceedings be fair, but that they be perceived to be fair by a reasonable observer with knowledge of all relevant circumstances.<sup>62</sup> No reasonable observer would understand why JCE III should be applied to Mr. MEAS Muth alone, when it was specifically found in Case 002 not to be applicable at the ECCC.

### III. RELIEF SOUGHT

**WHEREFORE**, for all of the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to REJECT the application of JCE III against Mr. MEAS Muth.

Respectfully submitted,



ANG Udom



Michael G. KARNAVAS

---

acceded to it on 26 May 1992. See United Nations Treaty Collection, website, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#3](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#3).

<sup>59</sup> Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, U.N. Doc. CCPR/C/GC/32, available at <http://www1.umn.edu/humanrts/gencomm/hrcom32.html>.

<sup>60</sup> *Rita Hiro Balani v. Spain*, Communication No. 1021/2001, U.N. Doc. CCPR/C/77/D/1021/2001 (1998), para. 4.3, available at <http://www1.umn.edu/humanrts/undocs/1021-2001.html>. See also *Waldman v. Canada* (Views adopted on 3 November 1999), in UN doc. GAOR, A/55/40 (vol. II), para. 10.6, available at [http://www.worldcourts.com/hrc/eng/decisions/1999.11.03\\_Waldman\\_v\\_Canada.htm](http://www.worldcourts.com/hrc/eng/decisions/1999.11.03_Waldman_v_Canada.htm).

<sup>61</sup> See Cambodian Constitution, Art. 31; Agreement, Arts. 12(2), 13(1); Establishment Law, Art. 33 new; ICCPR, Art. 14(1).

<sup>62</sup> *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 190.

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this **28<sup>th</sup>** day of **October, 2013**