

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

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Combined Response by *Avocats Sans Frontières* France Co-Lawyers for the Civil Parties to the Appeals by IENG Sary, IENG Thirith and NUON Chea against Co-Investigating Judges' Closing Order

Filed by:

The Co-Lawyers for the Civil Parties :

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
 Laure DESFORGES
 Ferdinand DJAMMEN NZEPA
 Françoise GAUTRY

Before:

The Pre-Trial Chamber:

Judge PRAK Kimsan, President
 Judge Rowan DOWNING
 Judge NEY Thol
 Judge Catherine MARCHI-UHEL
 Judge HUOT Vuthy

Distribution to:

Office of the Co-Prosecutors:

CHEA Leang
 Andrew CAYLEY
 YET Chakriya
 William SMITH

Lawyers for the Civil Parties:

NY Chandy
LOR Chunthy
HONG Kim Suon
SIN Soworn
CHET Vanly
PICH Ang
Silke STUDZINSKY
Emmanuel ALTIT
Emmanuel JACOMY
Madhev MOHAN
Lyma Thuy NGUYEN
Olivier BAHOUgne
Patrick BAUDOIN
Marie GUIRAUD
Pascal AUBOIN
Julien RIVET

Lawyers for the Defence:

SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G.KARNAVAS
PHAT Pouy Seang
Diana ELLIS
SA Sovan
Jacques VERGÈS
Philippe GRÉCIANO

I-FACTS AND PROCEDURE

- 1- On 16 September 2010, the Co-Investigating Judges issued a Closing Order indicting IENG Sary, NUON Chea and IENG Thirith.¹
- 2- On 18 October 2010, the Co-Lawyers for Ms IENG Thirith filed an appeal against the Closing Order.²
- 3- On 18 October 2010, the Co-Lawyers for Mr NUON Chea also filed an appeal against the Closing Order.³
- 4- On 25 October 2010, Mr IENG Sary filed his Notice of Appeal.⁴
- 5- In a decision dated 28 October 2010, the Pre-Trial Chamber permitted the civil parties to file submissions concerning the defence appeals within days five (5) from the filing of the Co-Prosecutors' response briefs.⁵
- 6- The Co-Lawyers for the Group 3 Civil Parties therefore herewith file their response pursuant to the above-mentioned decision.
- 7- The Co-Lawyers for the Group 3 Civil Parties will respond to each of the points raised by the Defence.

II- ARGUMENT

A- GROUND 1: VIOLATION OF THE PRINCIPLE OF LEGALITY

- 8- Enunciated in Article 33⁶ of the ECCC Law, which refers to the provisions of Article 15⁷ of the International Covenant on Civil and Political Rights, the principle of legality applies to both crimes and to all the forms of liability.
- 9- Moreover, as specified by international case-law, compliance with the principle of legality requires Tribunals to ensure that the alleged acts were sufficiently foreseeable to the accused under both national law and international at the time they were committed – in this instance, between 1975 and 1979.

¹ Closing Order, 16 September 2010.

² IENG Thirith Appeal, 18 October 2010.

³ NUON Chea Appeal, 18 October 2010.

⁴ IENG Sary Appeal, 25 October 2010.

⁵ Pre-Trial Chamber Decision of 28 October 2010.

⁶ Article 33 (new) of the ECCC Law.

⁷ International Covenant on Civil and Political Rights.

- 10- Nationally, the 1956 Penal Code was the governing national law instrument during 1975-1979 period. Internationally, Cambodia relied on customary international law, the general principles of law and ratified conventions.
- 11- As for direct applicability of international law, Articles 1, 2 and 29⁸ new of the ECCC Law incorporates into Cambodian law violations of international law coming within the jurisdiction of the ECCC, such as Genocide, Crimes against Humanity, Grave Breaches of the Geneva Conventions of 1949, as well as the applicable modes of responsibility.⁹
- 12- Moreover, it must be noted that Cambodia was bound by the international law provisions prohibiting the crimes of genocide, crimes against humanity and grave breaches of the Geneva Conventions of 1949.

⁸ ECCC Law.

⁹ D97/14/15 NUON Chea *et al* ECCC (2010) PTC, Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), para. 48.

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GROUND 1, PART I: CRIME OF GENOCIDE

13- Article 1 of the Genocide Convention¹⁰ provides: “*The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish*”.

Article 15 of the same Convention provides:

“The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3”.

14- Cambodia ratified the above Convention in 1951, and the fact that no national law provisions criminalized genocide does not exempt persons who committed the crimes of genocide from prosecution.

15- Indeed, Article 27 of the 23 May 1969 Vienna Convention on the Law of Treaties¹¹ provides: “*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. (...)*”.

16- Furthermore, whether or not genocide is applicable through the ratification of the Convention or through custom, a penalty is prescribed pursuant to the Convention¹² in Article 4 of the ECCC Law, which refers to the provisions of Rule 98¹³ of the Internal Rules.

17- Finally, the Defence claims that the crime of genocide was not accessible to the accused, because Cambodia had not enacted any laws penalizing it.

18- However, accessibility derives the forms of liability in the ECCC Law having a customary status which were partly incorporated in the 1956 Penal Code of Cambodia, and in particular, from the notion of planning and from the case-law of the International Tribunals established prior to the ECCC. These forms of participation have all been reaffirmed on numerous occasions and are enumerated in Article 29 paragraph 1 (new) of the ECCC Law.

19- Therefore, the submission that customary law is not applicable at the ECCC is untenable, to the extent that that owing to the virtually universal ratification of the conventions, the

¹⁰ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

¹¹ Vienna Convention of 23 May 1969.

¹² ECCC Law.

¹³ Internal Rules, Rev. 6.

universality principle applies to serious crimes such as genocide, crimes against humanity, torture and grave breaches of customary international humanitarian law.¹⁴

• **GROUND 1, PART II: CRIMES AGAINST HUMANITY**

20- Article 5 of the ECCC Law, which gives the Trial Chamber jurisdiction over crimes against humanity,¹⁵ provides:

“The Extraordinary Chambers shall have the power to bring to try all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.

Crimes against humanity, which have no statutes of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

- *murder;*
- *extermination;*
- *enslavement;*
- *deportation;*
- *imprisonment;*
- *torture;*
- *rape;*
- *persecutions on political, racial or religious grounds*

21- During the April 1975-January 1979 period, Cambodia had not ratified any treaties on the prevention of crime against humanity; therefore, Cambodian law had no provisions on this offence during that period. The issue thus arises whether crimes against humanity as set out in Article 5 above were under the ambit of customary international law during that period.

22- Crime against humanity was established as a legal concept by means of Article 6 of the Statute of the Nuremberg Tribunal,¹⁶ annexed to the London Agreement of 8 August 1948,¹⁷ which gave the Tribunal jurisdiction over crimes against humanity.

23- Jurisdiction over crimes against humanity is also set out in Article 5(c) of the International Military Tribunal for the Far East (Tokyo War Crimes Tribunal) of 19 January 1946¹⁸ in Allied Control Council Law No. 10.¹⁹

¹⁴ A. Cassese, “Is the Bell Tolling for Universality?”, footnote 2, p. 416.

¹⁵ See Article 22 of the ECCC Law.

¹⁶ Article 6 of the Nuremberg Statute.

¹⁷ See *Duch* Judgement, para 285.

¹⁸ *Ibid.*, para. 286.

¹⁹ *Ibid.*, para. 286.

- 24- More recently, jurisdiction over crimes against humanity was provided for in the Statutes of the ICTY, the ICTR, the Special Court for Sierra Leone and the ICC.
- 25- Since the Nuremberg Statute, the customary status of crimes against humanity under customary international law has not been seriously questioned.
- 26- Therefore, the principle of legality does not bar the Trial Chamber from relying on unwritten custom or from determining through a process of interpretation and clarification as to the elements of a particular crime.
- 27- The formulation of crimes against humanity adopted in Article 5 of the ECCC Law comports with that existing under customary international law during the 1975 to 1979 period.
- 28- It was therefore foreseeable during that period that the Accused could be held criminally liable for those crimes. Moreover, the Accused were aware of the laws relating thereto, since those laws formed part of customary international law.²⁰

• **GROUND, PART III: GRAVE BREACHES OF THE GENEVA CONVENTIONS**

- 29- On 8 September 1958, Cambodia ratified four Conventions dated 12 August 1949, all of which contain a “grave breaches” provision.²¹
- 30- The Trial Chamber has subject-matter jurisdiction over grave breaches of the Geneva Conventions of 1949 pursuant to Article 6. Article 6 provides:

“The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:

- *wilful killing;*
- *torture or inhumane treatment;*
- *wilfully causing great suffering or serious injury to body or health;*
- *destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;*
- *compelling a prisoner of war or a civilian to serve in the forces of a hostile power;*
- *wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;*
- *unlawful deportation or transfer or unlawful confinement of a civilian;*
- *taking civilians as hostages”.*²²

²⁰ *Duch* Judgement, para. 294.

²¹ *Ibid.*, para 403.

- 31- At the time of the facts alleged against the Accused, Cambodia was already bound by the grave breaches provisions of the Geneva Conventions, which specifically prohibit and criminalize the offences enumerated in Article 6 of the ECCC Law.
- 32- It must also be recalled that the principle of legality is satisfied where a State is already treaty-bound by a specific convention.²³
- 33- In that sense, Article 26 of the 23 May 1969 Vienna on the Law of Treaties provides that: “*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*”.²⁴
- 34- Furthermore, the Geneva Conventions, and particularly their grave breaches provisions, codified core principles of customary international law.²⁵
- 35- It was therefore foreseeable at the relevant time that the Accused could be held criminally liable for all the acts prohibited by the Conventions, and the laws concerning such liability were also accessible to all.
- 36- Finally, in light of the atrocious nature of the grave breaches of the Geneva Conventions, the Accused cannot claim that they were unaware that those acts were criminal.

B- GROUND 2: STATUTE OF LIMITATIONS OF DOMESTIC CRIMES

- 37- The Defence contends that the Accused cannot be prosecuted for domestic crimes, because of the expiry of the statute of limitations set out in the 1956 Penal Code, which was in force at the relevant time. The Defence also attempts to rely on the Pre-Trial Chamber decision of 26 July 2010 on the preliminary objection concerning the statute of limitations of domestic crimes.
- 38- The 1956 Penal Code of Cambodia²⁶ set forth a statute of limitations of 10 years for domestic crimes. Moreover, it is widely recognised in light of the events during the 1975 to 1979²⁷ and 1979 to 1993 periods, there was no functioning judicial system in Cambodia; therefore, the alleged crimes could not be prosecuted.

²² Article 6 of the ECCC Law.

²³ *Duch* Judgement, para, 404.

²⁴ Article 26 of the Vienna Convention on the Law of Treaties.

²⁵ See *Duch* Judgement, para. 405.

²⁶ Article 109 of the 1956 Penal Code of Cambodia.

²⁷ *Duch* Judgement, 26 July 2010

- 39- It can therefore be presumed that the statute of limitations was interrupted for that period (1979-1993). Furthermore, Article 3 (new) of the ECCC law extended the statute of limitations, first in 2001, and again in 2004.
- 40- The extension of the statute of limitations set forth in Article 3 (new) is not inconsistent with the criminal law principle of non-retroactivity; it is simply a matter of rules of procedure and does not run counter to the provisions of Article 14 of the International Covenant on Civil and Political Rights.
- 41- Additionally, the absence of a majority decision, as set forth in Article 14 of the ECCC Law,²⁸ on the preliminary motion on the expiry of the statute of limitation in the Judgement of 26 July 2010 in Case 001 does not bar the Co-Investigating Judges, in Case 002, from indicting the Accused for the domestic crimes they committed, and the fact that the Co-Prosecutors did not appeal the decision does not exempt the Accused from prosecution.
- 42- Furthermore, in light of the 5 December 2008 Decision on the Co-Prosecutors' Appeal (D99/3/42),²⁹ in which the Pre-Trial Chamber decided to amend the Co-Investigating Judges' Closing Order, the Accused ought to be indicted for the domestic crimes in order to avert the risk of acquittal at trial of all the other charges.³⁰

C – GROUND 3: JOINT CRIMINAL ENTERPRISE

- 43- The Co-Investigating Judges have recalled that under criminal law, joint criminal enterprise is a form of individual responsibility through commission.³¹ For joint criminal enterprise to be applied, on **three** conditions must be fulfilled:
- 1) it must be explicitly or implicitly set forth in the ECCC instruments,
 - 2) it must be acknowledged as customary international law at the relevant time,
 - 3) the law providing for such liability must be sufficiently accessible to the accused at the relevant time,
 - 4) the liability in question must be sufficiently foreseeable for the accused.
- 44- Article 29 of the ECCC Law sets forth the forms of liability pursuant to which accused persons may be held individually criminally responsible: “[a]ny Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes (...) shall be individually responsible for the crime”. Joint criminal enterprise as a form of liability was also set forth in criminal law during the post-World War II trials. These included the Nuremberg Military Tribunal trials of the major war criminals³² (where it was stated that individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches).

²⁸ Article 14 of the ECCC Law.

²⁹ Decision on the Co-Prosecutors' Appeal against Closing Order Indicting Duch.

³⁰ Co-Prosecutors' Appeal of the Closing Order Indicting Duch (D99/3/3).

³¹ Closing Order, 16 September 2010, Case 002.

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- 45- The Nuremberg Charter, Control Council Law No. 10 and the International Military Tribunal for the Far East also provided for prosecution of anyone who participated in a scheme or a plan with a view to committing a crime.
- 46- A large body of case-law incorporating these notions developed thereafter, notably in France, England and the United States.³³
- 47- Subsequent to that, having been applied at the international level, those notions were refined by the International Tribunal for the former Yugoslavia.
- 48- The foregoing reveals that the concepts of joint criminal enterprise in the commission of crimes or unlawful acts, through active participation in a scheme or plan, were largely used prior to the commission of the crimes with which the senior leaders of the Democratic Kampuchea regime are charged.
- 49- Finally, the particular forms of liability mentioned in Article 29 (new) were set forth in the 1956 Penal Code of Cambodia, with the exception of participation through planning and the theory of joint criminal enterprise.³⁴ The notion of planning is nonetheless included in the provisions of the 1956 Penal Code, and it was therefore foreseeable that acts of planning could constitute crimes.

D- GROUND 4: COMMAND RESPONSIBILITY

- 50- The Defence contends that command responsibility is not part of customary international law.
- 51- Perpetrators of grave³⁵ breaches of international humanitarian law during an internal armed conflict, including that in Common Article 3 of the Four Geneva Conventions of 1949, are criminally liable under customary international law.
- 52- Article 3 quoted above, which has long been recognised as forming part of customary law,³⁶ prohibits the commission of certain acts during an internal armed conflict. Moreover, the command responsibility principle was already set out in Article 1 of Convention (IV) respecting the Laws and Customs of War on Land and its annex:

³² Nuremberg, 14 November 1945 to 1 October 1946, official records, XLII volumes, Volume I, pp. 232-243.

³³ Amicus Curiae Brief of Professor Antonio Cassese, 27 October 2008, D99/3/24.

³⁴ See *Duch* Judgement, para 474.

³⁵ *Tadic*, IT-94-I-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 134.

³⁶ See *Corfou Channel Case*, Judgement, ICJ Reports 1949, p.22, and *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, pp.112 and 114.

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Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, which states: “*The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:*

1) be commanded by a person responsible for his subordinates [...].

Likewise, Article 43(1) of the 1977 Additional Protocol I Additional to the Geneva Conventions provided that: “[*t*]he armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party”.

53- This also applies to internal armed conflicts. The notion of command responsibility was an integral part of the prohibition of certain acts during internal armed conflicts set forth in Common Article 3 of the Geneva Conventions.

54- All the above examples show that command responsibility is part of customary international law.

55- The Defence also claims that command responsibility only applies to war crimes.

56- For an accused to be held responsible for the criminal conduct of his or her subordinates pursuant to superior responsibility, three elements must be fulfilled: (a) there must have been a superior-subordinate relationship between the accused and the person who committed the crime; (b) the accused must have known, or had reason to know, that the crime was about to be or had been committed; and (c) the accused must have failed to take the necessary and reasonable measures to prevent the crime or to punish the perpetrator.³⁷

57- The elements for determining whether an accused had effective command responsibility are, *inter alia*, the nature of the functions of the accused, including his or her position within the military or political structure, the procedure for his or her appointment and the actual tasks he or she performed.³⁸ This is therefore applies to a superior who had effective control over the perpetrator of the crimes in question.

58- The form of individual responsibility set forth in Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda³⁹ and Article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia applies to military personnel and civilian officials alike. This is also the case in the Statute of the International Criminal

³⁷ See *Duch* Judgement, para 538.

³⁸ *Prosecutor v. Sefer Halilovic*, IT-01-48-A, Judgement, ICTY Appeals Chamber, 16 October 2007, para. 66.

³⁹ Article 6(3) of the ICTR Statute, and Article 7(3) of the ICTY Statute.

Court, which states that a superior shall be criminally responsible for crimes within the Court committed by subordinates under his or her effective authority and control.⁴⁰

59- For example, in the Tokyo trial, some civilian officials were convicted of war crimes according to the command responsibility doctrine.⁴¹ It is therefore incorrect to assert that command responsibility only applies to war crimes.

E- GROUND 5: VIOLATION OF THE FAIR TRIAL RULES

60- The Defence also alleges violation of the fair trial principle, in reliance on the provisions of Rule 67(4) of the Internal Rules.

61- Yet, it is Rule 21 of the same Internal Rules which sets forth the fair trial principle at the ECCC, and provides:

1. *The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:*
 - a) *ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication;*
 - b) *Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules;*
 - c) *The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; and*
 - d) *Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.*
2. *Any coercive measures to which such a person may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. Such measures shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity.*
3. *No form of inducement, physical coercion or threats thereof, whether directed against the interviewee or others, may be used in any interview. If such inducements, coercion or threats are used, the statements recorded shall not be admissible as*

⁴⁰ ICTY Statute, footnote 30 *supra*, Art. 28 (2).

⁴¹ NASSER Zakr, *Analyse Spécifique du crime de génocide dans le Tribunal pénal international pour le Rwanda*, in *Revue de Science Criminelle et de Droit Pénal Comparé*.

evidence before the Chambers, and the person responsible shall be appropriately disciplined in accordance with Rules 35 to 38.

4. *Proceedings before the ECCC shall be brought to a conclusion within a reasonable time”.*

62- The Defence fails to identify any breaches of the provisions of the above Rule in the Closing Order. Therefore the submission that the Co-Investigating Judges violated the fair trial principle is untenable.

F- GROUND 6 : AMNESTY AND DOUBLE JEOPARDY (*NON BIS IN IDEM*)

63- First, with respect to double jeopardy (*non bis in idem*), Article 14(7) of the International Covenant on Civil and Political Rights, which is applicable at the ECCC, provides: “*No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country*”.⁴²

This principle is aimed at ensuring that individuals are not put under physical, psychological, emotional or financial pressure several times for the same offence.

64- However, this principle does not apply where, *inter alia*:

- 1) the court did not comply with the fundamental safeguards of a fair trial,
 - 2) the trial was held for the purpose of shielding the accused from international criminal responsibility,
 - 3) The court did not act with the diligence required by international standards.⁴³
- Moreover, Article 4(2) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms permits: “*the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case*”.⁴⁴

65- It cannot be argued that no trial was held in 1979 in which members of the Pol Pot regime were apparently convicted. On the other hand, it is also true that, in light of the events which prompted the trials, there was no functioning judicial system in Cambodia during the 1975-1979 period; it was therefore not possible to hold trials in conformity with international standards.

66- With respect to the amnesty, the offences charged in 1994 are not the same as the ones contained in the impugned Closing Order; this means that the amnesty in question cannot

⁴² Article 14 of the International Covenant on Civil and Political Rights.

⁴³ Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, pp. 319-321.

⁴⁴ Article 4(2), Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

be invoked before the ECCC. The amnesty accorded in the 1994 Decree only applied to prosecution under the 1994 Law. The pardon only applied to the death penalty and seizure of property, but not to the offences committed, which, moreover, have a *jus cogens* status under international law.

III- CONCLUSION

67- The Co-Lawyers for the Group 3 Civil Parties hereby join the prosecution in requesting that:

- NUON Chea,
- IENG Sary,
- IENG Thirith, and
- KHIEU Samphan

Be sent for trial before the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia to answer the charges contained in the Co-Investigating Judges' Closing Order of 16 September 2010.

Done in Phnom Penh, on 18 November 2010

For *Avocats Sans Frontières France* Co-Lawyers for the Civil Parties

KIM Mengkhy

Martine JACQUIN

Martine JACQUIN

MOCH Sovannary

Philippe CANONNE

Fabienne TRUSSES-NAPROUS

Elisabeth RABESANDRATANA

Laure DESFORGES

Christine MARTINEAU

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