

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

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**DEFENCE RESPONSE TO CO-PROSECUTORS' REQUEST FOR THE TRIAL CHAMBER
TO CONSIDER JCE III AS AN ALTERNATIVE MODE OF LIABILITY**

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I INTRODUCTION

1. On 20 May 2010, the Pre-Trial Chamber rendered its 'Decision on the Appeals Against the Co-Investigating Judges' Order on Joint Criminal Enterprise' (**PTC Decision**) in which the Pre-Trial Chamber decided that the extended form of Joint Criminal Enterprise (**JCE III**) was not recognized as a form of responsibility applicable to violations of international humanitarian law.¹
2. The Co-Investigative Judges, in their Closing Order, decided that the first form of Joint Criminal Enterprise (**JCE I**) and second form (**JCE II**) were modes of criminal responsibility set out in Article 29 (new) of the ECCC Law which formed part of the international law applicable in Cambodia at the relevant time.² The Co-Investigative Judges further considered that the systematic form of **JCE II** need not be relied upon, as the basic form of **JCE I** is that most suited for characterizing the criminal responsibility of the Charged Persons for the crimes described in the Closing Order.³ The defence for Madame Ieng Thirith (**defence**) appealed against the Closing Order, but did not raise the issue of lack of jurisdiction for JCE as a mode of liability, as the Pre-Trial Chamber had already ruled on the matter.⁴
3. On 17 January 2011, the Trial Chamber considered itself seized of Case 002.⁵ On 3 February 2011, the Trial Chamber informed the parties that the applicable deadline for filing preliminary objections fell on Monday 14 February pursuant to Internal Rules 80(1) and (2) and 89.⁶ In compliance with the Trial Chamber's Advance Notification, the defence filed its jurisdictional challenges before the

¹ PTC, Decision on the Appeals Against the Co-Investigative Judges' Order on Joint Criminal Enterprise, 20 May 2010, Document No. D97/15/9, para. 77.

² OCIJ Closing Order, 15 September 2010, Document No. D427, para. 1318.

³ OCIJ Closing Order, 15 September 2010, Document No. D427, para. 1541.

⁴ Ieng Thirith Defence Appeal from the Closing Order, 18 October 2010, Document No. D427/2/1, para. 80.

⁵ TC, Order to File Material in Preparation for Trial, 17 January 2011, Document No. E9.

⁶ TC, Advance notification of Chamber's disposition of Motions E14, E15, E9/2, E9/3, E24 and E27, 3 February 2011, Document No. E35.

Trial Chamber on 14 February 2011, including one challenge on the jurisdiction of the ECCC to prosecute the Accused on the basis of JCE.⁷ The Co-Prosecutors did not file any preliminary objections during the time-frame imposed under Internal Rule 89(1).

4. On 17 June 2011 the Co-Prosecutors filed their 'Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as An Alternative Mode of Liability' (**OCP Request**),⁸ requesting the Trial Chamber to find **JCE III** a valid mode of liability at the ECCC and to recharacterize the charges in the indictment at Judgement as crimes committed pursuant to **JCE III**.⁹
5. On 20 June 2011, the defence was informed by the Trial Chamber that the deadline for responding to the OCP Request was extended to 22 July 2011.¹⁰ The defence herewith files its response to the OCP Request.

II LEGAL PROVISIONS

6. The defence submits the following legal provisions are of relevance in the determination of the underlying request:

Article 35 of ECCC Law – Fair Trial Rights of the Accused

In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.

- a. to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;
- b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.

Internal Rule 89 – Preliminary Objections

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 no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible.

⁷ Ieng Thirith Defence's Preliminary Objections, 14 February 2011, Document No. E44, para. 33-38.

⁸ OCP, Co-Prosecutors' Request for the Trial Chamber to Consider JCE III as An Alternative Mode of Liability, 17 June 2011, Document No. E100.

⁹ OCP Request, para. 41.

¹⁰ Confirmed in TC, Decision on Extension of Time, 7 July 2011, Document No. E107.

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. The proceedings shall continue unless the Chamber issues immediately a decision which has the effect of terminating the proceedings.

Internal Rule 92 – Written Submissions

The parties may, up until the closing statements, make written submissions as provided in the Practice Direction on filing of documents. The Greffier of the Chamber shall sign such written submissions and indicate the date of receipt, and place them on the case file.

Internal Rule 98(2)

The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced. The Chamber shall only pass judgment on the Accused. If another person, appearing as a witness during the trial is suspected of committing a crime or conspiring with someone to commit a crime, the Chamber shall only try such person after he or she has been charged and indicted in accordance with these IRs.

III INADMISSIBILITY OF THE OCP REQUEST

3.1 Inadmissible: Preliminary Objection

7. The defence submits that the OCP Request constitutes a preliminary objection; hence it is inadmissible at this stage of the proceedings. The Pre-Trial Chamber has defined what constitutes a ‘jurisdictional challenge’, and that includes ‘challeng[ing] [...] the very existence of a form of responsibility or its recognition under customary law at the time relevant to the indictment’.¹¹ Alternatively, requesting the Trial Chamber to validate a form of liability, that has been rejected as existing under customary international law at the time of the commission of the alleged crimes by the Pre-Trial Chamber, as an applicable form of mode of liability before the ECCC, constitutes a jurisdictional challenge. The underlying request of the Co-Prosecutors forms a preliminary objection as set out in Internal Rule 89(1)(a), concerning the jurisdiction of the Chamber, as delineated by the Amended Closing Order. The Co-Prosecutors request the Trial Chamber to change the jurisdiction over modes of liability in such a way that the jurisdiction is extended to a new form of liability, namely **JCE III**.

¹¹ PTC Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, Document No. D427/2/15, para. 60.

8. On 3 February 2011, the Trial Chamber, in its 'Advance notification of Chamber's disposition of Motions E14, E15, E9/2, E9/3, E24 and E27',¹² informed the parties that the applicable deadline for filing preliminary objections fell on Monday 14 February as, pursuant to the Chamber's Order to File Materials in Preparation for Trial, the time limits set by Internal Rules 80(1) and (2) and 89 start to run from Friday 14 January 2011. The Trial Chamber made it clear that it will reject all requests to adopt a modified procedure different from that presently envisaged by the Internal Rules.¹³
9. The Co-Prosecutors did not file any preliminary objections before the 14 February 2011 and, thus, did not raise any jurisdiction challenges. They thus indicated acceptance of the Amended Closing Order's delineation of the Trial Chamber's jurisdiction over the alleged crimes and their modes of liability. The Co-Prosecutors cannot now be allowed to adopt a different position at this stage of the proceedings and request the Chamber to expand its jurisdiction; they are barred from making this submission. The time limit for the filing of preliminary objections has long expired, and the OCP Request should be rejected on this basis alone. In addition, the Trial Chamber explicitly stated in its Advance Notification that all attempts to modify procedure from that presently envisaged by Internal Rule 89 will be rejected. As a result, the OCP Request should be rejected.
10. Further, and in spite of the fact that the Co-Prosecutors were put on notice of the defence position by 'Ieng Sary's Observations to the Co-Prosecutors' Notification of Legal Issues It Intends to Raise at the Initial Hearing',¹⁴ the Co-Prosecutors have failed to provide any justification for the filing of this preliminary objection

¹² TC, Advance notification of Chamber's disposition of Motions E14, E15, E9/2, E9/3, E24 and E27, 3 February 2011, Document No. E35.

¹³ TC, Advance notification of Chamber's disposition of Motions E14, E15, E9/2, E9/3, E24 and E27, 3 February 2011, Document No. E35, p. 2.

¹⁴ Ieng Sary's Observations to the Co-Prosecutors' Notification of Legal Issues It Intends to Raise at the Initial Hearing, 3 May 2011, Document No. E9/30/1, paras. 3-6.

at so late a stage.¹⁵ In its OCP Request, the Co-Prosecutors merely asserted in a footnote that their submission was not an ‘objection’ and that the legal re-characterization of facts was not a jurisdictional issue,¹⁶ without providing the parties with further justification or explanation. This failure indicates that the Co-Prosecutors may intentionally have chosen not to address this issue in a timely manner and should result in inadmissibility of the Request.

3.2 Inadmissible: No Legal Basis for OCP Request

11. Further, the OCP Request contends that its request falls within the ambit of Internal Rule 98(2).¹⁷ The defence rejects this interpretation. The Chamber is requested to change the law and thus the Chamber’s jurisdiction over the modes of liability applicable at the ECCC and not merely the legal characterization of the facts as is permitted pursuant to Internal Rule 98 (2). This is demonstrated by the Co-Prosecutors request to the Trial Chamber to, first, ‘*find that JCE III is a valid mode of liability at the ECCC*’ and then, to ‘*recharacterise the charges in the Indictment at Judgment, where appropriate, as crimes committed pursuant to the extended form of [JCE]*’.¹⁸ It is clear from the Co-Prosecutors’ request that the Trial Chamber will need first to consider **JCE III** as a mode of liability applicable at the ECCC, in order then to recharacterize the charges. The only possibility set up in the Internal Rules to ‘validate’ a mode of liability applicable at the ECCC is to file a jurisdictional challenge under Internal Rule 89. Thus, the legal basis provided by the Co-Prosecutors for their request is invalid, and as such, the OCP Request should be rejected.

¹⁵ OCP, Co-Prosecutors’ Response to “Jeng Sary’s Observations to the Co-Prosecutors’ Notification of Legal Issues it Intends to Raise at the Initial Hearing”, 18 May 2011, Document No. E9/30/2.

¹⁶ OCP Request, footnote 12.

¹⁷ OCP Request, para. 1 and 8.

¹⁸ OCP Request, para. 41.



IV SUBMISSIONS

4.1 'Legal Re-Characterisation of Charges' Not Permissible

12. The OCP Request sets out, whilst referring to Internal Rule 98(2), that it requests the Chamber to '*recharacterise the charges in the Indictment at Judgement, as crimes committed pursuant to* JCE III.¹⁹ The defence contends that Rule 98(2) cannot permit the legal characterization of forms of responsibility. It is the defence submission that Internal Rule 98(2) does not allow for a re-characterization of the 'charges', but instead the 'facts'. Further, Internal Rule 98(2) prohibits the introduction of a new constitutive element in the crime. JCE III extends the concept of joint criminal enterprise to found liability where a crime not included in the common criminal enterprise was 'a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk'²⁰ thus introducing a new element. Re-characterizing the charges that the Accused faces at Judgement will violate the Accused's right to be informed promptly of the nature and cause of the charge against her.²¹
13. The Cambodian legal system does not address changes to a form of responsibility under its law. Article 348 of the Criminal Procedure Code of the Kingdom of Cambodia only permits a Court to decide the type of offence stated in the forwarding order issued by the Investigation Chamber. A redetermination of an offence is possible, only before the Court of Appeal, provided that the Court of Appeal does not add any new element that was not submitted to the court of first instance to decide.²² The defence recalls that the Trial Chamber is not bound by its decision in the Judgement in Case 001, especially where the parties in Case 001 did not raise the issue of whether legal recharacterization of charges is possible under Internal Rule 98(2), a point that the defence hereby submits in its response.

¹⁹ OCP Request, para. 41.

²⁰ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, para 204.

²¹ Internal Rule 21(1)(d).

²² Criminal Procedure Code of the Kingdom of Cambodia, Article 401.



14. The International Criminal Court's (ICC) Regulations of the Court contains a provision similar to the ECCC Internal Rule 98(2). Regulation 55 of the ICC permits the Trial Chamber to recharacterize the facts on a case at Judgement. The Appeals Chamber of the ICC has clearly stated that the changes that can be made to the legal characterization of the facts cannot involve a formal amendment to the charges.²³ Indeed, 'the modification of the legal characterisation is limited by the *facts and circumstances* described in the charges and any amendment thereto'.²⁴ It is clear that the recharacterization should be made on the facts, and not to the charges, as the Co-Prosecutors seek to do in their OCP Request.

15. In the event, that the Trial Chamber decides that legal recharacterization of the charges is permitted under Internal Rule 98(2), this would be subject to the fulfilment of two conditions: the Trial Chamber must ensure that no violation of the fair trial rights of the Accused is entailed; and that the form of responsibility in question is applicable before the ECCC.²⁵ The defence recalls that **JCE III** is a form of responsibility that is not applicable before the ECCC. The Pre-Trial Chamber has previously held that **JCE III** was not applicable at the ECCC as this form of liability did not exist under customary international law at the time of the commission of the alleged crimes. The Closing Order charges the Accused on the basis of **JCE I**, only. Recharacterizing the charges at Judgement and charging the Accused with a mode of responsibility that did not exist in 1975-79 will necessarily violate the right of the Accused to a fair trial. This is why the Co-Prosecutors, in their OCP Request, has asked the Trial Chamber to first declare

²³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 AO 15 AO 16, Appeals Chamber, Judgement on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" (**Appeals Chamber Judgement**), 8 December 2009, para. 84.

²⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber Judgement, para. 100 (underlined by us).

²⁵ *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, para. 496; On the requirement that any modification made on the facts should not violate the rights of the Accused and lead to an unfair trial, see *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber Judgement, para. 77, 85 and 100.

valid **JCE III** as a mode of liability.²⁶ The 'validation' of **JCE III** as an accepted mode of liability before the ECCC is therefore a necessary precondition, before recharacterizing the charges against the Accused. As previously asserted, the OCP Request to validate a form of liability before the ECCC is inadmissible as it is time-barred. Internal Rule 98(2) cannot be used to reconsider the applicability of a mode of liability before a Court, which has previously ruled it is inapplicable.

4.2 Substantive Arguments

16. The defence submits that on the basis of the arguments set out herein the OCP Request is inadmissible and should be rejected for lack of legal basis. The defence now turns to the substance of the argument in response to paragraphs 12-40 of the OCP Request.
17. The Co-Prosecutors argued in their OCP Request that **JCE III** was recognized as a mode of liability in customary international law during 1975-79.²⁷ The Co-Prosecutors have based their arguments solely on 'the object and purpose of the Nuremberg Charter and the post-Second World War II trials',²⁸ the *Essen Lynching* case²⁹ and the *Borkum Island* case³⁰ and, finally, the **JCE III** status as a 'general principle of law'.³¹
18. The defence rejects the Co-Prosecutors' reference to the object and purpose of the Nuremberg Charter as providing an authority which proves that **JCE III**, as a mode of liability, has its origins in that period. The defence respectfully agrees with the ruling of the Pre-Trial Chamber that the Nuremberg Charter cannot serve as a basis for establishing that **JCE III** existed under customary international law at the relevant time.³²

²⁶ OCP Request, para. 41.

²⁷ OCP Request, paras. 17-37.

²⁸ OCP Request, para. 23.

²⁹ OCP Request, paras. 24-26.

³⁰ OCP Request, paras. 27-28.

³¹ OCP Request, para. 29.

³² PTC Decision, para. 78.

19. The Co-Prosecutors further relied on the *Essen Lynching* case and the *Borkum Island* case when arguing that **JCE III** was part of customary international law in 1975-79. The defence hereby refers to the Pre-Trial Chamber's findings in its PTC Decision.³³ As correctly decided by the Pre-Trial Chamber, those two cases fail to prove that **JCE III** existed during the relevant time. The absence of a reasoned judgement in either case makes it unclear as to the basis of liability upon which the accused were convicted³⁴ and, as a result, it cannot provide a reliable and authoritative source of law upon which the Co-Prosecutors can rely in order to prove that **JCE III** was part of customary international law at the time. The defence hereby refers to the previous submissions of the Ieng Sary defence team on the inconsistencies of the cases on which the *Tadic* Appeals Chamber based its findings.³⁵ The Co-Prosecutors themselves recognised that the Judgement in the *Essen Lynching* case did not specify the theory of liability under which the Court held each accused responsible³⁶ and that no Judge Advocate stated the law in the *Borkum Island* case.³⁷ The Co-Prosecutors cannot just 'suggest' that the *Borkum Island* case upheld **JCE III**.³⁸

20. The Co-Prosecutors stated that **JCE III** liability may have been established in international law at the relevant time, 'by virtue of its status as a "general principle of law"', as many domestic jurisdictions recognised modes of co-perpetration similar to **JCE III**.³⁹ The defence again relies on the Pre-Trial Chamber's findings in its PTC Decision.⁴⁰ The defence submits that the Pre-Trial Chamber correctly found that the domestic cases referred to in the *Tadic* case, also cited by the Co-Prosecutors in their OCP Request, are not 'proper precedents

³³ OCP Request, paras. 79-81.

³⁴ PTC Decision, para. 79.

³⁵ Ieng Sary's Motion Against the Application at the ECCC of the Form of Liability Known as *Joint Criminal Enterprise*, 28 July 2008, Document No. D97 (Ieng Sary Motion on JCE), paras. 18-19, 24; Ieng Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC, 24 November 2008, Document No. D97/7, paras. 47, 49, 54.

³⁶ OCP Request, para. 26.

³⁷ OCP Request, para. 28.

³⁸ OCP Request, para. 28.

³⁹ OCP Request, para. 29.

⁴⁰ PTC Decision, paras. 82-87.

for the purpose of determining the status of customary law in this area'⁴¹ and 'could not be relied upon as irrefutable evidence of international principles or rules under the doctrine that general principles of law are recognised by the nations of the world'.⁴²

21. The Co-Prosecutors advised the Trial Chamber to request *amicus* submissions, if the Trial Chamber were to decide that **JCE III** did not form part of customary international law during the relevant time.⁴³ The defence recalls that *amicus* submissions have been sought before the ECCC on the development of the theory of JCE and the evolution of the definition of this mode of liability, with particular reference to the time period 1975-79, and with particular reference as to whether JCE as a mode of liability can be applied before the ECCC, taking into account the fact that the crimes were committed in the period 1975-79.⁴⁴ Requesting new *amicus* submissions on the same subject would be time-consuming and unnecessary at this stage of the proceedings, especially since the issue of the applicability of the joint criminal enterprise has already been extensively litigated before the Pre-Trial Chamber. *Amicus* submissions should not be called for legal questions that can be understood by judges. To seek the views of an *amicus* at this stage would lead to yet further delay and consequent unfairness to the Accused.

22. The Co-Prosecutors also argue that **JCE III** doctrine 'is consistent with the object and purpose of international criminal law'.⁴⁵ Whether the JCE III doctrine is a '*reasonable and necessary mechanism for addressing the unique threats posed by organised criminality*'⁴⁶ or whether the world community has a strong interest in prosecuting individuals on the mode of JCE III⁴⁷ is irrelevant here. The

⁴¹ PTC Decision, para. 82.

⁴² PTC Decision, para. 85; See also Prof. Dr. K. Ambos *Amicus Curiae* Brief Concerning Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 27 October 2008, Document No. D99/3/27, p. 29-30.

⁴³ OCP Request, para. 31.

⁴⁴ PTC, Invitation to *Amicus Curiae*, Case No. 001/18-07-2007/ECCC/OCIJ (PTC 02), 25 September 2008, Documents No. D99/3/13 and D99/3/14; PTC, Invitation to *Amicus Curiae*, Case No. 001/18-07-2007/ECCC/OCIJ (PTC 02), 23 September 2008, Document No. D99/3/12.

⁴⁵ OCP Request, paras. 38-40.

⁴⁶ OCP Request, para. 39.

⁴⁷ OCP Request, para. 38.



fundamental principle that needs to be respected is the principle of legality which dictates that an Accused should not be prosecuted for a crime and on a mode of liability that did not exist at the time of the commission of the alleged crimes. The Co-Prosecutors arguments advanced on the basis of the 'necessity' of having the **JCE III** doctrine recognised by the whole international community should be rejected by the Trial Chamber.

23. The Co-Prosecutors lastly argued that the application of **JCE III** does not unreasonably broaden the scope of criminal liability nor does it result in the criminalisation of conduct involving minimal culpability, as has been suggested.⁴⁸ The defence rejects this argument and refers to the Special Tribunal for Lebanon (**STL**) which recently decided that 'the better approach under international criminal law is not to allow convictions under **JCE III** for special intent crimes [...]', and that those crimes included genocide and persecution as a crime against humanity.⁴⁹ The defence also refers to the Ieng Sary previous submissions on JCE which demonstrate that the forms of liability of JCE were neither clear nor fixed, and that this matter has been subject to considerable discussion amongst judges and scholars.⁵⁰
24. The defence submits that the applicability of JCE in Cambodia in 1975-1979 is non-existent in respect of the third form of JCE and refers to its previous submissions on this issue,⁵¹ as well as the Pre-Trial Chamber's findings on the matter.⁵² The Co-Prosecutors have failed to show that **JCE III** was a mode of liability that existed under customary international law at the relevant time.

⁴⁸ OCP Request, para. 40.

⁴⁹ STL, STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging', 16 February 2011, para. 249.

⁵⁰ Ieng Sary Motion on JCE, para. 5.

⁵¹ 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, paras. 24-27; 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, paras. 63-75.

⁵² PTC Decision, paras. 75-89.

V CONCLUSION

1. For the reasons stated above, the defence respectfully requests the Trial Chamber:
 - (i) to find the OCP Request inadmissible;
 - (ii) or, alternatively, to reject the OCP Request in its entirety.

Party	Date	Name Lawyers	Place	Signature
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