

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

**FILING DETAILS**

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**DEFENCE REPLY TO CO-PROSECUTORS' RESPONSE TO DEFENCE APPEAL  
ON THE APPLICATION OF JOINT CRIMINAL ENTERPRISE**

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## I INTRODUCTION

1. On 8 December 2009 the Office of the Co-Investigating Judges filed the 'Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise' (**Impugned Order**).<sup>1</sup> On 18 January 2010 defence for Madame Ieng Thirith (**Charged Person**) filed an appeal against the Impugned Order (**Ieng Thirith Appeal**),<sup>2</sup> requesting the Pre-Trial Chamber (**PTC**) to quash the Impugned Order and find that the ECCC has no jurisdiction over joint criminal enterprise (**JCE**) as a form of liability in Case 002. If, contrary to the defence contention, the PTC finds that there is jurisdiction, the defence requests the Pre-Trial Chamber directs that the ECCC has no jurisdiction to apply the third form of JCE to this case. Further, the defence submits that the Co-Prosecutors have insufficiently pleaded the first and third forms of JCE in the Introductory Submission. As a result the liability form known as JCE cannot be applied to Case File 002. Two of the other Charged Persons also filed appeals against the Impugned Order (**Ieng Sary Appeal**<sup>3</sup> and **Khieu Samphan Appeal**<sup>4</sup>, together referred to as **Appeals**).
2. On 19 February 2010 the Office of the Co-Prosecutors (**OCP**) responded to these Appeals (**OCP Response**).<sup>5</sup> On 9 March 2010 the Pre-Trial Chamber informed the parties of its decision to determine the Appeals on written submissions solely, and directed the defence to file replies in accordance with Article 8.4 of the Practice Direction on Filing.<sup>6</sup>

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<sup>1</sup> OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, Document No. D97/13.

<sup>2</sup> 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.

<sup>3</sup> 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, 22 January 2010, Document No. D97/14/5.

<sup>4</sup> Khieu Samphan, Appeal against the Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 18 January 2010, Document No. D97/16/1.

<sup>5</sup> Co-Prosecutors' Joint Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise, 19 February 2010, Document No. D97/15/6.

<sup>6</sup> PTC, Decision to Determine the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE) on Written Submissions and Directions for Reply, 9 March 2010, Document No. D97/15/7.

3. Most of the arguments raised by the Response have been dealt with in the defence appeals for Ieng Thirith, Ieng Sary and Khieu Samphan. The defence incorporates by reference the arguments raised in the Ieng Thirith Appeal.

## II REPLY TO OCP PRELIMINARY OBJECTIONS

4. The OCP raises five arguments to challenge the Charged Persons' right to appeal from the Impugned Order. Whilst several of the arguments raised only concern the Ieng Sary Appeal, the defence will address the arguments that are relevant to the underlying Appeal.

### 2.1 Impugned Order Is an 'Order' and Not a 'Declaration'

5. The OCP refers to the Impugned Order as a 'declaration' as opposed to an 'order'.<sup>7</sup> The defence submits that, as shown by the name of the document (Order on the Application at the ECCC of the Form of Liability known as Joint Criminal Enterprise), it is an order and not some other category of legal document. The contention by the OCP that the OCIJ Order is a 'declaration' is baseless, which is demonstrated by the fact that there is no category of documents described as declarations eluded to in the Internal Rules. Further, the comparison the OCP draws between 'letters' sent to the OCIJ on the one hand and the OCIJ Order on the other hand, is unsubstantiated.
6. The defence further submits that the OCP is estopped from raising this argument. In Case 001 (Duch case), the OCP appealed from the OCIJ's Closing Order on the issue of the applicability of joint criminal enterprise.<sup>8</sup> In that case it submitted that the question of the applicability of JCE was not merely a declaratory matter, but concerned jurisdictional issues subject to appeal. The OCP now seeks to argue to the contrary but fails to provide any basis upon which the two cases can properly

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<sup>7</sup> OCP Response, paras.5-6.

<sup>8</sup> Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch" dated 8 August 2008, 5 September 2008, Case No. 001, Document No. D99/3/3.

be distinguished. It is accepted by the OCP that in both cases this issue can be re-examined at trial. And indeed in the Duch case, the OCP raised this issue again at trial.

7. Consequently, the OCIJ Order must be deemed an 'order' in the sense of Internal Rule 74(3), and the OCP argument should be dismissed.

## 2.2 The Impugned Order Relates to Confirmation of Jurisdiction

8. In paragraphs 7-9 of its Response, the OCP states that the Impugned Order does not confirm the ECCC's jurisdiction. The defence submits that, contrary to the OCP contention, the Order does confirm jurisdiction over the form of liability known as joint criminal enterprise for the Charged Person and her co-accused in Case File 002.
9. As confirmed by the OCIJ, the matters addressed in the Impugned Order are not requests for declaratory relief, which will not be addressed by the OCIJ at this stage. In this regard, the OCIJ have correctly held:

Thus, although the Co-Investigating Judges will not consider requests for declaratory relief, in these circumstances, the Co-Investigating Judges find it necessary to respond to the Request for the purpose of providing sufficient notice relating to a mode of liability which is not expressly articulated in the Law or the Agreement. The Co-Investigating Judges find the Request sufficiently clear and pertinent. The Co-Investigating Judges therefore reject the OCP submission that the motion seeks inappropriate relief, in these circumstances.<sup>9</sup>

10. The Impugned Order thus directly relates to the ECCC's jurisdiction to indict the Charged Person with the form of liability described as JCE. Whilst the OCIJ has been requested to rule on the question whether or not JCE was applicable at the relevant time in Cambodia, the answer to such question determines the jurisdiction of the ECCC.

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<sup>9</sup> Impugned Order, para. 10 (footnote omitted).

11. Further, the defence argument that this form of liability was improperly pleaded in the Introductory Submission relates directly to the jurisdiction of this Court to try the Charged Person for this specific form of liability.
12. The defence thus submits that this preliminary argument raised by the OCP should be dismissed.

### 2.3 Misconception Regarding Applicability Rule 21

13. In paragraphs 14-17 of its Response the OCP refers to Internal Rule 21, emphasizing the importance that the proceedings are 'fair and expeditious'. The OCP relies on this provision, designed to protect the Charged Person's rights, to deny her the right specifically provided by the Internal Rules to challenge this important OCIJ Order. The OCP argues that not allowing the appeal would not violate the Charged Person's rights under Internal Rule 21. Whether or not her rights would be violated is legally irrelevant in this discussion. No such requirement is embedded in the appeal provisions of the Internal Rules. The Internal Rules do not specify that in order to be appealable the Charged Person must show a violation of Internal Rule 21.
14. The OCP's allegation throughout this section that the underlying issue is academic is incorrect. Indeed the Response contradicts itself on this point. On the one hand it argues that 'the Co-Prosecutors have not finally analyzed the entire case file and sought—through their Rule 66 Final Submission—an indictment of these Appellants with JCE liability'.<sup>10</sup> At the same time, the Response already determines that 'the rejection of JCE liability would discard a mode of liability which accurately reflects the conduct of the Appellants in respect of the mass atrocities of the Khmer Rouge',<sup>11</sup> thus suggesting that the OCP has already made up its mind about including joint criminal enterprise in its Final Submission.

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<sup>10</sup> OCP Response, para. 20.

<sup>11</sup> OCP Response, para. 94.

15. Violation of Internal Rule 21 is not required in determining whether an appeal is admissible under Internal Rule 74(3). Besides the fact that dismissal of the Appeals would violate the Charged Person's fair trial rights, the defence submits that this is not a separate element required for the determination of whether or not an order is appealable under the system of the Internal Rules.
16. The defence submits that the OCP incorrectly adds a requirement to Rule 74(3) by requesting the Chamber to find that 'the Appellants' fair trial rights are not materially violated', whilst this requirement does not form part of the Internal Rules specifically designed for appeals such as the one at hand. This preliminary argument should thus be dismissed.

## 2.4 Judicial Economy Argument Invalid

### 2.4.1 *Allowing the Appeal Would Further Judicial Economy and Legal Certainty*

17. The final argument the OCP raises in attempting to have the Appeals dismissed is that judicial economy would be advanced by dismissing the Appeals.<sup>12</sup> Whilst this argument is generally true of *any* appeal lodged at *any* time, the defence submits that in this case refraining from dealing with this issue at this stage may very well prolong the proceedings, and lead to uncertainty of the charges.
18. It is relevant to determine the underlying issue at this point in time, because it will determine the scope of the OCP's Final Submission and the Closing Order that may follow. The investigations conducted by the OCIJ are being brought to an end over the next few months. It will be highly relevant for the OCP and the OCIJ to know whether or not they can include JCE in the Final Submission and Closing Order respectively. For the OCIJ may very well conclude that it cannot sustain the charges against the Charged Person if it cannot rely on joint criminal enterprise, especially the third extended form. Determination of this issue is thus crucial for this stage of the proceedings.

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<sup>12</sup> OCP Response, para. 18.

19. If the Pre-Trial Chamber finds itself barred from ruling on this matter, the scope of the charges will be uncertain until the judgment in Case 002. The Trial Chamber decided in Case 001, the Duch case, that it would not rule on JCE until the judgment.<sup>13</sup> A similar application to Case 002 would lead to uncertainty in preparation of the Closing Order, and uncertainty during the whole trial phase. This would effectively lead to the situation where the Charged Person is not properly informed of the scope of the charges against her until the end of the trial.
20. Whilst the OCP argues that in the Duch case it only raised the argument on joint criminal enterprise after the Closing Order,<sup>14</sup> this was because it had not been contested by the defence in that case, and the Closing Order ruled against the OCP position. Thus, the OCP appealed from the Closing Order in the Duch case on 5 September 2008, and raised that issue before the PTC only at that stage.<sup>15</sup>
21. Further, the OCP refers to the fact that the OCIJ took a year and a half from the date when the initial motion was filed by the Ieng Sary defence<sup>16</sup> before delivering its decision. The defence emphasizes that this should not be used as an argument not to allow the defence appeal.

#### 2.4.2 *Possibility of Conflicting Decisions Is Inherent in System*

22. The OCP's argument that there may be a conflict between decisions from the Pre-Trial Chamber and the Trial Chamber<sup>17</sup> is an inherent feature of the system prevalent at the ECCC where the Co-Investigative Judges and the Pre-Trial Chamber have been provided with the power by the Internal Rules to make determinations on legal matters, more specifically jurisdictional issues, and the

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<sup>13</sup> The OCP indicates in its Response that 'in *Duch*, the Trial Chamber shall determine the applicability of JCE only at judgment', see: OCP Response, para. 86.

<sup>14</sup> OCP Response, para. 19.

<sup>15</sup> Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch" dated 8 August 2008, 5 September 2008, Case No. 001, Document No. D99/3/3.

<sup>16</sup> 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.

<sup>17</sup> OCP Response, para. 18.

Trial Chamber can deal with those issues at a later stage of the proceedings. This is true for all legal matters raised at the investigative stage that may be relevant at the trial stage as well.

23. The defence further submits that the OCP is estopped from making the argument relating to possible conflicting decisions by the different Chambers. In Case 001 against Duch the issue of the application of joint criminal enterprise was ruled on by the Pre-Trial Chamber. However, because the Pre-Trial Chamber had ruled against the OCP in that instance, it was the OCP itself who decided to raise this matter again at trial, and urged the Trial Chamber to issue a decision which would have been in conflict with a prior ruling on that same matter by the Pre-Trial Chamber. The OCP made elaborate arguments as to why the Trial Chamber should overturn the previous decision by the Pre-Trial Chamber.<sup>18</sup> The OCP submitted:

Decisions of the PTC regarding the legal characterisation of the crimes are not binding on the Trial Chamber. Accordingly, despite the fact that the PTC made a preliminary ruling on the applicability of JCE, the Trial Chamber is free to address that issue and change the legal characterisation of the crimes based upon the facts contained in the Indictment and those presented during the trial. Adding JCE as a mode of liability is appropriate because the PTC erred in concluding that JCE should not be applied.<sup>19</sup>

24. The fact that conflicts may arise between decisions made by the Pre-Trial Chamber and the Trial Chamber is an inherent characteristic of the legal system prevalent at the ECCC. This should not be seen as a problem, especially since the rulings pertain to different stages of the proceedings. The OCP is estopped from raising this argument, and the argument should be dismissed both on that basis, and the content thereof.

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<sup>18</sup> Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 8 June 2009, Case 001, Document No. E73.

<sup>19</sup> Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 8 June 2009, Case 001, Document No. E73, para. 7.



#### 2.4.3 *Issues Raised Here Are Distinct from Issues to Be Raised at Trial*

25. Further, contrary to the OCP contention, the issues raised in the Appeals may have relevance both to matters which will be raised at trial, and also deal with issues that specifically concern the pre-trial stage.
26. One of the submissions of the defence concerns the improper pleading of JCE in the Introductory Submission. This is typically a matter that needs to be determined by the Pre-Trial Chamber.

#### 2.4.4 *Trial Chamber Decision in Duch Does Not Determine Issue in Case 002*

27. The OCP argues that in the Duch case the defence made an ‘almost identical challenge’ which is now shortly to be determined by the Trial Chamber. The defence wishes to emphasize that the defence for Case File 002 was excluded from putting forward arguments in that case, and the defence for Duch adopted a restrained attitude during the trial, leaving the Trial Chamber without the benefit of full legal argument to advance the opposing views. The Pre-Trial Chamber’s decision on joint criminal enterprise in the Duch case cannot in the circumstances determine the scope thereof in the underlying case.
28. The Pre-Trial Chamber held, in referring to 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” of 6 October 2008’ that

it found that the Charged Person Ieng Sary did not have the right to intervene in the case against the Charged Person Duch on the issue of the application of the theory of joint criminal enterprise. The Pre-Trial Chamber found further that its decision on the Appeal would not be directly applicable to Ieng Sary, who would still have the possibility to challenge the application of the theory of joint criminal enterprise in the case file to which he is a party.<sup>20</sup>

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<sup>20</sup> PTC, Decision on Urgent Joint Defence Request to Intervene on the Issue of Joint Criminal Enterprise in the OCP Appeal against the Duch Closing Order, 5 November 2008, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), Document No. D99/3/31, para. 5.

29. Similarly, the determination of the scope of the charges against Duch by the Trial Chamber will not determine the scope of the charges against the other Charged Persons. To wait for the Trial Chamber to rule on the applicability of joint criminal enterprise in the case against Duch would thus be pointless in determining the issues at hand.
30. Rather, not allowing the appeal on the basis suggested by the OCP brief would create a precedent where the Pre-Trial Chamber cannot deal with issues because they may be raised again in some form at the trial stage. Such an approach would be contrary to the provisions contained within the Internal Rules.

### **III REPLY TO OCP SUBMISSIONS ON PROCEDURE**

31. The OCP raised several matters in its Chapter III on Procedure. The defence submits that – these have been dealt with in the Ieng Thirith Appeal or by the other Appeals of the Charged Persons.
32. The defence does however respond to Section IV – E of the OCP Response on the pleading of JCE in the Introductory Submission.
33. The arguments on the improper pleading of JCE raised in the Ieng Thirith JCE Motion<sup>21</sup> and the Ieng Thirith Appeal<sup>22</sup> are incorporated here by reference.
34. It is the defence submission that the first and third forms of joint criminal enterprise were improperly pleaded in the Introductory Submission because no factual basis was specified for these forms participation. Paragraphs 5-16 of the Introductory Submission refer solely to the second form of JCE. The conclusion on the other hand also includes the first and third form, but no mention of those forms is made throughout the rest of the Introductory Submission and no factual

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<sup>21</sup> 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.

<sup>22</sup> Ieng Thirith Appeal, Appeal Ground 3.

basis is provided to support them. They are thus improperly pleaded and lack the precision and specificity required by the Pre-Trial Chamber.

35. In the case against Duch the Pre-Trial Chamber held that JCE was improperly pleaded in the Introductory Submission, for it was vague and imprecise. The Pre-Trial Chamber emphasized the need for precision ‘in order to analyze whether the different forms of joint criminal enterprise may be applied and to distinguish the concept of joint criminal enterprise from other comparable forms of liability which may be applicable under Cambodian law’.<sup>23</sup> The Pre-Trial Chamber held that, since the OCP only properly pleaded the joint criminal enterprise in that case after the investigative stage, the ‘JCE did not form part of the factual basis for the investigation and for this reason the Pre-Trial Chamber will not add it to the Closing Order at this stage’.<sup>24</sup> This is similarly applicable to the underlying proceedings.

36. Another issue raised by the OCP in its Response relates to the defence appeal ground that the formulation of the third form of JCE by the OCIJ Order is vague. The OCP explains the OCIJ Order on this point as an *obiter*, and advises it to be ignored.<sup>25</sup> The defence submits this formed an inherent element of the OCIJ Order, and since that element of the Order is vague and lacks specificity, it should be quashed on that basis. Further, the OCP is wrong to state that the OCIJ should have been restricted to ‘find if JCE applied before the ECCC’.<sup>26</sup> The relief requested by the defence related to the jurisdiction of the ECCC to try the Charged Person on the basis of JCE, and more specifically to exclude the second and third forms of JCE, and that the OCP improperly pleaded the first and third

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<sup>23</sup> Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias “DUCH”, 5 December 2008, Case 001, Doc. No. D99/3/42, para. 135.

<sup>24</sup> Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias “DUCH”, 5 December 2008, Case 001, Doc. No. D99/3/42, para. 141.

<sup>25</sup> OCP Response, para. 85.

<sup>26</sup> OCP Response, para. 85.

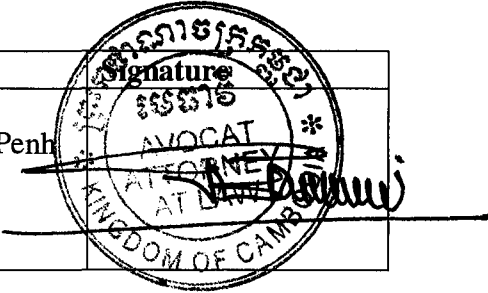
forms of JCE in the Introductory Submission, and hence it cannot be applied to Case File 002.<sup>27</sup>

#### IV CONCLUSION

37. For the reasons set out above, the defence respectfully requests the Pre-Trial Chamber to quash the Impugned Order and to find instead that:

- (a) Primarily, the ECCC has no jurisdiction over JCE as a form of liability;
- (b) In the alternative, that the ECCC has no jurisdiction to apply the second and third forms of JCE;
- (c) Furthermore, the Co-Prosecutors have insufficiently pleaded the first and third forms of JCE in the Introductory Submission, and as a result these forms of JCE cannot be applied to Case File 002.

Party	Date	Name Lawyers	Place
Co-Lawyers for Ieng Thirith	15 March 2010	PHAT Pouv Seang Diana ELLIS, QC	Phnom Penh



<sup>27</sup> 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.