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BEFORE THE PRE-TRIAL CHAMBER

OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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APPEAL AGAINST THE ORDER ON THE APPLICATION AT THE ECCC OF THE FORM OF LIABILITY KNOWN AS JOINT CRIMINAL ENTERPRISE

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Before:

The Pre-Trial Chamber

Judge PRAK Kimsan
Judge NEY Thol
Judge HUOT Vuthy
Judge Katinka LAHUIS
Judge Rowan DOWNING

The Co-Prosecutors

CHEA Leang
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Civil Party Lawyers and Unrepresented Civil Parties

MAY IT PLEASE THE PRE-TRIAL CHAMBER

I. Introduction

1. On 23 July 2008, the Co-Lawyers for the Defence of Mr IENG Sary requested the Office of the Co-Investigating Judges to note that participation in a joint criminal enterprise as referred to in the Introductory Submission is not a form of liability applicable before the ECCC.[1]

2. More than one year after this request was made and just weeks before the scheduled conclusion of the judicial investigation, the Office of the Co-Investigating Judges finally decided that it was time to rule on this request, by Order dated 8 December 2009.[2]

3. In the Order, the Co-Investigating Judges noted, first, that they have "the (...) discretion to determine the form of the response" to this type of request. Specifying that they "will not consider requests for declaratory relief", they concluded that in this instance, it was necessary "to respond to the Request for the purpose of providing sufficient notice relating to a mode of liability which is not expressly articulated in the Law or the Agreement".[3]

4. The Co-Investigating Judges also noted that participation in a joint criminal enterprise (all three categories) "was applicable law at the time of the alleged facts under investigation"[4] and that "there is a basis under international law for applying [it]"[5] before the ECCC. Considering that international crimes "(...) constitute specific categories of crimes under autonomous legal *'régimes'*, distinct from domestic criminal law",[6] the Co-Investigating Judges held that this form of participation is a mode of liability only for international crimes, and that it is therefore not applicable if the crime committed is criminalised under domestic law.

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[1] Ieng Sary's Motion against the Application at the ECCC of the Form of Liability Known as "Joint Criminal Enterprise", *D97*, 28 July 2008.
[2] *Order on the Application at the ECCC of the Form Liability Known as Joint Criminal Enterprise*, *D97/13*, 8 December 2009 (the "Order").
[3] Order, para.10.
[4] Order, para. 18.
[5] Order, para. 21.
[6] Order, para. 22.

5. Contrary to what is claimed by the Co-Investigating Judges, this decision is far from being merely declaratory. The Order not only introduces a form of liability which did not exist at the time of the facts under investigation and is not applicable before the ECCC, but it also sets out a two-tiered criminal system, and, in fact, leads to an absurd situation in terms of prosecution, whereby "committing" varies in meaning depending on the nature of the crime committed.

6. In reality, this decision proves that joint criminal enterprise liability as a form of liability is not applicable before the ECCC. This form of liability is not within the *ratione personae* jurisdiction of the Chambers regardless of the crime under consideration, and this holds true at all stages of the proceedings.

7. The Co-Lawyers for the Defence file this appeal brief under Rule 74(3)(a) of the Internal Rules, and invite the Pre-Trial Chamber:

- TO SET ASIDE the Co-Investigating Judges' Order in its entirety;
- TO DECLARE that the ECCC has no jurisdiction to prosecute and bring the Charged Persons to trial on the basis of the joint criminal enterprise theory.

II. Applicable law

A- Right of the Charged Person to appeal

8. Pursuant to Rule 55(10) of the Internal Rules, "[a]t any time during an investigation, (...) a Charged Person (...) may request the Co-Investigating Judges to make such orders (...). If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal".

9. According to Rule 74(3)(a) of the Internal Rules, "[t]he Charged Person may appeal against the (...) orders of the Co-Investigating Judges confirming the jurisdiction of the ECCC".

B- Jurisdiction of the ECCC and persons liable to punishment

10. Under the ECCC Agreement and the ECCC Law, the Extraordinary Chambers have *ratione personae* jurisdiction "to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979".

11. Under Article 29 of the ECCC Law, only a Suspect "who planned, instigated, ordered, (...) aided and abetted, or (...) committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law"[7] shall be individually responsible for the crimes.

12. Articles 76 and 82 of the 1956 Cambodian Penal Code provide that "[e]very person of sound mind and capable of reasoning shall be criminally responsible for the offences committed by him or her, for the felonies or misdemeanours for which he or she is an accomplice" and that "[e]very person who wilfully participates, either directly or indirectly, in the commission of a felony or misdemeanour is liable to the penalties applicable to the principal perpetrator. Direct participation constitutes co-perpetration, indirect participation constitutes complicity."

13. Further, Article 83 of the same Code provides that "[i]ndirect participation or complicity shall be punishable only if it is committed by provocation, giving instructions, procuring means, or aiding or abetting".

C- Legal principles and interpretation of criminal law

14. Under Article 12 of the ECCC Agreement, "[t]he procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level".

15. Under Article 6 of the 1956 Penal Code, "[a] penal law shall not have retroactive effect.

[7] Article 29 of the ECCC Law.

No offence may be punished by a penalty that was not provided for by law prior to the commission of the offence. However, where the law abolishes an offence or reduces a penalty, the legal provisions shall be applicable to anyone under prosecution."

16. This is a more stringent rule than Article 15 of the International Covenant on Civil and Political Rights (ICCPR), which also sets out the principle of *nullum crimen, nullum poena, sine lege.*

D- The rights at issue

1) Every person's right to be informed of the charges against him or her

17. Article 35(a) new of the ECCC Law provides that "[i]n determining charges against the accused, the accused shall be equally entitled (...) to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them". Rule 21(1)(d) of the Internal Rules also states that "every person suspected or prosecuted (...) has the right to be informed of any charges brought against him/her".

18. Pursuant to these principles, Rule 53(1) of the Internal Rules provides that "[i]f the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons"; the absence of the type of offence(s) alleged and the relevant provisions of the law that defines and punishes the crimes shall render the submission void. (Rule 53(3) of the Internal Rules).

2) The right to not be investigated for crimes which are outside the jurisdiction of the ECCC

19. Article 5(3) of the ECCC Agreement provides that "the scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979".

3) The right to benefit from a dismissal

20. At the conclusion of the judicial investigation, the Co-Investigating Judges must issue a dismissal order if "there is not sufficient evidence against the Charged Person or Persons of the charges". (Rule 67 of the Internal Rules). Conversely, if the Co-Investigating Judges decide to issue an indictment sending the Charged Person for trial, they must set out "the nature of the criminal responsibility" in their Closing Order, otherwise the indictment shall be void. (Rule 67(2) of the Internal Rules)

III. Preliminary observations

(I) Mr KHIEU Samphan was unable to participate in the proceedings on the Order on the application of joint criminal enterprise

21. Just as all the other parties, Mr KHIEU Samphan was invited by the Co-Investigating Judges to submit his observations for the purposes of the proceedings on joint criminal enterprise. However, he was unable to do so.

22. By the time the Co-Investigating Judges' deadline for submitting observations expired, Mr KHIEU Samphan had not yet received the translation into French of the Defence filings. Moreover, he did not have access to all the relevant decisions on this issue. In fact, Mr KHIEU Samphan could not participate in the proceedings under the same conditions as the parties who chose English as their second working language, including the Office of the Co-Prosecutors.

23. The Co-Lawyers for Mr KHIEU Samphan complained about this to the Co-Investigating Judges, inviting them to "take any measure necessary to restore equity and to ensure equal treatment, to which Mr. KHIEU Samphan is entitled".[8] They received no response, and no steps were taken to resolve the situation.

24. In their decision of 8 December 2009, the Co-Investigating Judges again refused to examine the issue having regard to the applicable law, but simply referred to "their previous orders relating to translation and the decisions of the Pre-Trial Chamber [and] [found that] these

[8] Letter to the Office of the Co-Investigating Judges: Invitation to File Supplementary Observations Relating to the Issue of Joint Criminal Enterprise before 31 December 2008, *D97/3/5*, 30 December 2008.

previous orders and decisions address the arguments raised by the Defence".[9] Yet, it is precisely these decisions which underpin Mr KHIEU Samphan's complaint.

25. According to the Order on Translation Rights and Obligations, as affirmed by the Pre-Trial Chamber, Mr KHIEU Samphan "is entitled to receive translation into French (...) [of] all judicial decisions and orders [and] all filings by the Parties"[10] (emphasis added) in addition to the Khmer version thereof. These translations are deemed "necessary to ensure that a charged person is able to exercise his (...) rights during the investigation".[11]

26. The Co-Lawyers cannot but invite the Pre-Trial Chamber to note the violation of Mr KHIEU Samphan's rights.

(II) Mr KHIEU Samphan is yet to receive translations into French of all filings by the Parties

27. To date, the Co-Lawyers for the Defence have still not received the translation into French of the following filings by the Parties:

- 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 Co-lawyers for the Civil Parties on Joint Criminal Enterprise, *D97/3/4*, 30 December 2008, 10 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 United Nations General Assembly Resolutions as Argued/Omitted by the OCP, *D97/12*, 31 July 2009, 10 pages.

28. Once again, and despite the passage of time, the violation of Mr KHIEU Samphan's right to receive all filings by the Parties in French and Khmer is now conclusively established. And

[9] Order, para. 11.
[10] *Decision on Khieu Samphan's Appeal Against the Order on Translation Rights and Obligations of the Parties*, 20 February 2009, *A190/I/20*, paras. 37 and 38.
[11] *Ibid.*, para. 43.

since it is established that the Co-Investigating Judges and the Pre-Trial Chamber acknowledge that this translation is required in order to enable him to fully participate in the proceedings, it is an inescapable conclusion that Mr KHIEU Samphan cannot participate in the ongoing appeal under conditions which satisfy fair trial requirements.

IV. The appeal is admissible, and a public hearing is necessary to consider it

A- The appeal is admissible

(1) Mr IENG Sary's motion should be considered as an objection to jurisdiction

29. In their decision, the Co-Investigating Judges consider "that the motion of IENG Sary was submitted erroneously under Internal Rule 53(1) (...) decide[d] *proprio motu* to consider the motion under the correct provision of the Internal Rules, namely Rule 55(10)". In reality, these two rules are complementary and facilitate a better understanding of the exact nature of motion filed by the Mr IENG Sary's Defence.

30. Under Rule 53(1), if the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed by either one or more named persons or by unknown persons, they have the obligation to open an investigation by issuing an Introductory Submission. They also have the obligation (otherwise the Indictment would be void) to set out the legal characterisation of the facts which they consider punishable.

31. The fact that the Office of the Co-Prosecutors decides to submit an Introductory Submission against named persons – as is the case in this instance – means that it considers that the acts of such persons constitute participation in the crimes within the jurisdiction of the ECCC. It is therefore important to know exactly what the applicable law means by participation in a crime, so as to determine, if necessary, whether (or not) the charges specified in the Introductory Submission are within the jurisdiction of the Court on whose behalf the Office of the Co-Prosecutors is supposed to act.

32. In requesting the Co-Investigating Judges to "declare that JCE liability is not a form of

liability applicable before the ECCC",[12] the Co-Lawyers for Mr IENG Sary therefore requested the Co-Investigating Judges to "make an order" that the latter consider necessary to ascertaining the truth under Rule 55(10), but, in particular, they invited the Co-Investigating Judges to confirm the jurisdiction of the ECCC over the Charged Persons.

33. In that sense, Mr IENG Sary's motion should be considered as a preliminary objection to the *rationae personae* jurisdiction at the judicial investigation stage against the Office of the Co-Investigating Judges.

(2) The Co-Investigating Judges' order is "an order confirming the jurisdiction of the ECCC" within the meaning of Rule 74(3)(a) of the Internal Rules

34. Contrary to what is claimed by the Co-Investigating Judges, the Order on the application of joint criminal enterprise is not "declaratory relief (...) for the purpose of providing sufficient notice relating to a mode of liability which is not expressly articulated". It is clearly an order confirming the jurisdiction of the ECCC within the meaning of Rule 74(3)(a) of the Internal Rules.

35. Under the ECCC system, as under all inquisitorial systems, the Co-Investigating Judges are seised *in rem* only of the facts specified in the Introductory Submission. However, pursuant to Article 5(3) of the ECCC Agreement, they are also bound by the general jurisdiction of the ECCC, which determines the "scope of the investigation". Indeed, whereas "a judicial investigation is compulsory for crimes within the jurisdiction of the ECCC",[13] it is not compulsory for crimes (and forms of liability) outside the jurisdiction of the ECCC.

36. In concrete terms, where the form of liability resulting from participation in a joint criminal enterprise is not applicable, the Co-Investigating Judges do not have to seek evidence that may establish a "joint criminal enterprise" (which has often been said to constitute in fact a crime in its own right) or participation (or non-participation) therein. On the other hand, if joint criminal enterprise is applicable, the Co-Investigating Judges have an obligation to seek inculpatory and exculpatory evidence in respect of this form of participation in the alleged

[12] Ieng Sary Motion against the Application at the ECCC of the Form of Liability Known as "Joint Criminal Enterprise", *D97*, 28 July 2008.
[13] Article 55(1) of the Internal Rules.

crimes.

37. This reasoning was affirmed by the Co-Investigating Judges themselves in a recent decision, where, after recalling that the judicial investigation is limited only to those facts which have been set out in the Introductory Submission, in fact, they added that in this circumstance, certain specific investigations must be undertaken depending on the possible characterizations and forms of liability.

38. In this instance, the Co-Investigating Judges considered that investigations were necessary to determine whether the Krom could be considered as a group for the purpose of establishing the constitutive elements of the crime of genocide and the participation of the Charged Persons therein.[14] Legal characterisation as such is not extraneous to the judicial investigation; rather, it enables the Co-Investigating Judges to determine and set the scope of the investigation, freely and within the contours of their own jurisdiction.

39. It must be recalled that, pursuant to Rule 67(2) of the Internal Rules, at the conclusion of the judicial investigation, the Indictment shall be void for procedural defect "unless it sets out (...) their [the material facts] legal characterization by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility". If the acts in question do not amount to "crimes within the jurisdiction of the ECCC", the Co-Investigating Judges must issue a Dismissal Order.

40. By deciding that joint criminal enterprise is a form of liability applicable before the ECCC, the Co-Investigating Judges unduly expanded the scope of the judicial investigation to include this form of liability during the entire period of the alleged facts under investigation. At the conclusion of the judicial investigation, they take it upon themselves to indict the Charged Persons based thereupon, thereby denying them the possibility of benefitting from a dismissal order.

[14] Combined Order on Co-Prosecutors' Two Requests for Investigative Action Regarding Khmer Krom and Mass Executions in Bakan District (Pursat) and the Civil Parties Request for Supplementary Investigations Regarding Genocide of the Khmer Krom and the Vietnamese, 13 January 2010, *D250/3/3*, para. 11. Needless to say, the Co-Lawyers for the Defence have not received its French translation.

41. In a comparable circumstance, the Appeals Chamber held that at the trial stage "each accused [has the] right not to be tried on, and not to have to defend against, an allegation that falls outside the Tribunal's jurisdiction".[15]

B- **A public hearing is necessary to consider the appeal**

42. Pursuant to Rule 77(6) "[t]he Chamber may, at the request of (...) [a] party, decide that all or part of a hearing be held in public, in particular where the case may be brought to an end by its decision, including appeals or applications concerning jurisdiction or bars to jurisdiction, if the Chamber considers that it is in the interests of justice".

43. As stated earlier, a decision on the applicability of a form of liability is not "declaratory relief" and indeed constitutes a decision confirming the very jurisdiction of the Court. Such a decision has real consequences in terms of the Charged Persons' right to be notified of the charges and, as the case may be, to benefit from a dismissal order. Moreover, there is no impediment to holding a public hearing.

44. Accordingly, the Co-Lawyers for the Defence invite the President of the Pre-Trial Chamber to set a date as soon as possible for a public adversarial hearing involving all those parties concerned by the Order under appeal.

V. Grounds of appeal

A- The Co-Investigating Judges' Order was issued out of time

1) The Co-Investigating Judges failed to make their order "as soon as possible"

45. Under rule 55(10) of the Internal Rules, which is applicable in this instance, where a Charged Person requests the Co-Investigating Judges to make an order and if the Co-Investigating Judges do not agree with the request, they must issue their order "as soon as possible". Contrary to what is claimed by the Co-Investigating Judges, it was not up to their "discretion" to respond to Mr IENG Sary's motion; rather, they were under the obligation to render a decision as soon as possible.

[15] *Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR72.5&6, *Decision on Jurisdictional Appeals: Joint Criminal Enterprise*, Appeals Chamber, 12 April 2006, para. 23.

46. The present matter has been underway since 28 July 2008, or for exactly one year, 5 months and 21 days. It started with the filing of the original request by the Co-Lawyers for the Defence of Mr IENG Sary.[16] It continued with the filing of the observations by the parties on 31 December 2008. That means that by 31 December 2008, the Co-Investigating Judges had all the legal information they needed to issue their order. Yet, they did not issue their order until December 2009.

47. There is no cogent reason why the deliberations took one year and a half, or why the Co-Investigating Judges waited till the eleventh hour to issue an order on this matter. Moreover, no explanation has been given for the delay.

48. In their letter dated 3 July 2009, the Co-Lawyers for the Defence of Mr IENG Sary, Mr NUON Chea and Mr KHIEU Samphan invited the Co-Investigating Judges to render a decision as soon as possible. They observed that the delay in the deliberations could lead to a decision purely for reasons of convenience. The Co-Lawyers indicated that:

> "At the conclusion of the investigation, the Co-Investigating Judges must examine the acts (...) and, in accordance with the applicable law, decide whether or not these constitute crimes within the jurisdiction of the ECCC. [And that] however, it is impermissible for the Co-Investigating Judges to determine the applicable law in view of the elements of proof gathered during the judicial investigation, so as to make the acts in question fall under the jurisdiction of the ECCC! (...) [and that] to decide this matter at the closure of the judicial investigation would amount to failure to characterise the facts based on the law, but instead deciding the law based on the facts. This (...) would be entirely unacceptable".[17]

49. On 28 July 2009, the Co-Investigating Judges simply responded that they were working on the matter and that they were due to render a decision as soon as possible "without awaiting the end of the investigation".[18] The Co-Investigating Judges' decision came five months thereafter, on 8 December 2009, whereas the conclusion of the investigation was expected at the end of that same month.

50. This delay violates the principle that justice not only has to be done, but must also be

[16] Ieng Sary's Motion against the Application at the ECCC of the Form of Liability Known as "Joint Criminal Enterprise", *D97*, 28 July 2008.
[17] Joint letter - Decision on Application of Joint Criminal Enterprise - Rule 55(10), *D97/10*, 3 July 2009.
[18] Co-Investigating Judges' Response - Decision on the Application of the Form of Responsibility Known by the Name of Joint Criminal Enterprise, *D97/11*, 28 July 2009.

seen to be done, which helps the Charged Person not have doubts about his chances of having a fair trial.

51. This decision comes at time when the impartiality of the international Co-Investigating Judge has been called into question and when the Defence of Mr IENG Thirith has moved for annulment of the judicial investigation in its entirety for that reason. Therefore, there is nothing to assure Mr KHIEU Samphan and his Defence that the Order on joint criminal enterprise – an extended form of liability which borders on collective liability, the Prosecutors' "magic bullet" – is based on the law or the ease that it offers to indict the Charged Persons and send them for trial.

2) The Co-Investigating Judges failed to fulfil their obligation to properly inform Mr KHIEU Samphan of the charges brought against him

52. The Co-Investigating Judges held that "the issue forming the basis of the (...) Request raises the matter of providing due notice to the Defence on modes of liability".[19] However, without citing any authority in support of their assertion, they also held that due notice "may be furnished as deemed appropriate throughout the investigation and at the Closing Order".[20]

53. According to a decision of the Pre-Trial Chamber, "delay in producing a judgement would be capable of depriving an individual of his right to the protection of the law in circumstances where "the parties were unable to obtain from the decision the benefit which they should".[21]

54. That is the case in this instance, as under the system in force before the ECCC, notice of the charges is furnished to the Charged Person in the Introductory Submission, according to Rule 53(1) of the Internal Rules. Such legal characterisation must be in keeping with the applicable law so as to ensure that the Charged Person receive due notice. Therefore, the Co-Investigating Judges were under the obligation to specify the applicable law as soon as possible.

55. The Introductory Submission included the notion of joint criminal enterprise, but the

[19] Order, para. 10.
[20] Order, para. 10.
[21] *Decision on Ieng Sary's Appeal Regarding the Appointment of a Psychiatric Expert*, citing *Boodhoo and others v. Attorney General of Trinidad and Tobago*, [2004], UKPC17, para. 12, 21 October 2008, *A189/I/8.*

Defence has challenged its applicability before the ECCC. The charges therefore remained in limbo for the entire period between the challenge of this form of liability by the Defence and the decision on its status before the ECCC, i.e. the entire duration of the judicial investigation; the Charged Person was thus denied his right to receive due notice of the charges against him.

B- **Joint criminal enterprise is not applicable before the ECCC**

56. "Joint criminal enterprise" as a form of liability is not applicable before the ECCC, and cannot serve as a basis for indicting the Charged Persons. The Co-Lawyers for the Defence do not wish to rehash the submissions of fellow defence lawyers to this effect; they endorse those submissions and invite the judges of the Pre-Trial Chamber to refer to them in deciding the present appeal.

57. However, they wish to point out at this juncture that the Co-Investigating Judges' conclusion is without legal basis. It is a decision of convenience designed to satisfy obvious penal objectives, and it constitutes a violation pure and simple of the most basic criminal law principles which are established and recognised under both Cambodian and international law.

58. To decide that joint criminal enterprise as a form of liability may be a basis for bringing charges for offences which occurred between 1975 and 1979 is to overlook the legality principle and the associated principles of strict interpretation and non-retroactivity of the criminal law; it is to forget that criminal responsibility can only be individual and that when in doubt, the more favourable interpretation must be applied, according to the principle *in dubio pro reo.*

59. The application of this ambiguous, indirect form of liability is contrary both to the spirit and the letter of the ECCC Law and the ECCC Agreement; it also amounts to making the jurisprudence of the *ad hoc* Tribunals the standard for determining the hierarchy of norms in the Cambodian domestic legal system, a prospect for which there is no justification.

C- The Co-Investigating Judges' Order institutes a two-tiered criminal justice system

1) There is no reference to an autonomous legal regime for international crimes in the 1956 Penal Code

60. In their decision, the Co-Investigating Judges held 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 are characterized by a coherent set of rules of procedure and substance".[22]

61. In support of their reasoning, the Co-Investigating Judges quote from a book on French general criminal law.[23] According to the relevant paragraphs of the book, "[TRANSLATION] *offences which are governed by a coherent set of rules of procedure and substance, which, owing to their number and importance, form an autonomous legal regime, distinct from the ordinary regime"* should be considered as *"offences falling into a specific category"*;[24] such offences include crimes against humanity.

62. To begin with, it must be noted that the notion of "autonomous legal regime" as described in the book is a legal theory based on the applicable law at the time of publication of the book, i.e. September 2002, and certainly not based on French law, from which the Cambodian Penal Code, which was applicable in the period 1975 to 1979, was inspired.

63. Also, and contrary to what the Co-Investigating Judges seem to be suggesting, it is because, with respect to such crimes, the applicable French domestic criminal law provides for rules which represent a departure from ordinary law that academic writings consider them as a special category of offences. Definitely not the other way around. This regime may very well be inspired from international law; however, the reason for its application is simple: it is because all rules which derogate from ordinary rules of law are articulated in French legislation and form specific provisions of the applicable penal code; indeed, they are referenced by the authors.

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[22] Order, para.22.
[23] DESPORTES (F.), LE GUNEHEC (F.), *Droit pénal général*, ed. Economica, Paris 2002.
[24] DESPORTES (F.), LE GUNEHEC (F.), *Droit pénal général*, ed. Economica, Paris 2002, para. 174.

64. Finally, it must be noted that the autonomous legal regime for crimes against humanity (only) under French law in 2002 contains no specific rules on individual responsibility. The authors indicate, *inter alia*, that "[TRANSLATION] *it is certain that the criminilisation of complicity in crimes against humanity has no specificity in legislation or in the cases*"[25] and add that crimes against humanity are governed by ordinary rules of procedure and jurisdiction.[26]

65. However, comparison with French law could be instructive:

> [TRANSLATION] *Before the new Penal Code came into force, none of the provisions of our law recognised such crimes*[27] *as autonomous offences. (...). In the absence of any such legislation, it was the Court of Cassation's audacious reasoning which made crimes against humanity prosecutable before French courts. (...). Contrary to what some had argued, the definition of crimes against humanity thus developed by the Court of Cassation was never intended to be applied widely and across time (...). It could therefore not be applied, for example, to offences committed during the Indochina war (...). The Penal Code reform resulted in major changes to the law. (...). As the new provisions are more severe than the previous ones, they are only applicable to crimes committed after 1 March 1994, the date the new Penal Code came into force; the rules developed earlier by the Court of Cassation remain applicable to crimes committed during World War II and to such crimes only.*[28]

This is therefore a far cry from an autonomous legal regime for international crimes.

66. Finally, it must be noted that under Article 29 of the ECCC Law – "a Suspect who planned, instigated, ordered, aided and abetted or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime" – does not distinguish the applicable forms of liability depending on the crimes under consideration. However, Article 4 of the Law on genocide makes specific reference to a form of participation which is not contemplated for any of the other crimes (conspiracy).

2) Article 29 should be interpreted consistently and in favour of the Charged Person

67. The Co-Investigating Judges consider that "pursuant to the principles of interpretation of

[25] *Ibid.*, para. 183.
[26] *Ibid.*, para. 184.
[27] In this instance, the authors are referring to crimes against humanity.
[28] DESPORTES (F.), LE GUNEHEC (F.), *Droit pénal général*, ed. Economica, Paris 2002, paras. 177 and 178.

autonomous legal regimes in line with French law, the modes of liability for international crimes can only be applied to international crimes".[29]

68. In reality, there is no autonomous legal regime for international crimes any more than there is a principle of interpretation specifically meant for these regimes. So it is not a question of two opposing legal regimes, but rather two contradictory legal analyses for defining the same term: in that, in one case "committing" refers to the notion of co-perpetration, while in the other, it refers to joint criminal enterprise.

69. Clearly, "only one of the two theories can prevail in the same legal system".[30] Knowing that the Co-Investigating Judges have recognised that joint criminal enterprise is not applicable to domestic crimes, the possibility of considering that it could be the only theory to prevail before the ECCC should be rejected.

70. Moreover, 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; indeed, this is why the Pre-Trial Chamber has held that the ECCC must be regarded as an international tribunal. Under international law, the rule with regard to interpretation is that judges must scrupulously abide by the principle *in dubio pro* reo, which stipulates that when in doubt as to the interpretation of a law, it must be interpreted in favour of the accused.

71. This international law principle must be applied to the interpretation of the legal texts which govern the determination of the forms of liability applicable to Charged Persons before the ECCC. In this case, the joint criminal enterprise doctrine is more severe than co-perpetration, hence the reason why the latter interpretation should prevail.

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[29] *Order on the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, D97/13*, 8 December 2009, para. 22.
[30] *Sylvestre Gacumbitsi v. Prosecutor,* 7 July 2006, Dissenting Opinion of Judge Shahabuddeen, para. 50.

IV- FOR THESE REASONS

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

- TO NOTE the violations of the rights of the Defence of Mr KHIEU Samphan over the course of the entire proceedings on joint criminal enterprise;
- TO NOTE that the Order was issued out of time in violation of fair trial rules;
- TO SET ASIDE the Order in its entirety;
- TO DECLARE that the ECCC has no jurisdiction to prosecute and bring the Charged Persons to trial on the basis of the joint criminal enterprise theory, and TO ORDER that the charges relating thereto be struck from the Introductory Submission.

WITHOUT PREJUDICE,

AND JUSTICE SHALL BE DONE

	SA Sovan Jacques VERGÈS	Phnom Penh Paris	
Date	Name	Place	Signature