

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

**Filing details**

**Case File No:** 002/19-09-2007-ECCC-OCIJ (CP/39)

**Party filing:** The Co-Lawyers for the Defence of Mr KHIEU Samphan

**Filed before:** The Pre-Trial Chamber

**Original language:** FRENCH

**Date of document:** 25 March 2010

**Classification**

**Classification suggested by filing party:** PUBLIC

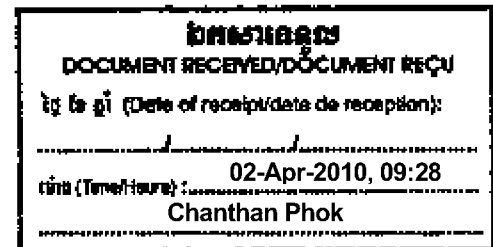
**Classification by the Pre-Trial Chamber:**

**Classification status:** សាធារណៈ / Public

**Review of interim classification:**

**Records Officer's name:**

**Signature:**



**REPLY OF MR KHIEU SAMPHAN'S DEFENCE TO THE CO-PROSECUTORS'  
JOINT RESPONSE ON JOINT CRIMINAL ENTERPRISE**

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**Before:**

**The Pre-Trial Chamber**

**Judge PRAK Kimsan**

**Judge NEY Thol**

**Judge HUOT Vuthy**

**Judge Catherine MARCHI-UHEL**

**Judge Rowan DOWNING**

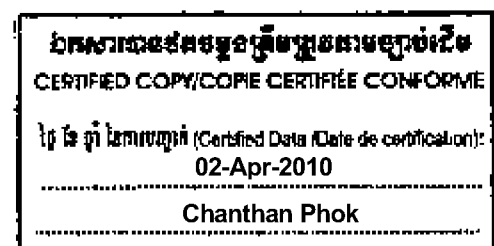
**The Co-Prosecutors**

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Original FRENCH: 00490861-00490868



**MAY IT PLEASE THE PRE-TRIAL CHAMBER****I. Introduction**

1. Pursuant to the Pre-Trial Chamber decision of 9 March 2010,<sup>1</sup> the Co-Lawyers for the Defence of Mr KHIEU Samphan hereby file their reply to the Co-Prosecutors' Joint Response on Joint Criminal Enterprise.<sup>2</sup>

2. The Defence incorporates by reference the arguments they put forward in their appeal brief, and also invoke the arguments of their fellow defence lawyers.

**II. Preliminary observations**

3. No matter how the Co-Investigating Judges or the Co-Prosecutors feel about this matter, the Co-Lawyers for the Defence will keep on recalling that Mr KHIEU Samphan's right to translation of all the decisions and parties' filings was established by the Order on Translation Rights and Obligations of the Parties, that it was expressly upheld in the appeal decision rendered by the Pre-Trial Chamber and that it is regularly and continuously violated.

4. Once again, the Co-Lawyers for the Defence wish to point out that they are yet to receive the French translations of the following parties' filings in the ongoing proceedings:

- Ieng Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC, *D97/7*, 24 November 2008, 28 pages;
- Response of the Co-Lawyers for the Civil Parties on Joint Criminal Enterprise, *D97/3/4*, 30 December 2008, 27 pages;
- Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise, *D97/8*, 31 December 2008, 27 pages;
- Ieng Sary's Supplementary Submissions to His Supplementary Observations on Joint Criminal Enterprise Filed on 24 November 2008: Limited to the Applicable

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<sup>1</sup> Decision to Determine the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE) on Written Submissions and Direction for Reply, 9 March 2010, *D97/16/6*.

<sup>2</sup> Co-Prosecutors' Joint Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise, 19 February 2010, *D97/16/5*, (the "Response").

United Nations General Assembly Resolutions as Argued/Omitted by the OCP, *D97/12*, 10 pages;

- 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, *D97/14/5*, 22 January 2010, 41 pages;
- Ieng Thirith's Defence Appeal against "Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise" of 8 December 2009, *D97/14/5*, 26 pages.

5. This situation runs counter to the applicable law and fairness, and infringes Mr KHIEU Samphan's right to participate fully in the proceedings. The Co-Lawyers for the Defence request the Pre-Trial Chamber Judges to take formal note of this.

### III. Argument

#### A- The appeal is admissible

6. Contrary to the Co-Prosecutors' claim, the "Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise", as its title implies, is not just a declaration, but it is an actual order. It is an order which has practical implications and which establishes that the ECCC has jurisdiction over a new form of responsibility.

7. Indeed, as underscored in the Defence appeal brief,<sup>3</sup> it is clear that Mr IENG Sary's request for the Pre-Trial Chamber to note that participation in a joint criminal enterprise as stated in the Introductory Submission is not an applicable form of responsibility at the ECCC<sup>4</sup> must be seen as a challenge to jurisdiction brought at the judicial investigation stage under Rules 55(10 and 53(1).

8. Moreover, it is clear that the Co-Investigating Judges' Order is indeed "an order confirming the jurisdiction of the ECCC" within the meaning of Rule 74(3) of the Internal Rules, and the Co-Prosecutor's response itself is evidence of this, in that:

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<sup>3</sup> Appeal against the Order on the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Responsibility, 18 January 2010, *D97/16/1*, paras. 29 to 33.

<sup>4</sup> Ieng Sary's Motion against the Application at the ECCC of the Form of Liability Known as Joint Criminal Responsibility, 28 July 2008, *D97*.

- In their Joint Response, the Co-Prosecutors refer to “facts” pertaining to joint criminal enterprise, which facts the Co-Investigating Judges have been investigating since the Introductory Submission.<sup>5</sup> This argument clearly reveals that the Co-Prosecutors accept the Defence’s position that determining joint criminal enterprise has practical implications for the judicial investigation and for the notification of the charges.
- Moreover, contrary to the Co-Prosecutors’ claim, this form of responsibility does constitute a new charge, since it resulted in opening another judicial investigation against Mr KHIEU Samphan.<sup>6</sup>

9. Contrary to the Co-Prosecutors’ position, deciding that the form of responsibility known as joint criminal enterprise is applicable at the ECCC obviously has practical implications for the Charged Persons as of the judicial investigation stage, and dismissing the defence appeals without considering them on the merits would run counter to the right to a fair trial, as couched in Rule 21.

10. No one challenges the fact that joint criminal enterprise is an extended form of criminal responsibility. The Co-Prosecutors aver that “*it is possible that none of the Appellants will be indicted for a crime or crimes relying on JCE liability. In that eventuality, the current exercise would be purely academic*”.<sup>7</sup> They then add that “*the Appellants will have a valid cause of action to bring a jurisdictional challenge before the Trial Chamber*”.<sup>8</sup>

11. In contrast, the Defence takes the view that it is possible that no trial will take place and that the judicial investigation will mark the final phase of these proceedings. It is their position that the Charged Persons have the right to an order dismissing the case in regard to facts that are not punishable, and that guaranteeing future rights by sending persons to trial on inexistent charges is not to guarantee them a fair trial.

12. If indeed the so-called declaration of the Co-Investigating Judges has no effect on

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<sup>5</sup> Response, para. 8.

<sup>6</sup> Written Record of Interview of KHIEU Samphan, 18 December 2009, D285, para. 9.

<sup>7</sup> Response, para. 15.

<sup>8</sup> Response para. 16.

the rights and the proceedings, then why is it provoking such an outcry on the part of the Co-Prosecutors, who have filed no less than 100 pages of arguments defending the applicability of joint criminal enterprise at the ECCC?

13. In reality, on the pretext of inviting the Pre-Trial Chamber not to issue a ruling, arguing that “[i]t would not be appropriate for the Pre-Trial Chamber to make the statements requested when another judicial body may well become seized of this case for trial”, the Co-Prosecutors are actually asking the Pre-Trial Chamber to relinquish its role as an appellate chamber for judicial investigation purposes and thereby allow the Co-Investigating Judges to assume full control over determining this important matter. Therefore, the argument that this will aid judicial economy is unpersuasive and unwarranted, and as such, it must fail.

#### **B – The appeal is meritorious**

14. The Defence notes that the Co-Prosecutors did not respond to their arguments on the merits and that they only responded to the ones contained in IENG Sary’s appeal brief. In order to provide a full picture of its arguments, the Defence wishes to recall the main arguments it put forward in its appeal of 18 January 2010.

##### **1) Joint criminal enterprise is not applicable at the ECCC**

15. To consider joint criminal enterprise as a basis for bringing charges with respect to facts which occurred between 1975 and 1979 is to overlook the principle of legality and associated principles, the principle of strict interpretation and the principle of non-retroactivity of criminal law; it is also to forget that criminal responsibility can only be individual and that, when in doubt, the more favourable standard must apply, according to the principle *in dubio pro reo*.

16. Application of this ambiguous and indirect mode of commission is contrary to both the spirit and the letter of the EEEEC Law and the ECCC Agreement, and also amounts to making the judicial decisions of the *ad hoc* Tribunals the benchmark for determining the hierarchy of norms in the Cambodian domestic legal system; there is no justification for that.

2) The Co-Investigating Judges' Order institutes a two-tier criminal justice system

➤ **There is only one legal system, the one established by the 1956 Penal Code**

17. In their decision, the Co-Investigating Judges take the view that *“the 1956 Cambodian Penal Code was inspired from French law, and under French law, international crimes such as those falling under the jurisdiction of the ECCC constitute specific categories of crimes under autonomous legal “regimes”, distinct from domestic criminal law, and characterized by a coherent set of rules of procedure and substance”*.<sup>9</sup>

18. In so doing, the Co-Investigating Judges, quite clearly, and justifiably so, give the signal that the 1956 Penal Code is the reference standard for determining the applicable forms of responsibility at the time of the offences under investigation.<sup>10</sup>

19. However, their interpretation of the code and their comparison with French law is fatally flawed. In fact, comparison with French law leads to an entirely different conclusion. At the time, there was no such thing as an autonomous legal regime for international crimes under either Cambodian law or French law.

20. French criminal law, before the 1994 Penal Code came into force, did not refer to crimes against humanity, not even as autonomous offences, and “[TRANSLATION] *It could therefore not be applied, for example, to acts committed during the Indochina war.*”<sup>11</sup> After the 1994 Code came into force, “[a]s the new provisions are more severe than the previous ones (...) the rules developed earlier by the Court of Cassation<sup>12</sup> remain applicable to crimes committed during World War II and to such crimes only”.<sup>13</sup>

21. This is therefore a far cry from an autonomous legal regime for international crimes setting forth hitherto unknown forms of responsibility and applying to such

<sup>9</sup> Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, D97/13, 8 December 2009, para. 22.

<sup>10</sup> On this point, see the arguments put forward in Mr Ieng Sary's motions.

<sup>11</sup> DEPORTES (F.), LE GUHEHEC (F.), *Droit Penal Général*, éd. Economica, Paris 2002, paras. 177 to 178.

<sup>12</sup> Rules relating to crimes against humanity.

<sup>13</sup> DEPORTES (F.), LE GUHEHEC (F.), *Droit Penal Général*, éd. Economica, Paris 2002, paras. 177 to 178.

offences only.

➤ **Rule 29 must be interpreted uniformly and in favour of the Charged Person**

22. The Co-Investigating Judges consider that “*pursuant to the principles of interpretation of autonomous legal “regimes” in line with French law, the modes of liability for international crimes can only be applied to the international crimes*”.<sup>14</sup>

23. In reality, there is no such thing as an autonomous legal regime for international crimes or even principles of interpretation specifically pertaining thereto. Therefore, this is not a matter of two opposing legal systems, but rather two contradictory legal analyses which are supposed to define the same term: in one instance “committing” refers to the notion of co-perpetration while in the other it refers to joint criminal enterprise.

24. It is clear that “only one of the two theories can prevail in the same legal system”.<sup>15</sup> Since the Co-Investigating Judges have recognised that joint criminal enterprise is not applicable to national crimes, the possibility of considering joint criminal enterprise as the only theory to prevail at the ECCC must be ruled out.

25. Article 12 of the ECCC Agreement provides that guidance may be sought in international law where Cambodian law does not deal with a particular matter; in fact, this is the basis on which the Pre-Trial Chamber considered that the ECCC is to be considered as an international tribunal. Under international law, the rule governing interpretation is that the judges must scrupulously abide by the principle *in dubio pro reo*, according to which, where there is a doubt regarding interpretation, such doubt must benefit the accused.

26. This international law principle applies to the interpretation of the legal provisions pertaining to the forms of responsibility applicable to the Charged Persons before the ECCC. In this instance, to the extent that the criminal enterprise doctrine is more severe

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<sup>14</sup> Order on the Application Before the ECCC of the Form of Responsibility Known as Joint Criminal Responsibility, D97/13, 8 December 2009, para. 22.

<sup>15</sup> *Sylvestre Gacumbitsi v. The Prosecutor*, 7 July 2006, Dissenting Opinion of Judge Shahabuddeen, para. 50.

than co-perpetration, the latter interpretation should prevail.

#### **IV. FOR THESE REASONS**

27. The Co-Lawyers for the Defence of Mr KHIEU Samphan request the Pre-Trial Chamber:

- TO FIND that the rights of the defence of Mr KHIEU Samphan have been violated throughout the proceedings on joint criminal enterprise;
- TO FIND that the Order is out of time, in violation of the rules governing a fair trial;
- TO SET ASIDE the Order in its entirety;
- TO DECLARE that the ECCC has no jurisdiction to prosecute and bring to trial the Charged Persons on the basis of the joint criminal enterprise theory, and TO ORDER that such charges be struck from the Introductory Submission.

**WITHOUT PREJUDICE,  
AND JUSTICE SHALL BE DONE**

	SA Sovan	Phnom Penh	[signed]
	Jacques VERGÈS	Paris	[Signed]
Date	Name	Place	Signature