

**BEFORE THE TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**IENTG SARY'S OBSERVATIONS TO THE CO-PROSECUTORS' NOTIFICATION OF LEGAL ISSUES IT INTENDS TO RAISE AT THE INTIAL HEARING**

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CHEA Leang  
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**All Defence Teams**

**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits his observations to the Co-Prosecutors’ Notification of Legal Issues It [sic] Intends to Raise at the Initial Hearing.<sup>1</sup> These observations are made necessary because the OCP has notified the Trial Chamber that it will “*Request to Recharacterize Charges in Indictment at Judgment to include: (a) that an armed conflict is not required to prove a crime against humanity; (b) rape as a crime against humanity; (c) commission of crimes by the third form of joint criminal enterprise [(“JCE III”)] (Rule 98).*”<sup>2</sup> Because these matters concern the jurisdiction of the Trial Chamber, the OCP could have only properly raised these matters no later than 30 days after the Closing Order became final.<sup>3</sup> It did not do so and it is now time-barred from raising these jurisdictional issues. Even if these issues could still be raised, Rule 98 does not allow the Trial Chamber to make these re-characterizations. Should the Trial Chamber determine that the OCP may raise these issues at the Initial Hearing, the Defence respectfully invites the Trial Chamber to order the OCP to provide a detailed written submission in advance of the Initial Hearing setting out its arguments as to why these re-characterizations should be permitted and to allow the Defence to file a written response.

## I. APPLICABLE LAW

1. Rule 89 of the ECCC Internal Rules (“Rules”) states:

### **Rule 89. Preliminary Objections**

(Amended on 1 February 2008, on 11 September 2009 and on 23 February 2011)

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.

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.

<sup>1</sup> Co-Prosecutors’ Indication of Legal Issues It Intends to Raise at the Initial Hearing, 19 April 2011, E9/30, (“OCP Indication of Legal Issues”).

<sup>2</sup> *Id.*, para. 9.

<sup>3</sup> See Rule 89.



E9/30/1

2. Rule 98(2) of the Rules states:

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.

**II. OBSERVATIONS**

3. The OCP's notification to the Trial Chamber that it will "*Request to Recharacterize Charges in Indictment at Judgment to include: (a) that an armed conflict is not required to prove a crime against humanity; (b) rape as a crime against humanity; [and] (c) commission of crimes by the third form of joint criminal enterprise (Rule 98)*"<sup>4</sup> raises jurisdictional issues.<sup>5</sup>
4. According to Rule 89, an issue concerning "the jurisdiction of the Chamber" "shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible."<sup>6</sup>
5. The Closing Order became final on 14 January 2011,<sup>7</sup> making the deadline for these issues to be raised 15 February 2011. The OCP did not raise these issues by the deadline; it is thus barred from doing so now. The OCP failed to act diligently in raising these

<sup>4</sup> OCP Indication of Legal Issues, para. 9.

<sup>5</sup> "The Pre-Trial Chamber observes that in a number of the sub-grounds of this Ground of Appeal ... including: sub-ground 3 ('*nexus* argument,'); ... sub-ground 14 ('rape argument'); ... the Co-Lawyers argue upon the very existence in law in 1975-79 of certain categories of the crimes against humanity, which represent arguments that go to the very essence of the test for compliance with the principle of legality and, as such, represent admissible jurisdictional challenges." Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/I/30, para. 84. "There have been numerous challenges to the ICTY's jurisdiction by accused charged with war crimes, crimes against humanity or genocide over modes of responsibility such as JCE and superior responsibility. Such appeals are often based on an argument that these modes of responsibility were not established in customary international law at the relevant time or were not applicable to a specific crime, and that their application would infringe upon the principle of legality. The ICTY jurisprudence has accepted these as jurisdictional challenges. With respect to whether the applicability of JCE before the ECCC amounts to a jurisdictional challenge, the Pre-Trial Chamber finds that the ECCC is in a situation comparable to that of the *ad hoc* tribunals." Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/I/14/15, paras. 23-24.

<sup>6</sup> Emphasis added.

<sup>7</sup> "Pursuant to the Chamber's Order to File Materials in Preparation for Trial (E9), the time limits set by Internal Rules 80(1) and (2) and 89 start to run from Friday 14 January 2011." Interoffice Memorandum from Susan Lamb, Senior Legal Officer – Trial Chamber – to all Parties in Case 002, Advance Notification of Chamber's disposition of Motions E14, E15, E9/2, E9/3, E/24 and E27, 3 February 2011, E35, p. 2.



issues as soon as the Trial Chamber became seized with the case and before the deadline imposed by the Rules.<sup>8</sup>

6. The OCP seeks to raise matters which unquestionably constitute Rule 89 preliminary objections. The removal of the nexus with armed conflict requirement for crimes against humanity, the addition of the act of rape as a crime against humanity and the addition of JCE III each constitute objections to the ECCC's jurisdiction, as this jurisdiction has been delimited in the Closing Order.
7. The Closing Order was corrected by the Pre-Trial Chamber in its Decision on IENG Sary's Appeal against the Closing Order (which addressed jurisdictional issues in accordance with Rule 74(3)(a)) by: **a.** adding the "existence of a nexus between the underlying acts and the armed conflict" to the "Chapeau" requirements in Chapter IV(A) of Part Three; **b.** striking rape out of paragraph 1613; and **c.** upholding the Co-Investigating Judges finding in paragraph 1433 that the facts characterized as crimes against humanity in the form of rape can be categorized as crimes against humanity of other inhumane acts.<sup>9</sup> The Closing Order omitted any reference to JCE III, as the Pre-Trial Chamber had previously held that it did not exist in customary international law in 1975-79 and was thus inapplicable at the ECCC.<sup>10</sup>
8. In Case 001, the international Co-Prosecutor advised the Trial Chamber at the Initial Hearing that "although at this hearing we do not intend to debate or to raise any legal issue, we would like to take this opportunity to advise the Trial Chamber and the parties that at Trial, during the proceedings, the Co-Prosecutors intend to invite the Trial Chamber to consider the applicability of the concept of joint criminal enterprise to the proceedings against the accused."<sup>11</sup> Raising this issue at the Initial Hearing was the

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<sup>8</sup> See Decision on IENG Sary's Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3, para.2, in which the Trial Chamber acknowledged the parties' obligations of due diligence. See also *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 631, where the ICTY Appeals Chamber held that "[f]ailure of counsel to object will usually indicate that counsel formed the view at the time that the matters to which the judge was inattentive were not of such significance to his case that the proceedings could not continue without attention being called thereto." This principle applies to the OCP as well as Defence counsel.

<sup>9</sup> See Decision on IENG Sary's Appeal Against the Closing Order, 13 January 2011, D427/1/26, para. 7.

<sup>10</sup> See Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15.

<sup>11</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript, 17 February 2009, E1/3.1, p. 9-10. The Defence did not respond to this submission. Civil Party lawyer Karim Khan, however, responded:



appropriate procedure in that case,<sup>12</sup> because Rule 89(1) at that time stated: “A preliminary objection concerning: a) the jurisdiction of the Chamber, ... **shall be raised in the initial hearing**, failing which it shall be inadmissible.”<sup>13</sup> It was not until the fourth revision of the Internal Rules in September 2009 that this procedure was amended to require such issues to be raised within 30 days of the Closing Order becoming final.

9. The OCP refers to Rule 98 as a basis for raising these issues at the Initial Hearing.<sup>14</sup> Rule 98(2) states in relevant part: “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**.”<sup>15</sup> This Rule refers to the competence of the Trial Chamber. It does not authorize the OCP to raise arguments at the Initial Hearing that it failed to raise within 30 days of the date the Closing Order became finalized, as required by Rule 89.
10. Even if the OCP were authorized to raise these issues, the Trial Chamber may not change the applicable law in the manner the OCP requests for the following reasons:

**First**, the *Duch* Trial Chamber noted that it could only make re-characterizations pursuant to Rule 98(2) where this would not violate the fair trial rights of the Accused.<sup>16</sup> It is axiomatic that it would violate fair trial rights to apply a crime or form of liability which did not exist in applicable law at the relevant time. Re-characterizing the charges in the Indictment by removing the nexus with armed conflict requirement as an element of crimes against humanity or to include rape as an

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we will in due course, of course respond to the motion that my learned friend the prosecutor intimated that he will file regarding joint criminal enterprise. It is not clear to me at this stage the rule under that application will be made and we will respond on behalf of the civil parties that we represent on the merits. However, one guiding principle must be borne in mind in my respectful submission, that when balancing whether or not a new form of participation should be inserted into this trial which will be decided of course on the merits, it is critical for the civil parties that I represent, that any decision will not necessitate any delay in these proceedings, Your Honours of course will be mindful of international human rights standards, enshrined in multiple regional instruments, and the right of the defence to have proper notice, Your Honours, I just wanted to raise this issue as far as our position at this stage.

*Id.*, p. 12.

<sup>12</sup> Although note that the Trial Chamber considered that “the OCP JCE request might have been presented in a more timely and coherent manner...” since the OCP only mentioned the issue at the Initial Hearing, but made its actual submissions later. See *Case of Kaing Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188 (“*Duch* Judgement”), para. 502.

<sup>13</sup> Emphasis added.

<sup>14</sup> OCP Indication of Legal Issues, p. 9.

<sup>15</sup> Emphasis added.

<sup>16</sup> *Duch* Judgement, 26 July 2010, para. 496.



enumerated crime against humanity would require the application of a definition of crimes against humanity which did not exist in applicable law in 1975-79.<sup>17</sup> Introducing JCE III to the Indictment through “re-characterization” is also prohibited; it *did not* exist in applicable law during 1975-79 as held by the Pre-Trial Chamber in its 69 page decision, wherein it conducted the most comprehensive judicial analysis of the *Tadić* decision from which JCE III emerged that has ever been undertaken.<sup>18</sup>

**Second**, Rule 98(2) states that no new constitutive elements may be introduced. Removing the nexus with armed conflict requirement would broaden the scope of crimes against humanity and could only be prejudicial to the Accused. Thus, it would have precisely the same impact as introducing a new constitutive element to the offense, and must be considered as such. Re-characterizing the charges in the Indictment to include rape as an enumerated crime against humanity would require adding a new constitutive element to crimes against humanity. Re-characterizing the charges in the Indictment to include JCE III is also not permitted, since JCE III has constitutive elements distinct from JCE I and II.<sup>19</sup> Furthermore, these re-characterizations would require altering the law applicable at the ECCC. Rule 98(2) must not be interpreted as allowing the Trial Chamber to re-characterize the law itself, but rather to change the legal characterization of the facts. This is how the Rule was interpreted by the Trial Chamber in Case 001.<sup>20</sup> Any doubt in the proper interpretation of this Rule must be resolved in favor of the Accused.<sup>21</sup>

**Finally**, Rule 98(2) does not allow for re-characterization of forms of liability. Rather, it states that the Trial Chamber may “change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are

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<sup>17</sup> See Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, paras. 371-72, 311.

<sup>18</sup> See Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15.

<sup>19</sup> Unlike JCE I and II, JCE III ascribes individual criminal liability in situations “involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common plan, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose.” See *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, para. 99.

<sup>20</sup> “The basis for the re-characterisation of facts before the ECCC is instead Internal Rule 98(2), which expressly envisages this eventuality, subject to fair trial safeguards.” *Duch* Judgement, para. 495. “The ICC’s Regulations of the Court similarly permit its Trial Chambers to change the legal characterisation of facts following the start of the trial proceedings.” *Id.* (emphasis added).

<sup>21</sup> In cases of doubt, the Trial Chamber must respect the Constitutional principle of *in dubio pro reo*, in accordance with Article 38 of the 1993 Cambodian Constitution, as amended in 1999.

introduced.”<sup>22</sup> JCE is not a crime, but a form of liability. In Case 001, the *Duch* Trial Chamber determined that Rule 98(2) did allow the re-characterization of forms of liability, but noted that its ability to re-characterize forms of liability was never challenged by the parties.<sup>23</sup> It concluded that it was authorized by Rule 98(2) to re-characterize forms of liability because the International Criminal Court’s Regulations allowed “for a change to the legal characterisation of facts to accord with a different form of participation.”<sup>24</sup> The Trial Chamber stated, “While comparable provisions in the Cambodian legal system do not specifically address changes to a form of responsibility, the Chamber is satisfied that this type of change is permissible under Internal Rule 98(2).”<sup>25</sup> The Trial Chamber *should* reconsider this conclusion from Case 001 since applicable Cambodian law *does not* allow such re-characterization<sup>26</sup> and since the wording of Rule 98(2) differs from the wording of the International Criminal Court’s Regulations.

11. Should the Trial Chamber determine that the OCP may raise these issues at the Initial Hearing, despite all arguments to the contrary, the Defence respectfully requests the Trial Chamber to order the OCP to provide a detailed written submission in advance of the Initial Hearing setting out its arguments as to why the requested re-characterizations should be permitted and to allow the Defence to file a written response. Such submissions are warranted because these are complicated legal issues and the parties will assist the Trial Chamber the most by preparing careful and detailed written submissions, which may then be clarified and elaborated upon in oral argument at the Initial Hearing.

### III. RELIEF REQUESTED

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully invites the Trial Chamber to consider these Observations and in so doing, either:

- a. REJECT the OCP’s attempt to raise these issues at the Initial Hearing; or
- b. ORDER the OCP to 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 ALLOW the Defence to file a written response to this submission.

<sup>22</sup> Emphasis added.

<sup>23</sup> See *Duch* Judgement, para. 493.


<sup>24</sup> *Id.*, fn. 867.

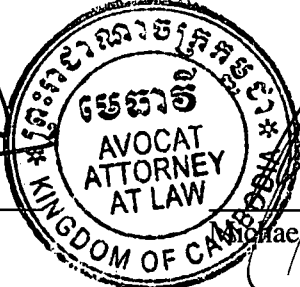
<sup>25</sup> *Id.*, para. 493.

<sup>26</sup> The Trial Chamber noted that “comparable provisions in the Cambodian legal system do not specifically address changes to a form of responsibility...” *Id.*

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Respectfully submitted,

  
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ANG Udom

  
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Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 3<sup>rd</sup> day of May, 2011