

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



**FILING DETAILS**

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**CO-PROSECUTORS' RESPONSE TO "IENG SARY'S OBSERVATIONS  
TO THE CO-PROSECUTORS' NOTIFICATION OF  
LEGAL ISSUES IT INTENDS TO RAISE AT THE INITIAL HEARING"**

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 Judge Silvia CARTWRIGHT  
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## RESPONSE

1. On 3 May 2011, IENG Sary, through his defence team (the “Defence”) filed his “Observations to the Co-Prosecutors Notification of Legal Issues it Intends to Raise at the Initial Hearing”<sup>1</sup> (the “Motion”). The Defence request that the Co-Prosecutors be prohibited from raising these issues at the Initial Hearing as they claim these three issues are preliminary objections to the Closing Order and consequently should have been raised within 30 days of the Closing Order becoming final pursuant to Rule 89. Alternatively, they argue that if these issues are not preliminary objections the request to re-characterize the facts in the Closing Order is impermissible. Finally, the Defence argue that if the Co-Prosecutors are allowed to raise such issues at the Initial Hearing that the Co-Prosecutors be ordered to provide detailed written submissions in advance of the hearing explaining why such re-characterizations should be permitted as well as providing the Defence an opportunity to respond.<sup>2</sup> For the reasons set out below, the Co-Prosecutors request that this Motion be dismissed.
2. On 11 May 2011 the Trial Chamber issued its “Scheduling of Initial Hearing” which listed the issues to be discussed at the Hearing (the “Scheduling Order”).<sup>3</sup> This list did not include the Co-Prosecutors’ notice of their request to the Trial Chamber to re-characterize charges as indicated in paragraph 1 (9) of the “Co-Prosecutors’ Indication of Legal Issues it Intends to Raise at the Initial Hearing,” filed on 19 April 2011. The Co-Prosecutors note, however, the Trial Chamber’s Schedule allows for these and other legal issues to be raised subject to “further directives from the Chamber in due course” or they “may instead be raised before the Chamber by the parties in the course of trial if and when relevant and necessary.”<sup>4</sup> Consequently, as the Trial Chamber has decided on the legal issues to be raised at the Initial Hearing the primary basis of the Defence Motion is now immaterial.
3. Nonetheless, the Co-Prosecutors notify the Trial Chamber and the Parties that it will file submissions requesting the re-characterization of charges in the indictment at judgment to include :

(a) that an armed conflict is not required to prove a crime against humanity;

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<sup>1</sup> Document E9/30/1, “IENG Sary’s Observations to the Co-Prosecutors’ Notification of Legal Issues it Intends to Raise at the Initial Hearing,” (the “Motion”) 3 May 2011, ERN 00686131 – 00686138.

<sup>2</sup> Motion at page 1.

<sup>3</sup> Document E86, “Scheduling of Initial Hearing” (the “Scheduling Order”) 11 May 2011, ERN 00687015 – 00687016.

<sup>4</sup> Scheduling Order at page 1.

- (b) rape as a crime against humanity; and
- (c) commission of crimes by the third form of joint criminal enterprise.<sup>5</sup>
4. The Co-Prosecutors intend to file these submissions prior to the Initial Hearing or at the latest prior to the Substantive Hearing. This will give all the Defence the opportunity to respond as to the admissibility and merits of such a request as requested by this Defence in their Motion.<sup>6</sup> On this point, the Co-Prosecutors' agree with the Defence that the Co-Prosecutors should provide "a detailed written submission setting out the arguments as to why re-characterizations of applicable law as stated in the Indictment should be permitted" and also agree that the Defence should be allowed to "file a written response to this submission."<sup>7</sup>
5. To be clear, however, the Co-Prosecutors' make the observation that the Defence primary position that the Co-Prosecutors' Rule 98 (2) re-characterization requests are in fact Rule 89 preliminary objections to the Closing Order is wrong. This position was rejected by the Trial Chamber in Case 001.<sup>8</sup>
6. In that case, after the Pre-Trial had refused the Co-Prosecutors Closing Order Appeal to include the joint criminal enterprise mode of liability in the Closing Order,<sup>9</sup> the Co-Prosecutors at the Initial Hearing requested that the facts in the Closing Order be re-characterized to include this mode of liability.<sup>10</sup> In the Trial Chamber's judgement, these facts were in fact re-characterized to include commission by joint criminal enterprise.<sup>11</sup> The Chamber held that the Co-Prosecutors request for re-characterization at the Initial Hearing (as noted by the Defence<sup>12</sup>) was not a Rule 89 preliminary objection.<sup>13</sup> The Defence argument therefore that the re-characterization request in Case 001 was only entertained at the Initial Hearing by the Trial Chamber because at that time Rule 89

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<sup>5</sup> Document E9/30, "Co-Prosecutors' Indication of Legal Issues it Intends to Raise at the Initial Hearing," 19 April 2011, ERN 00667433-00667434.

<sup>6</sup> Motion at page 1 and 6.

<sup>7</sup> Motion at page 6.

<sup>8</sup> Document No. E188, Case File 001/18-07-2007/ECCC/TC, KAING Guek Eav alias Duch, "Judgement," 26 July 2010, ERN. 00572517-00572797 at page 4 at para 14 (the "Duch Judgement"). The Trial Chamber held "no preliminary objection to the jurisdiction of the ECCC as such was raised at the Initial Hearing pursuant to Internal Rule 89."

<sup>9</sup> Duch Judgement at page 166, para 488.

<sup>10</sup> Duch Judgement at page 167, para 489.

<sup>11</sup> Duch Judgement at page 179, para 516.

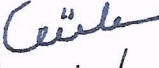
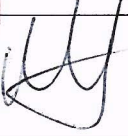
<sup>12</sup> Motion at page 3, para 8.

<sup>13</sup> Duch Judgement at page 4, para 14.

allowed for preliminary objections to be raised at the Initial Hearing is beside the point.<sup>14</sup> As the Co-Prosecutors' request was deemed not to be a Rule 89 preliminary objection that provision and related deadlines simply did not apply.

7. Accordingly, the Co-Prosecutors request that the Motion be dismissed:
- (a) as the Scheduling Order has effectively decided, on other grounds, the primary request in this Motion as to the issues to be raised at the Initial Hearing ; and
  - (b) no order is required to provide the Defence with written submissions justifying the request for re-characterization as the Co-Prosecutors have indicated it will do so and an opportunity to respond is already guaranteed by the Rules..

Respectfully submitted,

Date	Name	Place	Signature
18 May 2011	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		

<sup>14</sup> Motion at page 1 to 4.