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

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**Appeal Brief Against the Order on the Application at the ECCC of the Form of
 Liability Known as Joint Criminal Responsibility**

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Before:

The Pre-Trial Chamber
 Judge PRAK Kimsan, President
 Judge Rowan DOWNING
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002/19-09-2007-ECCC/OCIJ (PTC 37)

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I. FACTUAL AND PROCEDURAL HISTORY

1. For the description of the facts, reference is made to the Co-Prosecutors' Introductory Submission, dated 18 July 2007, and in particular to the facts specified in paragraphs 37 to 72 in respect of the following charges:

- a. Homicide (49-72), Torture (49-72) and Religious Persecution of Buddhists and Cham (37-72). These constitute violations of the 1956 Penal Code (Articles 501, 503, 504, 505, 506, 507 and 508); Article 500 and Articles 209 and 210, punishable under Articles 3 (new), 29 (new) and 39 (new) of the ECCC Law.
- b. Genocide of Buddhists, Cham and Vietnamese (37-72). This constitutes a violation of the 1948 CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, punishable under Articles 4, 29 (new) and 39 (new) of the ECCC Law.
- c. Murder (49-72); Extermination (49-72); Enslavement (43-48); Deportation (37-42); Imprisonment (43-72); Torture (49-72); Persecution on political, racial and religious grounds of former officials of the Khmer Republic, feudalists, capitalists and bourgeoisie, "new people," suspected "bad elements," Buddhists, Cham, and Vietnamese; and other Inhumane Acts (37-72). These constitute CRIMES AGAINST HUMANITY, punishable under Articles 5, 29 (new) and 39 (new) of the ECCC Law.
- d. Wilful Killing (49-72); Torture or Inhumane Treatment (49-72); Wilfully Causing Great Suffering or Serious Injury to Body or Health (49-72); Destruction or Serious Injury to Body or Health (49-72); Destruction or Damage to Property, not justified by military necessity and carried out unlawfully and wantonly (37-72); Wilfully Depriving a Prisoner of War or Civilian the Rights of Fair and Regular Trial (37-72); and Unlawful Deportation or Transfer or Unlawful Confinement of a Civilian (37-72). These constitute GRAVE BREACHES OF THE GENEVA

CONVENTIONS OF 12 AUGUST 1949, punishable under Articles 6, 29 (new) and 39 (new) of the ECCC Law.

2. In a filing dated 28 July 2008, IENG Sary seized the Co-Investigating Judges of a motion by which he objects to the application of any form of participation in a Joint Criminal Enterprise (“JCE”) against him, arguing that the ECCC has no jurisdiction to apply this form of liability.
3. IENG Thirith joined in the request, submitting, in the alternative, that the ECCC only has jurisdiction to apply the first form of JCE.
4. In their Response, the Co-Prosecutors requested the Co-Investigating Judges to apply all three forms of JCE liability. For the definition of all three forms of JCE, reference is made to the Co-Investigating Judges’ Order.
5. In their Order of 8 December 2009, the Co-Investigating Judges decided as follows:

Regarding international crimes:

- Reject the request insofar as the *actus reus* and *mens rea* for JCE 1 applies before the ECCC;
 - Reject the request insofar as the *actus reus* and *mens rea* for JCE 2 applies before the ECCC;
 - Reject the request insofar as the *actus reus* for JCE 3 applies before the ECCC;
 - Partially grant the request insofar as the only *mens rea* for JCE 3 applicable before the ECCC is the subjective acceptance of the natural and foreseeable consequences of the implementation of the common plan.
6. It is the impugned Order which is being appealed, on the following grounds:

II. THE LEGAL ELEMENT (*NULLUM CRIMINEN SINE LEGE*)

7. The impugned Order held that the legal element – namely the application of international customary law – predated the events under investigation (period from 17 April 1975 to 7 January 1979) and underpins, under international law, the application of the notion of JCE before the ECCC, and in particular JCE 3, the extended form. It is based on Article 15 of the 1966 International Covenant on Civil and Political Rights, and adopts the reasons for the ICTY Appeals Chamber judgement in the *Ojdanié* case.

8. On the other hand, the Order does not acknowledge the applicability of JCE to national crimes even though the penal law in force at time of the events under investigation was the 1956 Cambodian Penal Code. That Code contains the notion of co-perpetration: where the co-perpetrators are linked by a common plan, and the notion complicity, which is characterised by aiding and abetting: these are two modes of participation in crimes, one direct and the other indirect, which are criminalised by Articles 82 and 145 of the 1956 Penal Code.

9. Regard must also be had to the influence of French penal law in force at the relevant time (Articles 59 and 60 of the 1810 Penal Code, which makes the same distinction between co-perpetrators and accomplices and corroborates the type of participation recognised under the Cambodian Code.

10. It is therefore safe to conclude that JCE liability existed under Cambodian law in 1956, where it was referred to as “*coaction and complicité*” [co-perpetration and complicity], and included, at a minimum, the first two forms of JCE (the second form, known as “systematic” JCE, being a variation of the first).

11. There was no specific autonomous legal regime for such crimes under Cambodian law; there is no need to devise an interpretation scheme for specific categories based on the French legal tradition. These crimes, which are international in character, are

primarily and also domestic crimes, and are prosecuted as such under the relevant national law, which provides for a plurality of perpetrators (co-perpetration) and aiding and abetting (complicity).

12. In that sense, the legal element also exists for crimes under Cambodian law.

13. The Order should be reversed on this point.

III. *ACTUS REUS*

14. The requisite *actus reus* elements for JCE are:

- Plurality of persons
- The existence of a common purpose (or plan) which amounts to or involves the commission of a crime within the law
- The accused must personally contribute to the common plan.

15. The facts described in the Introductory Submission, and duly recorded, fully establish the existence of each of these requisite elements. For example, the plurality of persons element is established by the minutes of the leaders' meetings; for example, the existence of the common plan is established by the CPK Statutes and the existence of the CPK Central Committee, which directly implemented the policies on internal and external security, foreign affairs, internal affairs, health, social affairs, propaganda and reeducation, administrative matters and personnel.

16. The requisite *actus reus* elements for JCE are completely satisfied and the Order should be upheld on this point.

IV. *MENS REA*

17. The *mens rea* consists in the intent to perpetrate “a specific crime” and the intent must be shared by everyone; the *mens rea* for the second form of JCE concerns a concerted system of ill-treatment where the accused have knowledge of the nature of the system and intend to further its implementation. In this instance, specific intent is clearly established, as the perpetrators of the crimes committed them with the intent to destroy the enemies in order to build a new society with a new man: specific intent exists at each stage of the proceedings as the actions of the individuals follow a concerted plan and the extent of reprehensible acts is unparalleled. The criminal purpose and objectives of the enterprise are manifest and each leader had knowledge of the underlying finality of the enterprise.

18. The requisite *mens rea* elements for JCE I and II are established; the Order should be upheld on this point.

19. As for the *mens rea* for JCE 3, the responsibility must be based on a common plan, design or project and must be sufficiently accessible and foreseeable. The accessibility and foreseeability test is objectively satisfied by the fact that the regime was in place for three years, eight months and twenty days and the extent of the crimes. This form of liability is accessible and foreseeable for the defendants under both international customary law and the Cambodian Penal Code. The intent test is thus satisfied, especially since the Accused have not in any way proved – save for the incantatory assertions – that they had no knowledge of the criminal purpose and acts of the organisation they headed.

FOR THESE REASONS

In conclusion, joint criminal enterprise was recognised under international criminal law during the period under consideration and under national law. It should be applied in all its forms in the present case.

WITHOUT PREJUDICE

For the Civil Party Lawyers

Done in Phnom Penh, on 18 December 2009

[signed]

RABESANDRATANA

[signed]

KIM Mengkhy

[signed]

MOCH Sovannary