

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

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**CIVIL PARTIES' JOINT RESPONSE TO
DEFENCE RULE 89 PRELIMINARY OBJECTIONS**

Filed by:

Before:

Civil Party Co-Lawyers:

The Trial Chamber:

KIM Mengkhy
 MOCH Sovannary
 Martine JACQUIN
 Annie DELAHAIE
 Philippe CANONNE
 Elisabeth RABESANDRATANA
 Fabienne TRUSSES-NAPROUS
 Christine MARTINEAU
 Nicole DUMAS
 Daniel LOSQ
 Isabelle DURAND
 Barnabé NEKUIE

Judge NIL Nonn, President
 Judge Sylvia CARTWRIGHT
 Judge YA Sokhan
 Judge Jean-Marc LAVERGNE
 Judge THOU Mony

Distribution to:

The Office of the Co-Prosecutors

CHEA Leang
 Andrew CAYLEY

Civil Parties' Joint Response to Defence Rule 89 Preliminary Objections

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Laure DESFORGES
Ferdinand DJAMMEN NZEPA
François Gautry

Yet Chakriya
William SMITH

Civil Party Lawyers:

NY Chandy
LOR Chuntay
KONG Pisey
HONG Kim Suon
SIN Soworn
PICH Ang
Silke STUDZINSKY
Emmanuel ALTIT
Emmanuel JACOMY
Madhev MOHAN
Lyma Thuy NGUYEN
Olivier BAHOUUNE
Patrick BAUDOIN
Marie GUIRAUD
Pascal AUBOIN
Julien RIVET

Co-Lawyers for the Charged Persons

SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
PHAT Pouv Seang
Diana ELLIS

SAR Sovan
Jacques VERGÈS
Philippe GRÉCIANO

KAR Savuth

I. BACKGROUND

1. On 13 January 2011, the Pre-Trial Chamber sent the four Accused Persons for trial before the Trial Chamber (TC).¹
2. On 17 January 2011, the TC issued an Order to File Material in Preparation for Trial.²
3. Mr Nuon Chea filed his preliminary objections in two separate documents.³ An additional submission on consolidated preliminary objections was filed by his Defence team on 25 February 2011.⁴
4. On 14 February, Ms IENG Thirith filed her preliminary objections.⁵
5. Mr IENG Sary also filed his preliminary objections before the TC.⁶
6. On 14 February 2011, Mr KHIEU Samphan filed his preliminary objections before the TC in two separate documents.⁷

II. INTRODUCTION

7. The Civil Party Lead Co-Lawyers therefore have good cause to file their response, pursuant to ECCC Internal Rule 89(2) and Article 8.3 of the Practice Direction on Filing of Documents Before the ECCC.
8. The Civil Party Lead Co-Lawyers hereby respond to the preliminary objections filed by the four defense teams. The Civil Party Lead Co-Lawyers reserve the right to expand on the points raised herein by way of additional submissions.

¹ Decisions on appeals against the Closing Order (D427/4/14, D427/1/26, D427/2/12).

² E9.

³ Preliminary Objection Concerning the Jurisdiction of the Trial Chamber, 8 February 2011, E36, and Preliminary Objection Concerning the Legality of the Internal Rules and Effect of the Trial Chamber's Order of 17 January 2011, E42.

⁴ E51/3.

⁵ E44.

⁶ E43, E48.

⁷ Preliminary Objection Concerning Termination of Prosecution, E47, and Preliminary Objections Concerning Jurisdiction, E46.

III. ARGUMENT

9. Rule 89 of the IRs provides:

- 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.*

10. The four Accused Persons have filed preliminary objections challenging the jurisdiction of the Trial Chamber.

11. They have also raised objections seeking termination of the prosecution, in application of the provisions of the 1956 Penal Code of Cambodia regarding domestic crimes and grave breaches of the Geneva Conventions. For his part, Mr IENG Sary raised a preliminary objection seeking termination of prosecution of the crime of grave breaches of the Geneva Conventions of 12 August 1949.

12. Moreover, Mr Ieng Sary and NUON Chea raised objections concerning what they consider “procedural acts” performed after the issuance of the Closing Order and moving that they be declared null and void.

13. In all respects, it quite clearly emerges from these various filings that despite slight differences in approach, the Accused are arguing that the Chamber ought to give primacy to Cambodian Law (the 1956 Penal Code of Cambodia) which was in force at the time of the crimes committed under the Khmer Rouge regime. They all submit that prosecuting international crimes offends the criminal law principle of non-retroactivity and that of legality, in that such acts were not specifically criminalized by Cambodian criminal law at that time. According to them, for all the foregoing reasons, those acts ought to lead to the finding of termination of prosecution according to the prescription period of 10 years set out in the Penal Code of Cambodia. Lastly Mr IENG Sary and NUON Chea requested the TC Order of 17 January 2011 be declared null and void, concurrently, NUON Chea filed a preliminary objection concerning the legality of the Internal Rules which must be determined by this Chamber.
14. First, in the main, Civil Parties will address the Trial Chamber's alleged lack of jurisdiction to determine some issues brought before it, and the inadmissibility of other issues raised in the aforementioned preliminary objections.
15. Secondly, and in the alternative, the civil parties will provide a joint response to all the issues raised by the Defence teams of the four Accused.

A – FIRST, IN THE MAIN: INADMISSIBILITY OF THE PRELIMINARY OBJECTIONS

1. ALLEGED TRIAL CHAMBER'S LACK OF JURISDICTION

16. Various Chambers of the ECCC have on several occasions and in sufficiently clear fashion ruled on objections to the jurisdiction of the ECCC, and as an indirect consequence, on termination of prosecution of domestic crimes.
 17. In Case File No. 001 (*Duch*), the Trial Chamber issued a very clear ruling on the objection to jurisdiction, and also ruled on the alleged offence to the principle of legality. In its 15 February 2011 Ruling on the appeals by NUON Chea and IENG Thirith against the Indictment, the same Chamber affirmed the jurisdiction
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of the ECCC to try the Accused persons in accordance with Articles 3 to 6 of the ECCC Law.⁸

18. By filing the same preliminary objections to jurisdiction before the Trial Chamber, the Defence teams' submissions on this matter ought to be declared inadmissible and in breach of the maxim *ne bis in idem*. Regarding objections to jurisdiction, the IENG Thirith, Ieng Sary and NUON Chea Defence Teams have earlier clearly raised the same objection before the Pre-Trial Chamber, which decides appeals lying against decisions of the Co-Investigating Judges, under Internal Rules 68 and 74. Whilst Internal Rule 89(1) provides, *inter alia*, that parties may raise preliminary objections concerning jurisdiction, the interpretation of this provision must nevertheless be consistent with the provisions of Internal Rule 77(13), which provides that decisions of the Pre-Trial Chamber on appeals against the Co-Investigating Judges Closing Order are not subject to appeal. Where the Pre-trial Chamber has already ruled on an appeal concerning jurisdiction, as was unequivocally the case for the aforementioned Accused, it is not permissible for the objection concerning jurisdiction to be brought afresh before the TC.
19. According the maxim *specialia generalibus derogant* (special provisions override general ones), once a question concerning jurisdiction has been determined by the Pre-Trial Chamber on the basis of Internal Rules 74 and 77(13), it cannot be raised again before the TC without it being perceived as a disguised appeal concerning the same objection. By ruling on this ground, the TC would inevitably be forced to strip all meaning from the principle entrenched in Internal Rule 77(13) in that decisions of the Pre-Trial Chamber on appeals against decisions of the Co-Investigating Judges are final. In this instance, the general legal principle of *specialia generalibus derogant* applies. Accordingly, being special provision, Rule 77(13), overrides the general provision, Rule 89.

⁸ Decision of the Pre-Trial Chamber on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order in Case File 002, 15 February 2011, D427/3/15.

20. As a consequence, the TC cannot act as an appellate chamber at this stage of the proceedings for the purpose of issuing new ruling on matters that have been determined by the Pre-Trial Chamber in appeals against the Co-Investigating Judges' Closing Order.
21. Therefore, the Lawyers for Civil Parties respectfully request the TC to decline jurisdiction concerning the abovementioned objections to jurisdiction and termination of prosecution of domestic crimes, because, to the extent that those matters have already been considered by the Pre-Trial Chamber on appeal, the request amounts to a breach of Internal Rule 77(13).
22. With respect to all requests for the Chamber to rule on these preliminary objections prior to the judgment on the merits, the Civil Parties submit that no legal basis debars a court, and in particular the ECCC, from examining preliminary objections at the same time as the judgment on the merits. The Internal Rules give the judges full discretion with regard to this question. According to Internal Rule 89(3), the TC, may in all circumstances, consider preliminary objections at the same time as the judgment on the merits; and just as it did in Case No. 001, it can legitimately follow the same principle.

2. THESE PRELIMINARY MOTIONS ARE INADMISSIBLE DUE TO VIOLATION OF THE *NE BIS IN IDEM* PRINCIPLE:

23. Should the TC claim jurisdiction to entertain these objections, the Civil Party Co-Lawyers request that it declare these motions inadmissible due to violation of the general legal principle of *ne bis in idem*, and of *res judicata*.
24. The combined application of these two principles implies that a court cannot rule *de novo* on a matter which it has ruled previously, especially since the maxim *res judicata* applies *erga omnes* in a criminal law, as it is a matter of public order.
25. As a result, the TC will find that indeed here again, all of the Accused are raising the same arguments, under various guises, with the sole aim that the Chamber, on the one hand, decline jurisdiction according to the principles of Civil Parties' Joint Response to Defence Rule 89 Preliminary Objections

legality and non-retroactivity of criminal law, and, on the other hand, order termination of the prosecution. Yet, it has been made abundantly clear that all ECCC Chambers have taken a clear and unequivocal position on all these matters. Moreover, preliminary objections as Internal Rule 89(1), with the exception of the issue of nullity of procedural acts, only concerns the objections concerning jurisdiction or seeking termination of prosecution.

26. As such, the TC will once again note that the same arguments are being used to obtain the same results, and that this concerns matters on which the ECCC has ruled numerous times. The Chamber ought to dismiss the Defence preliminary objections and declare them inadmissible due to violation of the principles of *ne bis in idem* and *res judicata*.
27. For example, the arguments concerning the ECCC's lack of jurisdiction were addressed for the first time by the TC in Case No. 001 (*Duch*).
28. With respect to the instant case, Mr NUON Chea⁹ and Ms IENG Thirith,¹⁰ under Internal Rules 68 and 74, both raised objections to jurisdiction in their appeals against the Co-Investigating Judges' Closing Order.¹¹ The Pre-Trial Chamber issued a decision on this matter on 15 February 2011.¹²
29. In the same vein, with respect to domestic crimes in the *Duch* case, the Pre-Trial Chamber found that the domestic crimes of torture and premeditated murder, as defined in Cambodian national law, can be added to the Closing Order.¹³
30. In its decision on IENG Sary's appeal in the instant case, No. 2, the Pre-Trial Chamber dismissed the Accused's arguments that "the OCIJ erred in law by holding that the ECCC has jurisdiction to apply Article 3 new (National

⁹ Nuon Chea Appeal against the Closing Order.

¹⁰ Ieng Thirith Appeal From the Closing Order.

¹¹ Closing Order, 16 September 2010.

¹² D427/3/15, paras. 87-167.

¹³ Pre-Trial Chamber Decision on Appeal against Closing Order Indicting Kaing Guek Eav alias "Duch", D99/3/42, para. 107.

Crimes)”.¹⁴ The same Chamber reaffirmed its position on this matter in its decision on the appeals by NUON Chea and IENG Thirith against the Closing Order.¹⁵

31. Unlike the other Accused, Mr KHIEU Samphan did not raise a jurisdictional challenge or seek termination of prosecution in his appeal against the Closing Order. However, on the basis of the above reasoning, the Civil Party Co-Lawyers submit that the TC ought to find his motion on preliminary objections inadmissible due to failure to abide by the *ne bis in idem* principle.

3. THESE PRELIMINARY MOTIONS ARE INADMISSIBLE DUE TO VIOLATION OF THE PROVISIONS OF RULE 89(1)

32. The framework of the preliminary objections filed before the TC is clearly defined in Internal Rule 89(1). Accordingly, any preliminary objection not relating to jurisdiction, termination of prosecution or to nullity of procedural acts would be outside this framework and must be declared inadmissible. In this instance, Mr NUON Chea’s request for the TC to rule on the legality of the Internal Rules is manifestly outside the ambit of Internal Rule 89(1) regarding preliminary objections before the TC; and must therefore be declared inadmissible.
33. As for requests for the Chamber to rule on these preliminary objections prior to the judgment on the merits, the Civil Parties submit that there is no legal requirement for a court, in particular, the ECCC, to consider a preliminary objection at the same time as the judgment on the merits. The Internal Rules give the judges full discretion on this matter. In accordance with Internal Rule 89(3), the TC may in all circumstances, consider all preliminary objections at the same time as the judgment on the merits. As it did in Case No. 001, it can legitimately follow the same principle.

¹⁴ Decision on Ieng Sary’s appeal against the Closing Order, D427/3/15.

¹⁵ D427/3/15, paras. 168-184.

A –GROUND 2: IN THE ALTERNATIVE, AS TO MERITS

34. As submitted above, the Civil Parties note that the framework for preliminary objections is clearly defined in Internal Rule 89(1); accordingly, the Civil Parties will address only matters relating to this provision, i.e. the jurisdiction of the ECCC (1) and termination of prosecution (2).
35. With regard to these issues, the Civil Parties intend to rely on all the ECCC decisions, which are abundantly clear and sufficiently reasoned concerning each of the issues raised by the Accused.

1. FIRST ARGUMENT: JURISDICTION OF THE CHAMBER (VIOLATION OF THE PRINCIPLE OF LEGALITY).

36. Concerning the alleged violation of the principle of legality in relation to the Trial Chamber's jurisdiction to hear international crimes (genocide, crimes against humanity, grave breaches of the Geneva Conventions), the Trial Chamber adequately addressed it in its Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order, dated 15 February 2011 (see paragraphs 97 to 100). The PTC clearly held that nothing compels it to exercise its jurisdiction in accordance with the national principle of legality of Cambodian law.
37. At paragraph 99, the Chamber held that the ECCC has jurisdiction to hear the crimes enumerated in the ECCC Law and is bound by the international principle of legality.¹⁶
38. This principle does not require that international crimes and modes of responsibility be implemented by domestic statutes in order for violators to be

¹⁶ Article 15 of the International Covenant on Civil and Political Rights, in particular paragraph 2.
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found guilty. The characterisation of the Cambodian legal system as monist or dualist has no bearing on the validity of the law applicable before the ECCC.¹⁷

1.1 Genocide and Grave Breaches of Geneva Conventions of 1949

39. With respect to the crime of genocide, the TC has held that the crime of genocide formed part of international law at the time of commission. Accordingly, the ECCC has jurisdiction to try the Accused for alleged breaches of the Convention on Genocide and the 1949 Geneva Conventions.¹⁸

1.2 Crimes Against Humanity:

40. The PTC has held that the definition of crime against humanity as articulated in the Nuremburg Principles formed part of customary international law and was sufficiently specific during the period of the Khmer Rouge regime. It confirmed that this crime was foreseeable and accessible to the Accused at the relevant time.¹⁹

1.3. Superior Responsibility:

41. At paragraph 232 of its decision, the TC clearly demonstrated that the doctrine of superior responsibility existed as a matter of customary international law from 1975-1979. This mode of liability was both foreseeable and accessible to the Accused at the relevant time.

1.4. Joint Criminal Enterprise:

42. The Co-Investigating Judges recalled that under international law, Joint Criminal Enterprise is a mode of individual criminal liability is encompassed in the concept of commission.²⁰ For Joint Criminal Enterprise to apply, three conditions must be met :

¹⁷ D427/3/15, end of para. 98.

¹⁸ D427/3/15, end of para. 124.

¹⁹ D427/3/15, end of para. 133.

²⁰ Closing Order, 16 September 2010, Case 002.

- 1) It must be provided for in the ECCC laws, explicitly or implicitly.
 - 2) It must have existed under customary international law at the relevant time.
 - 3) The law on this mode of liability must have been sufficiently accessible to the persons under investigation.
 - 4) The persons under investigation must have been in a position to foresee possible liability.
43. Article 29 of the Law on the Establishment of the ECCC provides for individual responsibility for “[a]ny suspect who planned, instigated, ordered, aided and abetted, or committed the crime within the jurisdiction” Joint Criminal Enterprise as a mode of liability was also defined in international law during the trials held in the wake of the Second World War, namely landmark trials of war criminals tried before the Military Tribunal of Nuremburg ²¹ (where it was specified that where a convention does not set out penalties to punish those found guilty of violating its dispositions, does not prevent holding them criminally and individually responsible for such offences).
44. The Nuremberg Charter, Law No. 10 of the Control Council, the International Military Tribunal for the Far East have also recognized that persons having participated in a scheme with criminal intent may be found guilty.
45. Considerable jurisprudence incorporating these notions was subsequently developed, for example, in France, England and the United States.²²
46. Thereafter, once these concepts had been applied internationally, they were crystallized by the International Criminal Tribunal for the former Yugoslavia.
47. It emerges from the foregoing that the concepts of Joint Criminal Enterprise in the commission of crimes and illegal acts, through active participation in a project

²¹ Nuremburg, 14 November 1945-1 October 1946, Official Text, XLII volumes, Tomes 1, pp. 232-243.

²² See *Amicus Curiae* Brief of Professor Antonio Cassese, 27 October 2008, D99/3/24.

or criminal purpose, were widely used prior to the commission of crimes that now led to the prosecution of the senior leaders of the Democratic Kampuchea regime.

48. Lastly, the forms of responsibility mentioned in Article 29 (new) were known under the 1956 Penal Code of Cambodia, except for planning and superior responsibility.²³
49. With specific reference to KHIEU Samphan, paragraph 29 of his Preliminary Objection Concerning Jurisdiction reveals that he alleges lack of evidence of an officially recognised armed conflict that would enable the Chamber to assert jurisdiction over grave breaches of the Geneva Conventions and crimes against humanity. The Civil Parties submit that mere consideration of this aspect of the issue amounts to a substantive matter, especially so because it would inevitably mean that the Chamber, and all the parties, will discuss elements of proof, which manifestly concern the substantive case; therefore, this is premature. The Chamber should consider it during the judgment on the merits.
50. Likewise, in his Preliminary Objections Concerning Jurisdiction, Mr KHIEU Samphan also challenged the ECCC's personal jurisdiction. Examination of Khieu Samphan's level of responsibility, even where it is raised in a preliminary objection concerning the ECCC's personal jurisdiction, clearly amounts to a substantive matter that is intrinsically related to the nature the facts alleged against him and their characterization, and hence to the substantive case. It is only at trial by hearing witnesses, after an adversarial debate on the evidence produced that the Chamber will be in a position to assess the nature and extent of Khieu Samphan's responsibility.
51. For all intents and purposes, the Chamber therefore ought to consider this preliminary objection at the same time as the substantive judgment, as it did in Case No. 001.

²³ See *Duch* Judgement, para. 474.

2. SECOND ARGUMENT: TERMINATION OF PROSECUTION

2.1 Domestic Crimes

52. On this matter, the Civil Parties refer to the 15 February 2011 Decision on the Appeals by NUON Chea and IENG Thirith. In paragraph 176, the PTC affirms the ECCC's jurisdiction with respect to domestic crimes. The Chamber held that no violation of the principle of legality occurred in this instance.

2.2 Grave Breaches of the 1949 Geneva Conventions

53. As regards the statute of limitations on grave breaches of the Geneva Conventions, and in reference to Article 1 of the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, grave breaches of the Geneva Conventions are not subject to statutory limitations. According to this provision, "[n]o statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3(1) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 on the protection of war victims; (...)". This, read concurrently with Decision D427/3/15, in which the Pre-Trial Chamber affirmed the ECCC's jurisdiction over international crimes,²⁴ it can be concluded that the Accused must be tried for grave breaches of the Geneva Conventions of 1949.

IV - PRAYERS

54. Based on the foregoing submissions, the Civil Party lawyers request, in the main that:

The Trial Chamber decline jurisdiction with respect to:

²⁴ D427/3/15, para. 99.

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- 1) Preliminary objections on jurisdiction, termination of prosecution (domestic crimes) raised by the Defence Nuon Chea and IENG Thirith teams of, and termination of prosecution for grave violations of the 1949 Geneva Conventions raised by IENG Sary due to violation of Internal Rule 77(13).
- 2) Should the Chamber claim jurisdiction to consider these matters afresh, that it find the aforementioned preliminary objections raised by KHIEU Samphan inadmissible due to violation of the principles of *ne bis in idem* and *res judicata*.

55. In the alternative, that the Chamber find that all the Defence preliminary objections concerning jurisdiction or termination of prosecution manifestly without merit.

For the above reasons, the Trial Chamber is respectfully requested to entertain this Joint Response and to find in its favour.

Date	Names	Place	Signatures
7 March 2011	Ang PICH National Lead Co-Counsel	Phnom Penh	
	Elisabeth SIMMONEAU-FORT International Lead Co-Counsel		
	MOCH Savannary Civil Party Lawyer		
	Martine JACQUIN Civil Party Lawyer		