BEFORE THE TRIAL CHAMBER

OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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DEFENCE RESPONSE TO THE CO-PROSECUTORS' REQUEST FOR THE APPLICATION OF THE JOINT CRIMINAL ENTERPRISE THEORY IN THE PRESENT CASE

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Before:

The Trial Chamber

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MAY IT PLEASE THE TRIAL CHAMBER

I. PROCEDURAL BACKGROUND

1. By decision dated 5 December 2008,[1] the Pre-Trial Chamber dismissed the Co-Prosecutors' appeal to include joint criminal enterprise as a mode of liability in the Closing Order. After finding that this mode of liability was not specifically part of the investigation[2] and that Mr Kaing Guek Eav, alias Duch, had not been informed of the allegation related to his participation in an S-21 joint criminal enterprise prior to the Final Submission, the Pre-Trial Chamber decided not to include this mode of liability in the Closing Order.[3]

2. At the initial hearing on 17 February 2009,[4] the Co-Prosecutors indicated that they intended to invite the Trial Chamber during the trial to consider the applicability of joint criminal enterprise in the present case.

3. On 8 June 2009, i.e. after close to four months (!), the Co-Prosecutors filed their Request for the Application of Joint Criminal Enterprise in the present case.[5]

4. On 29 June 2009, the Trial Chamber informed the parties by oral decision that it was considering rendering its decision on this matter at the same time as the judgment on the merits.[6]

5. In their submissions, the Co-Prosecutors requested, pursuant to rules 92 and 98(2) of the Internal Rules, that the Trial Chamber apply joint criminal enterprise as a mode of

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[1] Decision on Appeal against Closing Order Indicting Kaing Guek alias "Duch", 5 December 2008, D99/3/42 ("Document No. D99/3/42"), ERN 00249846-00249887.
[2] Document No. D99/3/42, para. 125, ERN 00249880.
[3] Document No. D99/3/42, para. 141, ERN 00249885.
[4] Transcript of the hearing of 17 February 2009, E1/3.1, ERN 00295542-00295659.
[5] Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 8 June 2009, E73 ("Document No. E73"), ERN 00339212-00337227, notified to the Defence in Khmer and English on 16 June 2009, and in French on 3 September 2009.
[6] Transcript of the hearing of 29 June 2009, E1/39.1, ERN 00345656-00345765.

criminal liability for Duch.[7] According to the Co-Prosecutors, this mode of criminal liability was applicable in the present case, for three reasons:

(i) there was sufficient evidence in the Closing Order to conclude that the Accused committed the charged crimes through his participation in a joint criminal enterprise,

(ii) it was properly pleaded in the Final Submission that Duch was liable for these crimes as a result of his participation in a joint criminal enterprise, and

(iii) the joint criminal enterprise theory has existed in customary international law since 1940 and is applicable before the ECCC.[8]

6. The Defence intends to raise *in limine litis* the inadmissibility of the Co-Prosecutors' submissions. In the alternative, the Defence wishes to request that the Co-Prosecutors' request be dismissed.

II. *IN LIMINE LITIS:* INADMISSIBILITY OF THE CO-PROSECUTORS' SUBMISSIONS

7. *First*, the Defence notes that the Co-Prosecutors have already raised the issue of the applicability of joint criminal enterprise in the present case before the Pre-Trial Chamber which resolved the issue by rejecting the addition in the Closing Order of joint criminal enterprise as a mode of criminal liability.

8. After a thorough examination of the facts of the case, the Pre-Trial Chamber in fact categorically concluded that *"(…) the factual basis [was] not sufficient to allow such a characterisation"*.[9]

[7] Document No. E73, para. 1, ERN 00333912.
[8] Document No. E73, para. 2, ERN 00333912.
[9] Document No. D99/3/42, para. 137, ERN 00249884. See also paras. 131, ERN 00249882, and 141, ERN 00249885, where the Pre-Trial Chamber noted that *"(…) The S-21 JCE did not form part of the factual basis for the investigation (…)"*.

9. However, under Rule 98(2) of the Internal Rules, the Trial Chamber may only change the legal characterisation of the crime as set out in the Indictment[10] *"as long as no new constitutive elements are introduced"*.[11]

10. If the Trial Chamber were to accept to entertain the Co-Prosecutors' submissions, this would thus mean that the Pre-Trial Chamber decision can be appealed, which is contrary to Rule 77(13) of the Internal Rules.

11. *Secondly*, the Defence notes that the Co-Prosecutors' submissions were not notified to the witnesses, former S-21 staff members, who testified, even though it is indeed they who are of concern in this joint criminal enterprise.[12]

12. *Lastly*, it must be noted that even though the Co-Prosecutors' submissions were filed close to four months into the trial, they contain no new elements that emerged during the proceedings.

13. Therefore, having regard to all these matters, the Defence requests the Trial Chamber to declare the Co-Prosecutors' submissions inadmissible.

III. SUBMISSIONS ON THE MERITS

14. In the event that the Co-Prosecutors' submissions were to be found admissible, the Defence wishes to move that they be dismissed and intends to make the arguments set forth below.

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[10] The Defence does not dispute the fact that this applies not only to the crimes but also to the modes of participation of the accused therein.

[11] This is also the case under French criminal procedure law where it is permissible to change legal characterisations "[TRANSLATION] *as long as nothing is changed in or added to the offences as set out in the indictment"*. See Mementos Dalloz *Procédure pénale*, 18th Edition, p. 250. See *Pélissier and Sassi v. France*, Judgment of 25 March 1999, European Court of Human Rights, para. 50: *"In the Government's submission, provided that no reliance was placed on new facts, alternative verdicts could be returned by virtue of the principle that the trial courts exercise jurisdiction* in rem. *Under that principle, a trial court had jurisdiction to hear the facts and was not bound by the legal characterisation set out in the summons or indictment"*. See also *Procédure pénale*, by Guinchard and Buisson, Editions Litec, 3rd Edition, pp. 946 and 947.

[12] Document No. E73, para. 9, ERN 00339215.

MAIN SUBMISSIONS

A. The factual basis [of the Closing Order] is not sufficient to allow such a characterisation

15. As noted above, according to the Pre-Trial Chamber decision: *"(…) the factual basis [was] not sufficient to allow such a characterisation"*.[13]

16. Therefore, as the case file stands, the Defence considers that the characterisation of joint criminal enterprise is not applicable in the present case.

17. Accordingly, having regard to the entirety of the facts set out in the Closing Order, the Co-Prosecutors' request to apply joint criminal enterprise as a mode of criminal liability in the present case must be dismissed.

B. In any event, the joint criminal enterprise in which Duch is alleged to have participated has never been clearly defined by the Co-Prosecutors

18. According to international case-law, the Co-Prosecutors are required to plead with a high degree of specificity in the indictment the allegation as to an accused's participation in a joint criminal enterprise.[14]

19. Thus, as rightly pointed out by the Pre-Trial Chamber,[15] in the *Kvočka* case, the ICTY Appeals Chamber clearly identified the criteria for wording an indictment with regard to the application of joint criminal enterprise as a mode of criminal liability. Those criteria are as follows:

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[13] Document D99/3/42, para. 137, ERN 00249884. See also para. 131, ERN 00249882 and para. 141, ERN 00249885, where the Pre-Trial Chamber noted that: *"(…) The S-21 JCE did not form part of the factual basis for the investigation (…)"*.

[14] See *Prosecutor v. Kvočka et al.,* IT-98-30/1-A, Judgment, ICTY Appeals Chamber, 28 February 2005, paras. 27 and 28; see also *Prosecutor v. Blagoje Simic*, IT-95-9-A, Judgment, ICTY Appeals Chamber, 28 November 2006, paras. 20-22.

[15] Document D99/3/42, para. 135, footnote 90, ERN 00249883.

"[T]he Prosecutor must plead the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise. Therefore, in order for an accused charged with joint criminal enterprise to fully understand which acts he is allegedly responsible for, the indictment should clearly indicate which form of joint criminal enterprise is being alleged."[16]

20. However, it bears noting that the Co-Prosecutors' description of the joint criminal enterprise in which Duch is alleged to have participated (i) varied throughout the proceedings and (ii) still lacks specificity at this stage.[17]

21. (i) Thus, the Co-Prosecutors described the constitutive elements of Duch's alleged joint criminal enterprise differently in their Introductory Submission and in their Final Submission, in particular, concerning the participants in the alleged joint criminal enterprise and the purpose thereof. More specifically, the Introductory Submission describes a joint criminal enterprise at the national level involving the five co-accused in Case File No. 002/19-09-2007-ECCC,[18] while the Final Submission refers to an S-21 joint criminal enterprise in which Duch and other members of the S-21 staff are alleged to have participated.[19]

22. Therefore, contrary to what the Co-Prosecutors assert in their submissions, the *"JCE* [described in the Final Submission] is not *"closely based on the facts that were described in the Introductory Submission".*[20]

23. (ii) Further, it must be noted that the Co-Prosecutors continue to fail to clearly specify the constitutive elements of the joint criminal enterprise that they claim Duch participated in.

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[16] See *Prosecutor v. Kvočka et al.,* IT-98-30/1-A, Judgment, ICTY Appeals Chamber, 28 February 2005, para. 28 (emphasis added).
[17] In this regard, the Defence notes that the Co-Prosecutors themselves recognise in Document No. E73, para. 32, that at a minimum: *"(…) Duch did not receive formal notice of the exact form of JCE that is being alleged by the Co-Prosecutors until the Final Submission (…),* ERN 00339224.
[18] Introductory Submission, 18 July 2007, D3, paras. 5 to 16, ERN 00147249-00147258.
[19] Final Submission, 18 July 2008, D96, paras. 250 and 251, ERN 00206255.
[20] Document No. E73, para. 32, ERN 00249852.

24. In particular, the Co-Prosecutors continuously contradict themselves concerning the persons who are alleged to have participated in the joint criminal enterprise with Duch.

25. For example, the Defence notes inconsistencies in the Co-Prosecutors' submissions with regard to the exact identity of the participants in the joint criminal enterprise. In fact, first, the Co-Prosecutors refer to Duch and *"his subordinates"* [21], and then go on to refer to *"[t]he group of persons who participated in the JCE is described in paragraphs 20, 21 and 22 of the Closing Order and includes the members of the S-21 Committee"*.[22]

26. Furthermore, in the conclusion of their submissions, the Co-Prosecutors again raise doubt by requesting that the Trial Chamber *"(…) apply the legal theory of JCE in their Judgment regarding DUCH's participation and co-perpetration in the JCE as outlined in the Introductory and Final Submissions and the Appeal Brief"*.[23]

27. This lack of specificity as to the exact tenor of the joint criminal enterprise alleged against Duch makes it impossible for him to receive adequate notice of the charges against him and to adequately prepare his defence on this point. Hence, the Co-Prosecutors' request must be dismissed for this reason also.

C. The applicability of the joint criminal enterprise theory before the ECCC and, in particular, in the present case

28. The Co-Prosecutors contend that *"JCE is needed to accurately describe the extent of DUCH's criminal conduct"*.[24]

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[21] Document No. E73, para. 9, ERN 00248947.
[22] Document No. E73, para. 29, ERN 00248951.
[23] Document No. E73, para. 41, ERN 002489855 (emphasis added).
[24] Document No. E73, para. 7, ERN 00339214, and para. 9, ERN 00339215.

29. On this issue, the Defence refers to its submissions before the Pre-Trial Chamber in its Response to the *Amicus Curiae* Briefs.[25] The Defence continues to consider the reasons invoked by the Co-Prosecutors before the Pre-Trial Chamber and now before the Trial Chamber to justify the application of joint criminal enterprise in the present case to be without merit.

30. Turning to the issue of the applicability of the joint criminal enterprise theory before the ECCC from a more general standpoint, the Co-Prosecutors contend in their submissions that *"all three forms of JCE are applicable at the ECCC"* and that *"JCE has been part of customary international law since the 1940s"*.[26]

31. On this issue, the Defence refers to its submissions before the Pre-Trial Chamber in its Response to the *Amicus Curiae* Briefs,[27] and defers to the wisdom of the Trial Chamber to determine whether or not this theory is applicable before the ECCC.

ALTERNATIVE SUBMISSIONS

32. In the unlikely event that the Chamber were to consider recharacterising the facts, it must invite the Accused to make his submissions in a practical and effective manner on the new characterisation contemplated.

33. The Trial Chamber informed the parties that it was considering rendering its decision on the joint criminal enterprise theory at the same time as the judgment on the merits.[28]

34. However, according to the case-law of the European Court of Human Rights while a criminal court has the *"unquestionabl[e] right] to recharacterise facts over which it properly ha[s] jurisdiction"*, it is also required to afford *"the applicants the*

[25] Defence Response to the *Amicus Curiae* Briefs, 25 November 2008, D99/3/37 (Document No. D99/3/37), ERN 00242863-00242867; see, *inter alia*, paras. 4 to 11. (Annex A hereto)
[26] Document No. E73, para. 8, ERN 00339215.
[27] Document D99/3/37, ERN 00242863-00242867; see, *inter alia*, paras 12 to 14.
[28] Transcript of the hearing of 29 June 2009, E1/39.1, ERN 00345667-00345668.

possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time".[29]

35. For example, in *Pelissier and Sassi v. France,* the European Court considered that where the case was not adjourned for further argument, or, alternatively, the applicants were not requested to submit their written observations while the Court of Appeal was in deliberation, the fact that the applicants only learnt *of the recharacterisation* through the judgment of the Court of Appeal was "*plainly [...] too late*"[30] and amounted to an infringement of the right of the accused to be informed in detail of the nature and cause of the accusation against him or her and of his or her right to have adequate time and facilities for the preparation of his or her defence.[31]

36. The principle established by this case-law has been adopted in the Regulations of the International Criminal Court, which also provide for safeguards that must be respected by the Trial Chamber where the legal characterisation of facts is changed during the trial.

37. The relevant provisions of regulation 55 read as follows:

> *2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.*

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[29] See *Pélissier and Sassi v. France*, Judgment of 25 March 1999, European Court of Human Rights, para. 62: "*The Court accordingly considers that in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time. It finds nothing in the instant case capable of explaining why, for example, the hearing was not adjourned for further argument or, alternatively, the applicants were not requested to submit written observations while the Court of Appeal was in deliberation. On the contrary, the material before the Court indicates that the applicants were given no opportunity to prepare their defence to the new charge, as it was only through the Court of Appeal's judgment that they learnt of the recharacterisation of the facts. Plainly, that was too late.*" (Emphasis added). See also *Procédure pénale*, by Guinchard and Buisson, Editions Litec, 3rd Edition, pp. 361, 946 and 947.

[30] See *Pélissier and Sassi v. France*, Judgment of 25 March 1999, European Court of Human Rights, para. 62.

[31] *Ibid*., para. 63

> *3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:*
> *(a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1(b); and*
> *(b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1(e).*

38. As a result, the Defence submits that should the Trial Chamber decide to apply joint criminal enterprise as a mode of criminal liability for the Accused, it must invite the Accused to make his submissions on the new legal characterisation contemplated before the case is adjourned for deliberation.

39. Accordingly, the Defence already intends to reserve the right to request the Trial Chamber to examine again or have examined again any new witness, and to call any new witness or to present other evidence admissible pursuant to the international rules of procedure referred to above.

FOR THESE REASONS

40. The Defence requests the Trial Chamber:

IN LIMINE LITIS

- TO DECLARE the Co-Prosecutors' submissions INADMISSIBLE

AND OTHERWISE

MAIN SUBMISSIONS

- TO purely and simply DISMISS the Co-Prosecutors' request to apply the joint criminal enterprise theory in the present case,

AND, IN THE ALTERNATIVE, in the unlikely event that the Chamber were to consider granting the Co-Prosecutors' request,

- TO INVITE the Accused to make his submissions on the new legal characterisation contemplated in a practical and effective manner, and in good time, that is before the case is adjourned for deliberation,

- TO TAKE NOTE that the Defence intends to reserve the right to request the Trial Chamber to allow it to examine again or to have examined again any witness, to call any new witness and to present other evidence admissible.

WITHOUT PREJUDICE

	The Co-Lawyers KAR Savuth François Roux	Phnom Penh	
Date	Name	Place	Signature