

BEFORE THE PRE-TRIAL CHAMBER OF THE
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Case No.: 001/18-07-2007-ECCC-OCIJ (PTC-02)
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URGENT JOINT DEFENCE REQUEST TO INTERVENE IN THE 'APPLICATION OF THE
THEORY OF JCE' IN THE OCP APPEAL AGAINST THE DUCH CLOSING ORDER

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I INTRODUCTION

1. On 21 August 2008, the Office of the Co-Prosecutors (“**OCP**”) filed a Notice of Appeal against the Closing Order of the Co-Investigative Judges in Case File 001/18-07-2007-ECCC/OCIJ. On 5 September 2008, the OCP filed its Co-Prosecutors’ Appeal Brief (“**OCP Appeal**”), requesting the Pre-Trial Chamber to amend *inter alia* the Closing Order so as to include the participation mode of joint criminal enterprise (“**JCE**”) in the indictment against Kaing Guek Eav (“**Duch**”).
2. On 15 September 2008, the defence for Ieng Sary filed an “Expedited Request to Make Submissions on the Application of Joint Criminal Enterprise Liability in the Co-Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav ‘Duch’”. The Pre-Trial Chamber rejected this application in the “Decision on Ieng Sary’s Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav ‘Duch’” (“**PTC Ieng Sary Decision**”).
3. The Charged Persons filing this submission, Ieng Thirith, Nuon Chea and Khieu Samphan (“**Charged Persons**”), are indicted, *inter alia*, as being party to a joint criminal enterprise, as set out in the Introductory Submission.¹
4. The defence representing the Charged Persons apply to be heard in the imminent proceedings before the Pre-Trial Chamber on the OCP Appeal.
5. The reason that the defence seeks to be heard is that it has a direct interest in the issue to be argued and the decision to be taken by the Pre-Trial Chamber. Any such decision of the Pre-Trial Chamber as to the application of JCE will directly affect the proceedings against the Charged Persons. The defence is, therefore, filing a “Request to Intervene in the Application of the Theory of JCE in the OCP Appeal against the Duch Closing Order” (“**Defence Request**”).

¹ Paras. 2, 5-16, and 116 of the Introductory Submission.

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II THE APPLICABLE STANDARD

6. In its PTC Ieng Sary Decision, the Pre-Trial Chamber ruled that “[t]he Internal Rules do not provide a right for a third party to intervene”.² It recalls, however, that in the case against Ieng Sary, the other accused persons were allowed to share their views with the Chamber in a separate case, because that “invitation was made in circumstances where the determination of the application would lead to the issuance of general directions on the procedural rights of unrepresented civil parties to address the Pre-Trial Chamber”.³
7. The right of other accused persons to intervene in a case against one of the accused is thus limited to those instances where a ruling might apply beyond the case of the single accused person. This reasoning must apply equally, if not more so, to the Charged Persons’ substantive rights which will be affected by such decision.
8. If the Pre-Trial Chamber holds that the Charged Persons have no such right to intervene, the defence submits that the said request should be allowed for reasons of judicial economy and to give recognition to the Charged Persons fair trial rights (this will be dealt with in section 3.3 below).

III ARGUMENTS

3.1 The Issues

9. Article 29 of the Law on the ECCC sets out the modes of participation in crimes which come within the jurisdiction of the ECCC. It makes no reference to JCE. An issue arises, therefore, as to whether the court can infer that JCE is capable of representing a separate mode of participation over which the ECCC has jurisdiction.

² PTC Ieng Sary Decision, para. 9.

³ PTC Ieng Sary Decision, para. 11.

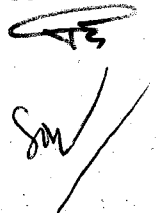
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10. Further, as the Cambodian Penal Code has not historically recognized JCE as a mode of participation, whether those accused of crimes committed in 1975-1979 can be found responsible by virtue of being a party to a joint criminal enterprise. This question is further complicated by the question whether the concept of JCE existed as a form of liability under customary international law in the relevant time period, 1975-1979.

3.2 Direct Relevance to Charged Persons

11. The Pre-Trial Chamber has sought the assistance of three *amici curiae* in its deliberations on whether the theory of JCE is applicable to crimes committed in 1975-1979.
12. Any decision the Pre-Trial Chamber takes on this matter is of direct importance to the Charged Persons of Case File 002, as the Pre-Trial Chamber, once it has decided on the ambiguous issue of the applicability of JCE in 1975-1979, cannot easily reverse such determination in the future. Arguably the Office of the Co-Investigative Judges ("OCIJ") in Case No. 002 can reverse such decision, but since they are subject to the Pre-Trial Chamber's superior jurisdiction *and* have explicitly indicated they will give a ruling on this matter in the Ieng Sary case *after* the Pre-Trial Chamber has ruled on this matter, it is to be expected that the OCIJ will not deviate from the Pre-Trial Chamber's view. If it were in fact to disagree with the Pre-Trial Chamber's decision in Case No. 001, it is inevitable that the Pre-Trial Chamber would reverse its decision on appeal.
13. Further, this issue may very well be raised at trial before the Trial Chamber, who can again decide the point.⁴ In the interests of judicial economy, consistency and expediency there may be a disinclination to reverse a decision of the Pre-Trial Chamber. Significantly too, it may be anticipated that the Trial Chamber will deal with this issue in the case against Duch, where exactly the same situation can be

⁴ And the same argument goes for the Supreme Court Chamber.

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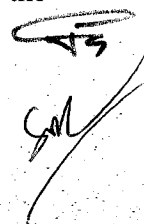
expected to arise: in that if the defence for the Charged Persons are not a party to that case they will be excluded from this crucial debate which is highly relevant to their cases.

14. If, as is understood to be the case, the defence on behalf of Duch does not seek to submit argument on this matter, the Pre-Trial Chamber will be deprived of the opportunity to weigh up the arguments taking account of the position held by those most affected by their ultimate decision.
15. The fairness of the proceedings would be compromised by a failure of the Pre-Trial Chamber to allow arguments to be presented by the defence. This would give rise to an imbalance in the presentation of argument and is contrary to the entitlement of the Charged Persons to have a right to be heard on all matters of relevance.
16. To exclude the defence from making legal submissions on this critical issue would thus adversely affect the fair trial rights of the Charged Persons, and as such, the defence for the Charged Persons submit they should be permitted to be heard on this crucial matter which is central to the charges faced and which will ultimately define the nature of the indictment drafted against the Charged Persons.

3.3 Judicial Economy and Charged Persons' Rights

Judicial Economy

17. Firstly, the defence for the Charged Persons submit that for reasons of judicial economy, they should be allowed to file submissions at this stage in the proceedings. If the Pre-Trial Chamber is intent on making a decision on the concept of JCE and its applicability in 1975-1979, the Chamber should be fully informed of all relevant arguments. It is for this reason, the defence presumes, that the Pre-Trial Chamber invited *amici curiae* to assist in coming to an informed decision. Currently, the Prosecution, Civil Parties and *amici curiae* can contribute to the debate, with the exclusion of the defence. Such exclusion of defence arguments would result in the



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Pre-Trial Chamber's decision being partly uninformed, and thus flawed, if only for procedural reasons.

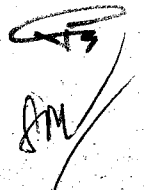
Fair Trial Violation: The Right to Be Heard

18. Secondly, excluding the Charged Persons from making submissions on this matter will impede on the Charged Persons' right to be heard on matters which have a direct bearing on their case and on the issues ultimately to be determined. As previously stated, realistically no submissions before the OCIJ will succeed if they put forward a view contrary to the decision already arrived at by the Pre-Trial Chamber.
19. This would imply that the Charged Persons' right to be heard as enshrined in Article 14(1) of the International Covenant on Civil and Political Rights would be violated.⁵ The defence will have lost its right to effectively be heard on an issue of central importance.

Violation of the Right to Appeal

20. Moreover, not only would the Charged Persons' right to be heard at the first level be denied, they would also not have an effective remedy at the appeal stage. Given the implications set out above, the defence for the Charged Persons would not be involved, presumably at *any* level before this tribunal, in this debate. The Charged Persons' right to appeal this matter would thus also effectively be denied.
21. Moreover, no party would suffer any prejudice if the defence for the Charged Persons file submissions; whilst the Charged Persons would suffer prejudice from such exclusion. In addition to the judicial economy argument, as well as the breach of fair trial rights, the defence submit this prejudice should persuade the Pre-Trial Chamber to allow the Charged Persons to file submissions on this matter.

⁵ This provision has been expressly implemented in the ECCC system by Article 13 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", which provides that "[t]he 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."



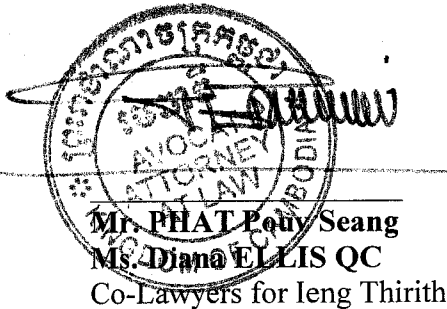
22. If the Pre-Trial Chamber permits the defence for the Charged Persons to file submissions, the defence submit that this could be done in a timescale which would not cause delay in the proceedings

IV PRAYER


23. If the Pre-Trial Chamber decides to rule on the applicability of JCE at this time and stage of the proceedings in the Duch case, the defence for the Charged Person request permission to intervene in the appeal of the Co-Prosecutors against the Duch Closing Order, and to file submissions on this matter.

24. The defence respectfully suggest filing such submissions by mid-November, so as not to cause any delay in the ongoing proceedings.

Done in Phnom Penh, this 23rd day of October 2008.



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