

BEFORE THE TRIAL CHAMBER**OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****Filing details**

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**Group 3 Civil Parties - Brief in Support of 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:

Judge NIL Nomm, President

Judge Silvia CARTWRIGHT

Judge YA Sokhan

Judge Jean-Marc LAVERGNE

Judge THOU Mon

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I. PROCEDURAL BACKGROUND

1. On 8 August 2008, the Co-Investigating Judges issued a Closing Order, by which they indicted Duch.
2. On 21 August 2008, the Co-Prosecutors appealed the Closing Order.
3. On 16 September 2008, Duch's Co-Lawyers filed their Response to the Appeal.
4. On 28 October, the Pre-Trial Chamber invited the parties to make their submissions on the *Amicus Curiae* Briefs concerning the issue of joint criminal enterprise.
5. On 17 November 2008, the Group 3 Civil Parties' Co-Lawyers filed their Response to the *Amicus Curiae* Briefs.
6. On 5 December 2008, the Pre-Trial Chamber rendered a decision amending the Closing Order and sending Duch for trial before the Trial Chamber.
7. On 8 June 2009, the Co-Prosecutors filed before the Trial Chamber their request for the application of the joint criminal enterprise theory.
8. On 3 September, the Group 3 Civil Parties' Co-Lawyers received notification of the Co-Prosecutors' Request in their working language.

II. SUMMARY OF THE SUBMISSIONS

9. The Group 3 Civil Parties' Co-Lawyers concur with the Co-Prosecutors' Request and submit that under rule 98(2) of the Internal Rules, the Trial Chamber is not bound by the legal characterization of the facts before the Chamber.
10. The Trial Chamber is therefore not bound by the legal characterisations set out in the Closing Order, and may therefore take into consideration DUCH's responsibility for the crimes he committed through his participation in a joint criminal enterprise ("JCE"). Such new characterisation would not infringe the rights of the Accused given that he has had adequate time

and facilities for the preparation his defence in relation to the application of this characterisation, and that the Closing Order sets out all the constitutive elements of this mode of liability.

11. Moreover, it is now established that the JCE theory is taken to represent customary law and that it can be considered as one of the modes of liability under article 29 of the ECCC Law.

III. SUBMISSIONS

A. The Trial Chamber's powers with regard to characterisation

12. Pursuant to Rule 98(2) of the Internal Rules, the Trial Chamber is empowered to change the legal characterisation of crimes.

98(2) 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.

13. In fact, the Trial Chamber is not bound by the legal characterisations decided by the Pre-Trial Chamber and/or the ones set out in the Indictment. The power of trial courts to change the legal characterisation of a crime is recognised in the practice of international and national courts.

International Law

14. The Co-Prosecutors rightly cited the 24 May 2009 decision of the ICC in the *Lubanga* case, in which the Pre-Trial Chamber recognised that the Parties may request the Trial Chamber to reconsider the legal characterisation of the facts.¹ This decision was affirmed on 14 July 2009 by the ICC Trial Chamber still in the *Lubanga* case. In the said decision, the Chamber held that it has “the power to change the legal characterisation of facts” on the condition that it does not exceed “the facts and circumstances described in the charges and any amendments to the charges”.²

¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*, Pre-Trial Chamber I, 24 May 2007.

² *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*, Pre-Trial Chamber I, 14 July 2009, para. 27.

National Law

15. Under French criminal procedure, basis of Cambodian criminal procedure, which is applicable before the ECCC, a criminal court judge is not bound by the legal characterisations given and not only does he or she have the right, he or she also has the duty to characterize the facts before the court and to apply criminal law thereto, depending on the outcome of the examination at the hearing.³

16. Two rules govern the power to change legal characterisations:

The absence of new facts

17. As noted in Rule 98(2), the Judge must have before him or her all the factual elements permitting the new characterisation.

18. In the present case, the factual elements contained in the Closing Order provide a solid foundation for the characterisation of DUCH's participation in a JCE.

19. As stated in the Co-Prosecutors' brief, the Order sets out proof of the material and mental elements of the three forms of JCE.⁴

20. In order to charge a person with participation in a JCE, it is recognised in international case law that the following must be specified:⁵

- a. the nature and purpose of the JCE
- b. the time when or the period during which the JCE was allegedly committed
- c. the identity of the participants in the JCE

21. The Closing Order clearly sets out the reason for the establishment of S-21, which was "to implement the Party political line regarding the enemy according to which prisoners absolutely had to be smashed".⁶ This was attained, *inter alia*, through the imprisonment, enslavement, torture, murder, extermination and persecution of the enemies of Angkar.⁷ This

³ *Arrêt de la Chambre criminelle de la Cour de Cassation*, 6 February 1985, Bull.Crim. n° 65.

⁴ Case of Kaing Guek Eav alias Duch, Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 8 June 2009, E73, paras. 29, 30 and 31.

⁵ *The Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14 A, Appeals Judgment, 9 July 2004, para. 193.

⁶ Case of Kaing Guek Eav alias Duch, Closing Order, 8 August 2008, D99, para. 31 ("Closing Order").

⁷ Closing Order.

criminal plan was established in August 1975 and continued until the fall of the Khmer Rouge regime.⁸ It was shared by the persons identified in paragraphs 20 to 22 of the Closing Order.

22. The Closing Order also highlights DUCH's central role in the operation of S-21⁹ and the fact that "DUCH knew the purpose that S-21 served" and that he "intended his actions to serve that purpose".¹⁰

23. The facts set out in the Closing Order also show that Duch may be liable for participating in all three forms of JCE.

24. With regard to the "basic" form of JCE, what is required is proof that the accused had the intent to commit the alleged crimes and that the other participants shared such intent.¹¹ All of Duch's actions as vice-president and, later, as head of S-21, are evidence of his criminal intent.

25. As for the "systematic" form of JCE, what is required is proof that the accused had personal knowledge of the system of mistreatment and that he had the intent to further that purpose.¹² Considering Duch's position at S-21, he could not but have had knowledge of its system of mistreatment, and by his actions, he furthered the common criminal purpose.

26. The fact that the crimes set out in the Closing Order were the natural and foreseeable outcome of the common criminal plan shared by DUCH is sufficient to prove his participation in an "extended" form of JCE.¹³

Respect for the rights of the defence

27. A change of legal characterisation must be such that it provides the Accused with the opportunity to present his defence in respect of the new characterization envisaged.

28. The case law of the European Court of Human Rights takes account of the fact that the judges or the prosecution have raised this question during the proceedings or that the new characterisation was discussed earlier in the proceedings.¹⁴

⁸ Closing Order, in particular, paras. 20, 22 and 25.

⁹ Closing Order, para. 131.

¹⁰ Closing Order.

¹¹ *Prosecutor v. Duško Tadić*, Appeals Judgment, IT-94-1, 15 July 1999, paras. 220 and 228

¹² *Prosecutor v. Krnojelac*, Appeals Judgment, IT-97-25-A, 17 September 2003, para 32.

¹³ *Tadić*, para. 204.

29. In the present case, the Accused was put on notice as to the Prosecution's intention to prosecute him for his participation in a JCE in the Introductory Submission and in the Final Submission. Also, the appeal of the Closing Order on the basis that it did not include JCE is further proof that such characterisation was possible. Further, the Defence was invited by the Pre-Trial Chamber to make its observations regarding the form of liability known as joint criminal enterprise. The Defence responded, stating that it had no observations to make.

30. Again, at the initial hearing, the Co-Prosecutors informed the Trial Chamber that they wanted the Chamber to apply JCE in Case No. 001 and that they intended to file a brief to that effect.¹⁵

31. On 8 June, the Co- Co-Prosecutors filed a brief requesting the application of the JCE theory in the present case. It is open to the Defence to reply to that brief.

32. It is therefore clear that the Accused has had adequate time and facilities for the preparation of his defence concerning the application of JCE, and it therefore cannot be argued that if the Chamber were to accept the application of JCE, the Accused would be denied the opportunity to present his defence in respect of the new characterisation.

B. Conditions for the application of the JCE theory in the present case

33. In order for the Chamber to accept a mode of liability, it is required that application thereof does not violate the *nullum crimen sine lege* principle and that it is provided for in the relevant legal provisions of the ECCC.

The characterisation of commission through participation in a JCE would not be a violation of the *nullum crimen sine lege* principle

34. Article 33 new of the *Law on the Establishment of the ECCC* incorporates article 15 of the *International Covenant on Civil and Political Rights*:

¹⁴ Case of *Pélissier and Sassi v. France*, ECHR, 25 March 1999, para. 55; *Mattei v. France*, Judgment of 19 December 2006, ECHR. In general, the European Court considers that Article 6(1) concerning the rights of the defence is violated where the new characterisation is raised and adopted only during the deliberations without the defence having been invited to make its submissions regarding the new characterisation.

¹⁵ Transcript of the Initial Hearing, 17 February 2009, E1.3.1, pp. 10 and 11.

The Extraordinary Chambers of the trial court shall ensure that the trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses.

35. As explained in the *Amicus Curiae* Briefs in regard to the Co-Prosecutors' appeal of the Closing Order,¹⁶ the JCE theory is taken to represent customary law.

36. Notions similar to JCE started to emerge in the aftermath of the Second World War.

37. The Nuremberg Charter, Control Council Law No. 10 and the International Military Tribunal for the Far East recognised the possibility of prosecuting persons who had participated in a scheme or conspiracy designed to execute a criminal plan.

38. A substantial amount of national case law incorporating these notions has since developed, for example in England, France and the United States.¹⁷

39. It was only after that these concepts – after they had been applied at the international level – were crystallised by the International Criminal Tribunal International for the former Yugoslavia under the appellation joint criminal enterprise.

40. It emerges from the foregoing that the concepts of joint enterprise in the commission of crimes or unlawful acts, active participation in a criminal design or conspiracy, were extensively used even before the commission of the crimes that led to the prosecution of the most senior leaders of Democratic Kampuchea.

41. Therefore, the decision by the Chamber to apply JCE as a mode of commission of the crimes falling within the jurisdiction of the Court would not violate the *nullum crimen sine lege* principle.

The notion of JCE is reflected in Article 29 of the ECCC Law

42. Article 29 of the ECCC Law provides: “Any Suspect who planned, instigated, ordered, aided and abetted, or committed” the crimes falling within the jurisdiction of the ECCC shall be

¹⁶ See, in particular, *Amicus Curiae* Brief of Professor Antonio Cassese, 27 October 2008, D99/3/24; see also Response to the *Amicus Curiae* Briefs, 17 November 2009, D99/3/33.

¹⁷ See *Amicus Curiae* Brief of Professor Antonio Cassese, 27 October 2008, D99/3/24; see also *La notion de participation à un plan concerté en droit français*, Crim, 23 janvier 1997: *Bull. Crim.* n° 32; D1997.147 Note Pradel, (Response to the *Amicus Curiae* Briefs, 17 November 2009, D99/3/33).

individually responsible for such crimes. The wording of article 29 of the ECCC Law echoes the wording of the Statutes of the ICTY, the ICTR and Special Court for Sierra Leone. Each of these courts has interpreted the notion of committing as including participation in a JCE.

43. Accordingly, the Chamber should apply JCE as a mode of commission in order to fully cover the Accused's responsibility.

IV. CONCLUSION

44. The Group 3 Civil Parties' Co-Lawyers join in the Co-Prosecutors' Request for the Application of the Joint Criminal Enterprise theory in the present case, and request the Trial Chamber to consider that DUCH participated in an S-21 joint criminal enterprise from August 1975 until January 1979.

Phnom Penh, 16 September 2009

For the Group 3 Civil Parties' Co-Lawyers:

[signed] _____
KIM Mengkhy

[signed] _____
Christine MARTINEAU