

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

FILING DETAILS

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IENG THIRITH DEFENCE'S PRELIMINARY OBJECTIONS

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I INTRODUCTION

1. On 15 September 2010, the Office of the Co-Investigating Judges (OCIJ) issued the 'Closing Order',¹ against which the defence for Madame Ieng Thirith (**Accused**) appealed (**Appeal**).² The Co-Prosecutors filed a joint response (**Joint Response**),³ and the defence filed a reply.⁴ On 13 January 2011 the Pre-Trial Chamber issued its 'Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order' (**PTC Decision**),⁵ which Decision omits the underlying reasons for the decision, which, it announced 'shall follow in due course'.⁶ No such reasoning has yet been notified to the parties.
2. As argued on prior occasions,⁷ the defence submits the PTC Decision does not qualify as a 'decision' as defined in Internal Rule 77(14), which requires that a decision be reasoned. Unless and until the PTC Decision is reasoned, it does not fall under Internal Rule 77(14). In the circumstances, the defence respectfully seeks the right to file additional submissions once the underlying reasons for the PTC Decision are made known to the parties. It is impossible to analyze the PTC Decision at this stage; hence, this analysis will be confined principally to the OCIJ's Closing Order.

1.1 Initial Hearing

3. Article 5.1 of the Practice Direction on filing allows the defence to file its Preliminary Objections in a fifteen-page document. Whilst the defence filed an 'Urgent Ieng Thirith Defence Request for Additional Time and Pages for the Preliminary

¹ OCIJ, Closing Order, 15 September 2010, Document No. D427.

² Ieng Thirith Defence Appeal from the Closing Order, 18 October 2010, Document No. D427/2/1.

³ Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order, 19 November 2010, Document No. D427/2/7.

⁴ Defence Reply to Prosecution Joint Response to Ieng Thirith Defence Appeal against the Closing Order, 6 December 2010, Document No. D427/2/11.

⁵ PTC, Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order, 13 January 2011, Document No. D427/2/12.

⁶ PTC Decision, p. 5.

⁷ See for instance, Urgent Defence Request to Determine Deadlines, 14 January 2011, Document No. D14, paras. 4-5.

Objections',⁸ this has not been determined prior to finalizing this document. However, the Trial Chamber issued its Interoffice Memorandum of 3 February 2011, indicating that the requested extension of page and time were not allowed. Hence, the defence files this 15-page document within the time limit prescribed by the Trial Chamber's 'Order to File Material in Preparation for Trial'.⁹ This document will refer to jurisdictional arguments raised at previous occasions, specifically the Appeal and Reply.¹⁰ The arguments raised in those documents are incorporated by reference.

4. The defence intends to elaborate on the issues addressed in this motion in more detail at the Initial Hearing, in accordance with Internal Rule 89bis(3).

1.2 Request to Decide on Preliminary Objections before Start of the Trial

5. The defence respectfully requests the Trial Chamber to decide on these issues before the start of the trial, and not wait until the judgment. Internal Rule 89(3) permits the Chamber to decide on these issues either immediately, or at the same time as the judgment on the merits. The defence respectfully requests the Chamber to deal with these issues at this stage of the proceedings, as the Accused has the right to have these issues decided upon before being tried. It would also preserve her right to be tried without undue delay, as guaranteed by Article 14(3)(c) of the International Covenant on Civil and Political Rights (ICCPR), as it would prevent prosecution of crimes or forms of liability that may fall outside of the scope of the ECCC's jurisdiction.
6. In the *Karemera* case at the International Criminal Tribunal for Rwanda (ICTR), the Appeals Chamber held that a Trial Chamber must decide jurisdictional challenges before the start of the trial, as the accused has the 'right not to be tried on, and not to

⁸ Urgent Ieng Thirith Defence Request for Additional Time and Pages for the Preliminary Objections, 25 January 2011, Document No. E24.

⁹ TC, Order to File Material in Preparation for Trial, 17 January 2011, Document No. E9.

¹⁰ Defence Reply to Prosecution Joint Response to Ieng Thirith Defence Appeal against the Closing Order, 6 December 2010, Document No. D427/2/11.

have defend against, an allegation that falls outside the Tribunal's jurisdiction'.¹¹ Also in *Semanza*, the ICTR Trial Chamber held that it must dispose of preliminary motions before proceeding to trial.¹² The International Criminal Tribunal for the former Yugoslavia (ICTY) held in the *Tadic* case that jurisdictional challenges raise fundamental issues of fairness and that one of their underlying purposes is to avert the possibility of an accused being tried and convicted on charges that are not properly brought before the court. The ICTY Appeals Chamber held that '[s]uch a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial.'¹³

7. The defence thus requests the Trial Chamber to adjudicate the Preliminary Objections before allowing the case to be brought to trial.

II RELEVANT LEGAL PROVISIONS

8. Internal Rule 89 defines the scope for Preliminary Objections as follows:

1. A preliminary objection concerning:
 - a) the jurisdiction of the Chamber,
 - b) any issue which requires the termination of prosecution;
 - c) nullity of procedural acts made after the indictment is filed shall be raised in the initial hearing, failing which it shall be inadmissible.
2. The Chamber shall afford the other parties the opportunity to respond to the application.
3. The Chamber shall, as appropriate, issue its reasoned decision either immediately or at the same time as the judgment on the merits. In the latter case, the proceedings shall continue.

III SUBMISSIONS ON JURISDICTION

3.1 Introduction

9. The defence submits the ECCC have no jurisdiction to prosecute the Accused for the following crimes:

¹¹ *Prosecutor v Karemera et al*, Appeals Chamber, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, Case Nos. ICTR-98-44-AR72.5 & ICTR-98-44-AR72.6, para. 23.

¹² *Prosecutor v Semanza*, Trial Chamber, Decision on the Defence Motion for the Adjournment of the Trial Proceedings, 30 October 2000, Case No. ICTR-97-20-I, para. 4.

¹³ *Prosecutor v Dusko Tadic*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-AR72, para. 6.

- Genocide (Section 3.3)
- Crimes against humanity (Section 3.4)
- Grave breaches of the Geneva Conventions (Section 3.5)
- Domestic crimes (Section 3.6)
- Forced marriages as constituting another inhumane act as crime against humanity (Section 3.7)
- Rape within forced marriage as a crime against humanity (Section 3.8)
- Enforced disappearances as an other inhumane act as crime against humanity (Section 3.9)

10. Further the defence submits the ECCC have no jurisdiction to prosecute the Accused on the basis of the following forms of liability:

- Joint criminal enterprise (Section 3.10), and
- Superior responsibility (Section 3.11).

3.2 General Principle of Law: *Nullum Crimen Sine Lege*

11. Firstly, the defence submits that the principle of *nullum crimen sine lege* prohibits the prosecution of several of the crimes and the forms of responsibility as set out in the Closing Order. The defence deals with this argument at the beginning of its submissions as this argument is relevant to each of the following sub-sections.

12. Article 33(2) of the Law on the Establishment of the ECCC (**Establishment Law**) stipulates that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. This is confirmed by Article 6 of the 1956 Cambodian Penal Code and Article 5(1) of the ICCPR. In addition, Article 15(2) ICCPR states that '[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations'.



13. In order to be applicable before the ECCC, a crime:
- a. Must be specified in the Establishment Law;
 - b. Must be criminalized in the 1956 Penal Code;
 - c. Form part of customary international law during the temporal jurisdiction of the Court;
 - d. Is criminalized in an international convention which is directly applicable to the ECCC.¹⁴
14. The ICTY Appeals Chamber held that the crime of forcible transfer could fall under the category of ‘other inhumane act’ because it was criminalized at the time of the commission of the crime, and hence did not violate the principle of *nullum crimen sine lege*.¹⁵ *A contrario*, one may conclude that if a specific act was *not* criminalized at the relevant time, it may not fall under the category of other inhumane act.

3.3 Genocide

15. Article 4 of the Establishment Law states that ‘[t]he [ECCC] shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979’. The Establishment Law adopted the same definition of ‘genocide’ as the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁶

¹⁴ Establishment Law, Article 2.

¹⁵ See *Prosecutor v. Stakic*, Judgement, Case No. IT-97-24-A, 22 March 2006, para. 317, where the Appeals Chamber held: “The Appeals Chamber notes that Article 2(g) of the Statute, Articles 49 and 147 of Geneva Convention IV, Article 85(4)(a) of Additional Protocol I, and Article 18 of the 1996 ILC Draft Code all condemn forcible transfer. The notion of forcible transfer had therefore clearly been accepted as conduct criminalised at the time relevant to this case, such that it does not violate the principle of *nullum crimen sine lege*.”

¹⁶ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A on 9 December 1948, entry into force: 10 January 1951, Articles 2 and 3.

16. The defence submits that the ECCC lacks jurisdiction to prosecute the Accused for the crime of genocide. Such prosecution would violate the fundamental principle of *nullem crimen sine lege*. Due to the limited amount of pages available to these Preliminary Objections, the defence incorporates by reference the arguments advanced in its Appeal in this respect,¹⁷ and submits that the ECCC have no jurisdiction to prosecute the Accused for this crime.

3.4 Crimes against Humanity

17. The defence submits that the ECCC have no jurisdiction to prosecute the Accused for crimes against humanity. Crimes against humanity were not criminalized in Cambodia at the relevant time, and hence, there is no jurisdiction to prosecute the Accused for crimes against humanity. Doing so would violate the principle of *nullum crimen sine lege*. The 1956 Penal Code does not contain a provision criminalizing crimes against humanity in Cambodia.

18. Because of the limited amount of pages available to these Preliminary Objections, the defence incorporates by reference the arguments advanced in its Appeal in this respect.¹⁸

3.5 Grave Breaches

19. The application of grave breaches has been limited by the Closing Order to ‘the S-21 security centre, at the Au Kanseng security centre, and during incursions into Vietnam by the Revolutionary Army of Kampuchea’ (RAK).¹⁹ Also, in respect of the legal discussion of jurisdiction for grave breaches, the defence incorporates by reference its arguments set out in its Appeal.²⁰

¹⁷ Appeal, Section 3.3 – Genocide.

¹⁸ Appeal, Section 3.4 – Crimes against Humanity.

¹⁹ Closing Order, para. 1479.

²⁰ Appeal, Section 3.5 – Grave Breaches.

3.6 Domestic Crimes

20. The defence submits that the ECCC do not have jurisdiction to prosecute the Accused for domestic crimes. For a complete overview of the defence's arguments, reference is made to Section 3.6 of the Appeal and Section IV of the Reply.²¹
21. In the *Duch* case the Trial Chamber failed to reach a majority decision and thus could not prosecute Duch for domestic crimes.²² The Prosecutors did not appeal from this decision, and thus acquiesced to this legal finding.
22. The defence submits the prosecution of domestic crimes is barred by the statutory limitation; to extend the period in which prosecution is permitted amounts to a breach of the general principle of criminal law of *nullum crimen sine lege*. Interestingly, Article 6 of the 1956 Penal Code itself prohibits the retroactive application of law.
23. The defence further submits that another general principle of criminal law provides that a criminal law must be devised for the general public, and not target a specific group of individuals. Article 3(new) of the Establishment Law is violation of this principle, and thus violates the Accused's right to equality where such extension of the statute of limitation only applies for the prosecution of those individuals appearing before the ECCC where they are charged with crimes committed during the 1975-1979 period, and fails to extend such period for all other similar crimes committed between 1979 and 2003. The law is thus devised for and targets a specific group of individuals, and is not for the general public, which forms a breach of the general principle of the right to equal treatment for equal cases. This amounts to discrimination of the Accused.

²¹ Defence Reply to Prosecution Joint Response to Ieng Thirith Defence Appeal against the Closing Order, 6 December 2010, Document No. D427/2/11.

²² Trial Chamber, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, Case 001, 26 July 2010, Document No. E187.

24. On this basis, application of Article 3(new) of the Establishment Law should be dismissed.

3.8 Forced Marriages and Rape within Forced Marriage

25. As conceded by the OCIJ in the Closing Order, the application of crimes against humanity at the ECCC requires that the attack be committed on 'national, political, ethnic, racial or religious grounds'.²³ This is an addition to the customary international definition of crimes against humanity, and 'introduces a legal limitation to the jurisdiction of the ECCC'.²⁴ The OCIJ state that they will indeed apply the narrower definition in interpreting Article 5 of the ECCC Law.²⁵ Nonetheless, they refrain from doing so in their analysis of these alleged two crimes of forced marriage and rape within forced marriage.

26. Paragraphs 1313-1315 of the Closing Order provide a definition of crimes against humanity to be applied at the ECCC. The defence argued above that it objects to the ECCC exercising jurisdiction over this crime in general (Section 3.4). But the defence also takes issue with its specific application to the alleged crimes of forced marriage and rape within forced marriage, both charged as other inhumane acts.

3.8.1 *Forced Marriages / Regulation of Marriages as 'Other Inhumane Act'*²⁶

27. The Closing Order defines one of the five criminal 'policies' of the Khmer Rouge as the 'regulation of marriage by whatever means necessary'.²⁷ The defence submits that the 'regulation of marriage' should not be categorized as an international crime falling within the ambit of crimes against humanity. This alleged 'crime' is not defined in the Closing Order, where it is sometimes referred to as 'regulation'²⁸ and at

²³ Closing Order, para. 1315.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ See also the arguments set out in Ieng Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request Concerning Forced Marriage and Forced Sexual Relations, 11 August 2009, Document No. D188/3.

²⁷ Closing Order, para. 216.

²⁸ See for instance, Closing Order, heading on p. 209.

other times as 'the crime of forced marriage',²⁹ which has an entirely different connotation. Also the content of such alleged crime is insufficiently defined, as can for instance be demonstrated from the following conclusion: 'Some witnesses state that they were forced to consummate their union, which corroborates the existence of a common purpose established by the senior leaders of the CPK that marriages were necessary to increase the population'.³⁰ The defence does not address the obvious evidentiary problems herein.

28. This alleged crime falls outside the scope of the ECCC's jurisdiction, as it is not defined in the Establishment Law. The crime is not mentioned in the 1956 Penal Law, nor was it part of customary international law at the relevant time. Cambodia is not a party to any international convention that deals with this crime at that time, nor was it at the relevant time.

3.8.2 Rape within Forced Marriage as Other Inhumane Act

29. The Accused is charged separately with rape within forced marriage as other inhumane act.³¹ The defence submits that, besides the fact that the ECCC lack jurisdiction to prosecute this crime, the legal elements for rape as a crime against humanity as other inhumane act have not been fulfilled.

30. The defence submits this crime is insufficiently specified in the Closing Order, and the PTC Decision has not yet provided further details. There is an inherent problem with this crime as formulated by the Closing Order. The alleged crime of rape within forced marriage does not implicate the Accused and/or her co-accused as a party to the sexual act. Whilst prosecution of rape is possible where a defendant himself is not a party to such sexual act as a principal but derives from, secondary liability. The difficulty with this particular alleged crime is that it is not possible to identify any perpetrator, apart from the guilt of any superior, but the superior cannot be guilty without any underlying crime. The *actus reus* and *mens rea* are not identified as being

²⁹ See for instance Closing Order, para. 861.

³⁰ Closing Order, para. 1447.

³¹ PTC Appeal, p. 4, under 2.



present in any one single person, but in multiple persons, if at all. It is, in effect, alleged that both husband and wife raped each other, i.e. that it is a form of mutual rape? By finding the superior guilty of the act of rape within forced marriage, this would necessarily also criminalize the actions of the parties who commit the act of sexual intercourse. The consummation becomes a crime, albeit that they are not personally responsible for such crime. The formulation of such alleged crime is thus problematic, and prosecution not feasible. The Chamber is thus requested not to allow prosecution for this crime.

3.9 Enforced Disappearances

31. In its 'Joint Defence Response to Civil Parties' Investigative Request Concerning the Alleged Crime of Enforced Disappearance', the defence submitted that the ECCC has no jurisdiction to prosecute the Accused for the crime against humanity of enforced disappearance.³² The defence incorporates by reference the arguments set out therein.

32. The crime of enforced disappearance as an inhumane act falls outside the scope of the ECCC's jurisdiction, as this did not constitute a crime at the relevant time. Accordingly, prosecution on this basis would violate the principle of *nullum crimen sine lege*. The crime is not mentioned in the Establishment Law, nor was it mentioned in the 1956 Penal Law, nor was it part of customary international law at the time.³³ Also, Cambodia is not a party to any international convention that deals with this crime at that time. One Convention in relation to a similar crime was created in 2006, but Cambodia is not a party to it, and the convention has only entered into force two months ago.³⁴ Further, the definition employed in this Convention testifies to the strict requirements that even today govern this crime.³⁵

³² Defence for Ieng Thirith and Nuon Chea, Joint Defence Response to Civil Parties' Investigative Request Concerning the Alleged Crime of Enforced Disappearance, 24 July 2009, Document No. D180/2.

³³ Antonio Cassese, *International Criminal Law* (2003), p. 80 & 94.

³⁴ See "International Convention for the Protection of All Persons from Enforced Disappearance, Status as at 8 July 2009, URL address: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en.

³⁵ Article 2 of this Convention defines 'enforced disappearance' as 'the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with

3.10 Joint Criminal Enterprise

33. The defence for the Accused on a previous occasion set out in detail its jurisdictional objections to the prosecution on the basis of joint criminal enterprise (JCE).³⁶ In that document, the defence argued *in extenso* that the third, extended form of JCE (JCE III) should not be applicable before the ECCC, a recommendation that was indeed reflected in the PTC Decision on the applicability of JCE, where the PTC held:

[T]he Pre-Trial Chamber is of the view that [the authorities relied upon by *Tadic*] do not provide sufficient evidence of consistent state practice or *opinio juris* at the time relevant to Case 002. The Pre-Trial Chamber concludes that JCE III was not recognized as a form of responsibility applicable to violations of international humanitarian law [...].³⁷

34. Given that JCE III was excluded since the PTC's ruling, the defence will focus on the other two forms of JCE: JCE I and JCE II. In its submissions on JCE before the Co-Investigating Judges,³⁸ the defence elaborated on the requirements for finding JCE applicable. The defence also adopts the arguments set out in the Ieng Sary motion³⁹ and Supplementary Observations.⁴⁰

35. Kai Ambos, in his *amicus curiae* brief before the Pre-Trial Chamber in Case 001, argued that four requirements need to be fulfilled:⁴¹

- (i) JCE must have existed under customary international law at the relevant time;

the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law'.

³⁶ Ieng Thirith Defence Appeal against 'Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise' of 8 December 2009, 18 January 2010, Document No. D97/15/1.

³⁷ PTC, Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, Document No. D97/15/9, para. 77.

³⁸ Ieng Thirith Submissions on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise Pursuant to the Order of the Co-Investigating Judges of 16 September 2008, 30 December 2008, Document No. D97/3/2.

³⁹ Ieng Sary's Motion against the Application at the ECCC of the Form of Liability Known as *Joint Criminal Enterprise*, 28 July 2008, Doc. No. D97.

⁴⁰ Ieng Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC, 24 November 2008, Doc. No. D97/7.

⁴¹ *Amicus Curiae Concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ(PTC02)*, 27 October 2008, Doc. No. D99/3/27 (Case File 001), p. 21.

- (ii) It must have formed part of Cambodian law at the relevant time;
- (iii) It must have been sufficiently accessible and foreseeable to the defendants at the relevant time; and
- (iv) In addition to the foregoing, the law applicable to the ECCC must provide for this form of liability.

36. The defence adopts the analysis of Kai Ambos and his conclusion that only the first form of JCE was unambiguously part of Cambodian law at the relevant time. The applicability of the second form of JCE is ambiguous and uncertain, and should therefore not be relied upon to the detriment of the Charged Person.⁴²

37. Further the defence submits that the applicability and interpretation of JCE is widely disputed and the exact content thereof, if applicable, is open to many different and contradictory interpretations, as evidenced by the many views brought forward in the discussion of the applicability thereof in Case File 001. The Penal Code of 1956 provides for two different forms of liability, co-perpetration and complicity, which largely coincide with joint criminal enterprise in its basic and second forms. The ECCC should first and foremost apply Cambodian law, and as such should rely on the 1956 Penal Code, instead of falling back on contested forms of liability under international law.

38. Consequently, the defence submits that the ECCC do not have the required jurisdiction to prosecute for this form of liability.

3.11 Superior Responsibility

39. The Closing Order charges the Accused with superior responsibility as an alternative form of liability in relation to three of the crimes defined as crimes against humanity:⁴³

⁴² Kai Ambos *Amicus* Brief, p. 30.

⁴³ Closing Order, para. 1561.


- a. Other inhumane acts through 'attacks against human dignity' and forced marriage;
- b. Rape in the context of forced marriage; and
- c. Persecution on racial grounds of the Vietnamese.

40. The Accused is alleged to have 'failed to take the necessary steps to prevent the commission of these crimes' and 'Ieng Thirith knew or had reason to know of the actual commission of these crimes by her subordinates and she failed to punish the perpetrators'.⁴⁴ The defence hereby incorporates by reference the arguments set out in Section 3.8 of its Appeal and Section VIII of its Reply,⁴⁵ and concludes that no jurisdiction exists for the ECCC to prosecute the Accused for this form of liability.

IV CONCLUSION

41. The defence respectfully requests the Trial Chamber to decide on these Preliminary Objections after they have been expanded upon at the Initial Hearing, but before the commencement of the trial.

42. The defence further request the Chamber to find that the ECCC have no jurisdiction to prosecute the Accused for the crimes and forms of liability set out above.

Party	Date	Name Lawyers	Place	Signature
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⁴⁴ Closing Order, para. 1562.

⁴⁵ Defence Reply to Prosecution Joint Response to Ieng Thirith Defence Appeal against the Closing Order, 6 December 2010, Document No. D427/2/11.