

**BEFORE THE PRE-TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**Criminal Case File N°:** 001/18-07-2007-ECCC-OCIJ (PTC02)

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**IENG SARY'S EXPEDITED REQUEST TO MAKE SUBMISSIONS ON THE APPLICATION OF JOINT CRIMINAL ENTERPRISE LIABILITY IN THE CO-PROSECUTORS' APPEAL OF THE CLOSING ORDER AGAINST KAING GUEK EAV "DUCH"**

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**Filed by:**

**Co-Lawyers:**  
ANG Udom  
Michael G. KARNAVAS

**Distribution to:**

**The Pre-Trial Chamber**  
**Judges:**  
PRAK Kimsan  
NEY Thol  
HUOT Vuthy  
Katinka LAHUIS  
Rowan DOWNING

**Co-Prosecutors:**

CHEA Leang  
Robert PETIT

<b>ឯកសារបានចម្លងតាមច្បាប់ដើម</b>	
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UCH ARUN	

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby files this Request to make submissions on the application of joint criminal enterprise liability in the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" dated 8 August 2008 ("OCP Appeal").<sup>1</sup> Mr. IENG Sary respectfully requests to file written submissions limited to the legal aspects of Ground 2 of the OCP Appeal, namely the alleged error of law in failing to indict Duch for the commission of crimes through participation in a joint criminal enterprise ("JCE").<sup>2</sup> Should this Request be granted, Mr. IENG Sary's written submissions *will not* address the distinct question of whether the facts established by the OCIJ in the Closing Order would support the use of JCE liability in this case.<sup>3</sup>

## I. SUMMARY OF ARGUMENT

1. The application of JCE liability at the ECCC fundamentally affects Mr. IENG Sary because he is alleged to be part of the same "common criminal plan" as Duch. In these circumstances, Mr. IENG Sary has a clear interest in the outcome of the appeal and must be permitted to make submissions on this appeal.
2. The complexity of the issues involved in this appeal renders intervention by Mr. IENG Sary helpful to the Pre-Trial Chamber. More importantly, intervention would also redress the violation of equality of arms caused by depriving Mr. IENG Sary of procedural equality with the OCP.
3. It is in the interests of judicial economy that Mr. IENG Sary be permitted to make submissions on this appeal, as resolution of this issue at this stage will greatly impact on the length, cost and scope of the judicial investigation against Mr. IENG Sary.

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<sup>1</sup> Filed on 5 September 2008.

<sup>2</sup> OCP Appeal, para. 2 (ii); paras. 43-58.

<sup>3</sup> Such a task appears to be the intention of the OCP Appeal whereby it is requesting the Pre-Trial Chamber to re-evaluate the evidence reviewed by the OCIJ in order to verify whether it makes the same factual assessment as the OCIJ. This appears to be beyond the scope of appeals before the Pre-Trial Chamber as it would require almost full appellate review before the trial has even started. The scope of appeals before the Pre-Trial Chamber is unclear. However, the recent amendment to Internal Rule 104, which drastically limits the scope of full appeals from trial judgements, implies that this Ground of the OCP Appeal is beyond the scope of an appeal before the Pre-Trial Chamber.

001/18-07-2007-ECCC-OCIJ (PTC02)

4. Given the complexity and importance of the issue of whether JCE liability is applicable at the ECCC, an oral hearing is warranted. It is in the interest of justice that this issue be vetted in a full, fair and transparent manner.

## II. LAW

5. The applicable framework for an appeal against a Closing Order is set out in Internal Rule 74. Under Internal Rule 74(2), the “Co-Prosecutors may appeal against all orders by the Co-Investigating Judges.” Conversely, the Defence has no right of appeal against the Closing Order.<sup>4</sup>
6. Under Internal Rule 75(3), “Submissions on appeal shall be filed by the appellant with the Greffier of the Chamber within 30 (thirty) days from the date that notice of the decision or order was received.” Responses to appeals before the Pre-Trial Chamber must be filed within “15 calendar days of notification, in the ECCC official language which the party has elected under Article 2.2, of the document to which the participant is responding.”<sup>5</sup> In this case, the OCP Appeal was filed and notified to the parties on 5 September 2008.
7. Submissions on appeal by other parties or even external bodies with a limited connection to proceedings have been permitted by the Pre-Trial Chamber. For example, in IENG Sary’s Appeal Against the Provisional Detention Order, the Pre-Trial Chamber invited Civil Parties to file submissions.<sup>6</sup> Moreover, in the same appeal, the Pre-Trial Chamber issued a public notice inviting *amicus curiae* briefs to be filed,<sup>7</sup> an invitation that was accepted by two respondents.<sup>8</sup> This practice has also been followed in other appeals before the Pre-Trial Chamber.<sup>9</sup> Subsequent to the oral hearing on Mr. IENG Sary’s

<sup>4</sup> See Internal Rule 74(3), which lists the specific types of orders against which the Defence may lodge an appeal.

<sup>5</sup> Article 8.3 of the Practice Direction on Filing of Documents, *ECCC/01/2007/Rev.2*.

<sup>6</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), Directions to Civil Parties on Written Submissions, 30 April 2008.

<sup>7</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), Public Notice, 4 February 2008.

<sup>8</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), A submission from Anne Heindel, Documentation Center of Cambodia Legal Advisor, in her personal capacity, 18 February 2008; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), Amicus Curiae Brief Relating to the Appeal Challenging the Order of Provisional Detention of 14 November 2007, 19 February 2008, filed by Mr. Mahdev Mohan and Mrs. Vinita Ramani Mohan.

<sup>9</sup> *Case of Kaing Guek Eav “Duch”*, 07-09-001 ECCC/PTC, Public Notice, 4 September 2007 inviting “organisations and the public” that they may submit written *amicus curiae* briefs “relating to any matter” of the Appeal Against the

001/18-07-2007-ECCC-OCIJ (PTC02)

Appeal Against the Provisional Detention Order, the Pre-Trial Chamber also invited responses by Civil Parties in Case File 001 to an application for reconsideration filed by a Civil Party in Case File 002.<sup>10</sup> This was permitted "in the interests of justice".<sup>11</sup>

### III. ARGUMENT

#### A. The issue of the application of JCE liability fundamentally affects Mr. IENG Sary

8. Mr. IENG Sary and Duch are alleged by the OCP to be part of the same JCE.<sup>12</sup> A subsequent decision by the OCIJ to separate the investigation of Duch from that of the other charged persons<sup>13</sup> seems to have had no effect: the OCP's theory of the case revolves around the application of JCE liability. Mr. IENG Sary and the other three charged persons are still being investigated for crimes which allegedly occurred at S-21. As such, the investigation of Duch and of Mr. IENG Sary are inextricably linked. This has been recognised by the OCP, which has admitted that Duch is "in a separate case file but [is] [...] a common defendant"<sup>14</sup> with Mr. IENG Sary. If JCE liability were to be applied against Duch then the application of JCE liability against Mr. IENG Sary would become almost inevitable.
9. Recently, the Defence filed a motion before the OCIJ opposing the application of JCE liability at the ECCC<sup>15</sup> on the basis that: a) it is not specified in the ECCC Establishment Law; b) it is not part of Cambodian law; c) it is not recognised in customary international law and even if it were today, it was not customary international law in 1975-79, nor is

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Provisional Detention Order filed by the Defence of Duch. *See also Case of Nuon Chea*, 002/19-09-2007-ECCC/OCIJ(PTC01), Public Notice, 27 November 2007, and *Case of Ieng Thirith*, 002/19-09-2007-ECCC/OCIJ(PTC02), Public Notice, 16 January 2008.

<sup>10</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC03), Further Directions Concerning Application for Reconsideration of Civil Parties Right to Address the Chamber, 14 July 2008.

<sup>11</sup> *Id.*, para. 3.

<sup>12</sup> *See* Press Release, Statement of the Co-Prosecutors, (18 July 2007), available at [http://www.eccc.gov.kh/english/cabinet/press/33/Statement\\_of\\_Co-Prosecutors\\_18-July-2007\\_.pdf](http://www.eccc.gov.kh/english/cabinet/press/33/Statement_of_Co-Prosecutors_18-July-2007_.pdf).

<sup>13</sup> *See* Update by the Co-Investigating Judges, 1 November 2007, where the public is informed that "on 19 September 2007, [the OCIJ] decided, in order to ensure good judicial administration, to order the separation of the DUCH case."

<sup>14</sup> *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Response to IENG Sary's Motion on Joint Criminal Enterprise, 11 August 2008, para. 4.

<sup>15</sup> *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion Against the Application at the ECCC of the Form of Liability Known As Joint Criminal Enterprise, 28 July 2008.

customary international law directly applicable in Cambodian courts; and d) it is not recognised by any international convention enforceable at the ECCC.<sup>16</sup> These arguments are almost identical to the arguments that the OCP will have to overcome in the present appeal.

10. In these circumstances with almost identical issues of fact and law the Defence submits that submissions from Mr. IENG Sary would be warranted. This follows the approach taken at the Special Court for Sierra Leone in *Kallon*, where the Appeals Chamber permitted written submissions to be filed on behalf of Moinina Fofana and Augustine Gbao intervening in support of a Defence challenge to jurisdiction, even though Fofana was in a separate case.<sup>17</sup> Similarly, when the ICTY Appeals Chamber was faced with an appeal regarding one small aspect of JCE liability which potentially affected all accused exposed to JCE liability, the *Association of Defence Counsel Practising Before the ICTY* (ADC-ICTY) was requested by the Appeals Chamber to make written submissions<sup>18</sup> and was also permitted to make oral submissions<sup>19</sup> on that issue in support of those filed by the Defence team responding to that appeal.
11. While it is possible that the Duch Defence will make similar submissions to the IENG Sary Defence on the application of JCE, Duch's Co-Lawyers have an obligation solely to their client. They may not be expected, nor required, to fully protect Mr. IENG Sary's interests, as those are only protected by the Co-Lawyers representing Mr. IENG Sary. Hence the need for the Defence to intervene on behalf of Mr. IENG Sary.

## B. Complexity of JCE liability and equality of arms

<sup>16</sup> *Id.*, at 1.

<sup>17</sup> See *Prosecutor v. Kallon*, SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, at 3.

<sup>18</sup> *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005.

<sup>19</sup> See *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005; see also ADC Oral Submissions at *Prosecutor v. Brđanin*, IT-99-36-A, Appeal Procedure Transcript, pp. 64-72, 7 December 2006.

12. JCE is one of the most controversial forms of liability.<sup>20</sup> No other form of liability has provoked a similar range and depth of critical academic literature.<sup>21</sup> The direct application of this form of liability in a domestic court such as the ECCC requires the resolution of further issues of international criminal law, international human rights law and Cambodian criminal and constitutional law not previously addressed by the few courts that have applied JCE liability. The Defence submits that the Pre-Trial Chamber would be aided by submissions from the Defence on this complex issue.
13. Denying the Defence the opportunity to make submissions would result in depriving Mr. IENG Sary procedural equality, thus constituting an infringement of the *equality of arms* principle.<sup>22</sup> Concretely, the OCP would be able to make submissions before the Pre-Trial Chamber on an issue that directly affects Mr. IENG Sary but Mr. IENG Sary himself would not. Nothing could be more fundamentally unfair.

### C. Interests of judicial economy

<sup>20</sup> "Since the *Tadić* appeal judgement of 15 July 1999, joint criminal enterprise (JCE) as a mode of international criminal responsibility has developed into one of the most controversial elements of substantive international criminal law." Göran Sluiter, *Guilt by Association: Joint Criminal Enterprise on Trial*, 5 J. INT'L CRIM. JUST. 67 (2007).

<sup>21</sup> Professor Dershowitz has described JCE as "a conglomeration, coupled with an expansion, of the five defined modes, allowing prosecutors and judges illegitimately to aggregate the cumulative evidence against an accused to find him guilty of some generalized crime, without proof that the accused did 'plan', 'instigate', 'order', 'commit' or otherwise 'aid and abet' any specific criminal act." *Prosecutor v. Krajišnik*, IT-00-39-A, Brief on Joint Criminal Enterprise on Behalf of Momčilo Krajišnik, 4 April 2008, para. 4. For a similar observation see also Mohamed Elewa Badar, "*Just Convict Everyone!*" – *Joint Perpetration: From Tadić to Stakić and Back Again*, 293 INT'L CRIM. L. REV. 301 (2006). "A major source of concern with regard to the applicability of JCE III ... is that ... the participant is unfairly held liable for criminal conducts that he neither intended nor participated in. It is also unjust that the liability of the actual perpetrator (the one who carried out the crime outside the common plan) is tested subjectively whereas that of the participant is tested objectively. Moreover, if the accused had actually participated in crimes outside the initial plan 'common purpose' as an aider or abettor they would arguably have an increased chance of acquittal, as the Prosecution would be confronted with having to prove a higher level of mental awareness, namely, that the accused knew that the principal perpetrator had the state of mind required for the crime at issue. Finally, and more dramatically, this extended category of JCE serves to convict the participant in a common plan for crimes carried out by the actual perpetrator even if the former lacks the state of mind or the mens rea required for the crime in question (particularly specific purpose crimes)." Professors Danner and Martinez have found that JCE "raises the specter of guilt by association and provides ammunition to those who doubt the rigor and impartiality of the international forum". Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 137 (2005). Danner & Martinez further noted that "if conspiracy is the darling of the U.S. prosecutor's nursery, then it is difficult to see how JCE can amount to anything less than the nuclear bomb of the international prosecutor's arsenal." *Id.*

<sup>22</sup> *Prosecutor v. Tadić*, IT-94-1-A, Appeal Chamber Judgement, 15 July 1999, paras. 48-52.

D99/13/16

001/18-07-2007-ECCC-OCIJ (PTC02)

14. Resolving at this stage whether the issue of JCE liability applies at the ECCC would promote judicial economy and result in more a expeditious judicial investigation and subsequent trial. It is also well-known that the ECCC faces severe budgetary constraints in completing its mandate. In these circumstances it is vital that the public money funding the ECCC is not spent on the investigation and prosecution of a form of liability that may actually not be applied at the ECCC. If JCE liability is found not to be applicable before the ECCC, this will impact dramatically on the OCIJ investigation into Mr. IENG Sary, IENG Thirith, NUON Chea and Khieu Samphan as the common criminal plan was the very basis of the Introductory Submission filed by the OCP.

**D. In the interest of justice and transparency oral submissions are warranted.**

15. The Defence respectfully submits that this appeal gives rise to an oral hearing. Arguing against an oral hearing, the OCP asserts: a) the “parties can sufficiently brief the Pre-Trial Chamber on the relevant factual and legal issues through their written pleadings,”<sup>23</sup> and b) the “need for an expeditious resolution of all outstanding legal issues to enable the public trial to commence as soon as possible.”<sup>24</sup> Simply put, these are insufficient reasons to deviate from the presumption of an oral hearing for Pre-Trial Chamber appeals, as established by the Internal Rules.<sup>25</sup>
16. While written submissions will inform the Pre-Trial Chamber of the respective positions of the parties in relation to JCE liability, it is only by the Pre-Trial Chamber Judges asking questions of the various parties and participants involved in the appeal that this fundamental issue will be adequately examined. Furthermore, this process provides the most ideal means by which the public can be fully informed.
17. The Pre-Trial Chamber should not succumb to the OCP’s misplaced fear for a delay in the commencement of the Duch trial. The need for an expeditious resolution of this outstanding issue in the Duch case does not justify rushing through this appeal,

<sup>23</sup> OCP Appeal, para. 9.

<sup>24</sup> *Id.*

<sup>25</sup> That there is a presumption in favor of an oral hearing is clear from Internal Rule 77(4) which refers to the right of the parties to “consult the case file up until the date of the hearing” and Article 8.4 of the Practice Direction on the Filing of Documents which provides that a “reply to a response shall only be permitted where there is to be no oral argument on the request.” This latter provision presumes that there will be an oral argument and sets out the written reply as an exception to this principle.

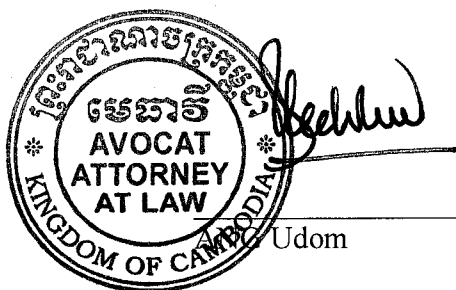
particularly when the decision will dramatically affect the long-term fairness of the other judicial investigations and subsequent trials.

#### IV. CONCLUSION & RELIEF SOUGHT

18. The Defence submits that the application of JCE liability at the ECCC is one of the most complex procedural issues to be faced by the Pre-Trial Chamber. It is also an issue that directly and substantially affects Mr. IENG Sary. It would be highly ironic if the Defence would not be permitted to make submissions on this issue in the Duch Appeal when in previous appeal hearings before the Pre-Trial Chamber anyone with no more than a passing interest or knowledge of proceedings has been invited to participate.

**WHEREFORE**, for all of the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to:

- a. GRANT the Defence the right to make written submissions before the Pre-Trial Chamber in the Co-Prosecutors' Appeal of the Duch Closing Order within 15 days of the issuance of a decision to that effect;
- b. ORDER that there shall be an oral hearing on the legal aspects of this appeal and that the Defence be permitted to make oral submissions at that hearing.



Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 15<sup>th</sup> day of **September, 2008**