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**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**IENTG SARY'S REPLY TO THE CIVIL PARTIES' RESPONSE TO IENG SARY'S APPLICATION FOR SANCTIONS AGAINST THE CO-PROSECUTORS FOR ALLEGEDLY MISLEADING THE COURT REGARDING THE LAW ON JOINT CRIMINAL ENTERPRISE**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”) hereby submits, pursuant to Rule 35(1) of the ECCC Internal Rules, this Reply to the Civil Parties’ Response (“Civil Parties’ Response”)<sup>1</sup> to IENG Sary’s Request for Sanctions under Internal Rule 35 Due to the Co-Prosecutors Misleading the Court in their Supplementary Observations on Joint Criminal Enterprise Filed on 31 December 2008 (“Request for Sanctions”).<sup>2</sup> The Civil Parties’ Response fails to address the central issue raised by the Defence in its Request for Sanctions and puts forward several incorrect and misleading arguments. Though none of the Civil Parties’ assertions affect the legal conclusions set out by the Defence, this Reply is necessary to avoid any confusion regarding the issues raised by the Civil Parties.

### I. SUMMARY OF THE ARGUMENT

1. The Civil Parties’ Response asserts that: a.) the ILC Report recognizes common plan liability as part of the Nuremberg Principles;<sup>3</sup> b.) the Defence quoted the Spiropoulos Report as though it were the International Law Commission (“ILC”) Report, thereby causing the Defence “to completely miss” Principle VII, which shows that the ILC Report recognized common plan liability;<sup>4</sup> c.) the Spiropoulos Report recognizes common plan liability;<sup>5</sup> and d.) the formulation of the Principles set out in the Spiropoulos Report has no legal authority and the ILC’s decision to include Principle VII shows that the ILC considered common plan liability to be a part of the Nuremberg Principles.<sup>6</sup>
2. The Defence will show:
  - a. The Civil Parties fail to address the core issue of the Request for Sanctions: the sanctions sought for the International Co-Prosecutor or members of the OCP for deliberately misleading the court by intentionally not disclosing UNGA Resolution 488 (V);
  - b. The ILC Report recognizes common plan liability *only* in relation to crimes against peace;

<sup>1</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Civil Parties’ Response to IENG Sary’s Application for Sanctions Against the Co-Prosecutors for Allegedly Misleading the Court Regarding the Law on Joint Criminal Enterprise, 06 August 2009.

<sup>2</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary’s Request for Sanctions under Internal Rule 35 Due to the Co-Prosecutors Misleading the Court in Their Supplementary Observations on Joint Criminal Enterprise, Filed on 31 December 2008, 29 June 2009. D 97/9 ERN 00345986.

<sup>3</sup> Civil Parties’ Response, paras. 3-4.

<sup>4</sup> *Id.*, paras. 5-6.

<sup>5</sup> *Id.*, paras. 7-13.

<sup>6</sup> *Id.*, paras. 14-16.

- c. Inadvertently quoting the Spiropoulos Report as though it were the ILC Report does not change the fact that neither Report recognized common plan liability for war crimes or crimes against humanity;
- d. The Spiropoulos Report, like the ILC Report, recognizes common plan liability only in regard to crimes against peace; and
- e. The fact that the ILC Report retained Principle VII does not mean that it recognized common plan liability: "complicity" in Principle VII differs materially from common plan liability.

## II. ARGUMENT

### a. The Civil Parties fail to address the sanctions requested against the OCP for deliberately misleading the court

- 3. The crux of the Request for Sanctions was to seek sanctions against the OCP for deliberately misleading the court by intentionally not disclosing UNGA Resolution 488 (V). The Defence based its Request for Sanctions on the fact that the codes of ethics under which the OCP members are bound provide an obligation to disclose unfavorable authority: knowingly and wilfully misleading the Court is prohibited.
- 4. The Civil Parties in their Response do not address this ethical obligation of disclosure argued by the Defence. This failure to address the core issue of the Request for Sanctions gives rise to the conclusion that the Civil Parties indeed agree that the OCP violated its ethical obligation when it deliberately chose not to disclose UNGA Resolution 488 (V).
- 5. The Civil Parties focus on an insignificant issue of misquotation which does not affect the proposition put forward by the Defence: the Nuremberg Principles do not include common plan liability for war crimes and crimes against humanity.

### b. The ILC Report recognizes common plan liability *only* in relation to crimes against peace

- 6. The Civil Parties argue that the ILC Report recognizes common plan liability as part of the Nuremberg Principles.<sup>7</sup> It is clear, however, from a careful reading of the seven principles listed in the ILC Report that common plan liability was envisioned only in regard to crimes against peace.

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<sup>7</sup> *Id.*, paras. 3-4.

7. The Principles state in pertinent parts:

*Principle VI:* The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

*Principle VII:* Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.<sup>8</sup>

8. It is clear that the mention of “participation in a common plan” in Principle VI is in relation only to crimes against peace, since it is listed only under that subsection and *not* in the following subsections referring to war crimes and crimes against humanity.
9. Principle VII deals with “complicity” in relation to crimes against peace, war crimes and crimes against humanity. The Civil Parties rely on Principle VII, implying that the terms “common plan liability” and “complicity” are used interchangeably. The mere fact that Principle VI and VII use two different terms shows that common plan liability and complicity are not the same concept and are not terms that can be used interchangeably.
10. Complicity as a legal concept differs substantially from common plan liability. Common plan liability represents a more general concept of imputed criminal responsibility, i.e. individual criminal responsibility for the acts of others,<sup>9</sup> while complicity – and an

<sup>8</sup> Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No.12 (A/1316) (“ILC Report”) (emphasis added).

<sup>9</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, 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*, 03 August 2009,

accomplice, in particular – is defined by *Black's Law Dictionary*, as a “person who is in any way concerned with another in the commission of a crime, whether as a principal in the first or second degree or as an accessory.”<sup>10</sup>

11. The ILC commentary to Principle VII does refer to “common plan” but *only* in the context of crimes against peace.<sup>11</sup> Paragraph 127 of the ILC commentary notes that several of the defendants were convicted for complicity in war crimes and crimes against humanity.
12. The Civil Parties’ first argument fails because 1) Principle VI mentions common plan liability only in relation to crimes against peace, 2) complicity, as discussed in Principle VII, materially differs from common plan liability, and 3) the commentary to the ILC Report does not refer to common plan liability in any context other than in regard to crimes against peace.

**c. Inadvertently quoting the Spiropoulos Report as though it were the ILC Report does not change the fact that neither Report recognized common plan liability for war crimes or crimes against humanity**

13. The Civil Parties argue that the Defence quoted the Spiropoulos Report as though it were the ILC Report, thereby causing the Defence to miss Principle VII, which shows that the ILC Report recognized common plan liability.<sup>12</sup> The Defence accepts that through an unintentional oversight, it mistakenly quoted the Spiropoulos Report as the ILC Report in a footnote.<sup>13</sup>

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para. 9, (“IENG Sary’s Supplementary Submissions”) quoting Attila Bogdan, *Individual Criminal Responsibility*, 6 INT’L. CRIM. L. REV. 63 (2006) at 75.

<sup>10</sup> BLACK’S LAW DICTIONARY 16 (Bryan A. Garner ed., Westgroup St. Paul Minnesota 1999). See also Separate Opinion of Judge Shahabuddeen in *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, para. 10: “In *Davies v. Director of Public Prosecutions*, Lord Simonds ... said that the term accomplice included the following persons... : ‘...persons who are *participes criminis* in respect of the actual crime charged, whether as principles or accessories before or after the fact ... or persons committing, procuring, or aiding and abetting ...’”

<sup>11</sup> ILC Report, para. 126. Paragraph 8 of 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*, 3 August 2009 notes that the ILC Report does not include common plan liability for war crimes and crimes against humanity. Then it states, “[w]hile [the ILC Report] does include the other principles mentioned by the OCP, no mention whatsoever is made of common plan liability.” The Defence acknowledges that this statement might have led to confusion and should have been drafted with greater clarity/accuracy.

<sup>12</sup> Civil Parties’ Response, paras. 5-6.

<sup>13</sup> See Request for Sanctions, fn. 30.

14. The Spiropoulos Report contains only five principles, which, indeed, are substantially similar in phrasing to the first five principles of the ILC Report.<sup>14</sup> The subsequent addition of Principles VI and VII in the ILC Report, however, does not prove that the ILC intended to include and recognize common plan liability, in general, as a Nuremberg principle. Principle VI, as already discussed, only refers to common plan liability in the context of crimes against peace, while Principle VII only refers to complicity - which differs materially from common plan liability. Consequently, the misquotation does not affect the Defence position that the ILC Report does not specify common plan liability to be applicable to war crimes or crimes against humanity.

**d. The Spiropoulos Report, like the ILC Report, recognizes common plan liability only in regard to crimes against peace**

15. The Civil Parties Response asserts that the Spiropoulos Report recognizes common plan liability.<sup>15</sup> It bases this assertion on a "historical analysis of the Spiropoulos Report"<sup>16</sup> and on the commentary to the Report.<sup>17</sup>
16. The historical section of the Spiropoulos Report does not show that common plan liability was recognized as part of the Nuremberg principles. Even though some states suggested a broad interpretation of common plan liability during the drafting process of the Nuremberg Charter, the conclusion of the discussions on 23 July 1945,<sup>18</sup> and all the subsequent drafts presented during the London Conference,<sup>19</sup> restricted the penalization of the participation in a common plan only to cases where the aim was the domination of a nation by means of an aggressive war.

<sup>14</sup> The five principles listed in the Spiropoulos Report are: 1.) Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefore and liable to punishment; 2.) The fact that domestic law does not punish an act which is an international crime does not free the perpetrator of such crime from responsibility under international law; 3.) The fact that a person who committed an international crime acted as Head of State or public official does not free him from responsibility under international law or mitigate punishment; 4.) The fact that a person acted pursuant to order of his Government or of a superior does not free him from responsibility under international law. It may, however, be considered in mitigation of punishment, if justice so requires; 5.) Any person charged with a crime under international law has the right to a fair trial on the facts and law. *Formulation of the Nürnberg Principles – Report by J. Spiropoulos, Special Rapporteur*, Extract from the Yearbook of the International Law Commission, 1950, vol. II (A/CN.4/22) ("Spiropoulos Report").

<sup>15</sup> Civil Parties' Response, paras. 7-13.

<sup>16</sup> *Id.*, paras. 8-12.

<sup>17</sup> *Id.*, para. 13.

<sup>18</sup> Spiropoulos Report, para. 17 citing Minutes of Conference Session of 23 July 1945.

<sup>19</sup> For the British draft of 28 July 1945, see Spiropoulos Report, para. 20, for the American draft of 30 July 1945, see *id.*, para. 22.

17. Furthermore, the Nuremberg Charter only explicitly listed common plan liability when describing crimes against peace (Article 6(a)). Common plan liability is not referenced in Article 6(b) – war crimes and Article 6(c) – crimes against humanity.<sup>20</sup> Even though Article 6 in its last paragraph (following the description of crimes against peace, war crimes and crimes against humanity) states that “[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan”, the Nuremberg Judgement clearly limited common plan liability to crimes against peace. The Nuremberg Judgement disregarded the charges “that the defendants conspired to commit war crimes and crimes against humanity” and only considered “the common plan to prepare, initiate and wage aggressive war.”<sup>21</sup>
18. The same conclusion, namely that the Nuremberg Charter and Judgement clearly limited common plan liability to crimes against peace, was reached in the final working paper on the formulation of the Nuremberg Principles issued by the Sub-Committee appointed by the ILC.<sup>22</sup> The Spiropoulos report was based on this final working paper.<sup>23</sup>

<sup>20</sup> See Charter of the International Military Tribunal, Article 6(a) “CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; (b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. See also Henri Donnedieu de Vabres, *The Nuremberg Trial and the Modern Principles of International Criminal Law in PERSPECTIVES ON THE NUREMBERG TRIAL* 213, 249 (G. Mettraux (ed.), Oxford University Press, 2008)

<sup>21</sup> Judgment of the International Military Tribunal, for the Trial of German Major War Criminals, Nuremberg, 30<sup>th</sup> September and 1<sup>st</sup> October 1946, London H.S.S.O. Miscellaneous No.12 (1946), at 44. See also Judgment of the International Military Tribunal for the Far East, at 34, which held that “the Charter does not confer any jurisdiction in respect of a conspiracy to commit any crime other than a crime against peace. There is no specification of the crime of conspiracy to commit conventional war crimes. This position is accepted by the Prosecution and no conviction is sought under these counts. These counts, accordingly, will be disregarded.”

<sup>22</sup> *Formulation of the principles recognized in the Nürnberg Tribunal and in the Judgment of the Tribunal – Draft proposed by the Sub-Committee on the formulation of the Nürnberg principles incorporated in document A/CN.4/SR.25, fn.9*, Extract from the Yearbook of the International Law Commission, 1949, vol.I, A/CN.4/W.6, at fn. 9. See in particular the proposed formulation of Principle 3.

<sup>23</sup> Spiropoulos Report, paras. 41-42.



19. Common plan liability is not mentioned in the five Principles of the Spiropoulos Report. It is only mentioned in the commentary to Principle I<sup>24</sup> and the section on Crimes.<sup>25</sup> In both instances, common plan liability is limited to the context of preparing, initiating and waging of aggressive war.
20. The argument put forward by the Civil Parties that the Spiropoulos Report recognizes that “the Tribunal has applied some complicity rule to war crimes and crimes against humanity because several defendants were convicted for giving orders” is erroneous.<sup>26</sup> If this selective quote is read within the context of the entire Spiropoulos Report and interpreted systematically, only one conclusion can be drawn: complicity - not common plan liability - was applied for crimes against humanity and war crimes.<sup>27</sup>

**e. The fact that the ILC Report retained “complicity” in Principle VII does not mean that it recognized common plan liability**

21. The Civil Parties argue that the formulation of the Principles set out in the Spiropoulos Report has no legal authority and the ILC’s decision to include Principle VII despite the Spiropoulos Report shows that it considered common plan liability to be a part of the Nuremberg Principles.<sup>28</sup>
22. The Defence agrees that the Spiropoulos Report had only an advisory role in the preparation of the ILC Report. The fact that the ILC decided to include Principle VII, however, does not change the fact that the Nuremberg Principles only include common plan liability in regards to crimes against peace. Principle VII of the Nuremberg Principles deals with complicity and not with common plan liability. Thus, as discussed under Section B, these two principles are fundamentally distinct and not interchangeable.

### III. CONCLUSION AND RELIEF SOUGHT

23. The Civil Parties failed to address the core issue of the Request for Sanctions: the sanctions sought against the OCP for deliberately misleading the court by intentionally not disclosing UNGA Resolution 488 (V). The Civil Parties have chosen, instead, to focus on an insignificant misquotation, which, as shown herein, does not affect the

<sup>24</sup> *Id.*, para. 43(2)(i)-(iii).

<sup>25</sup> *Id.*, para.44(a)(ii).

<sup>26</sup> Civil Parties Response, para. 13.

<sup>27</sup> Spiropoulos Report, para. 43(2)(iii).

<sup>28</sup> Civil Parties’ Response, paras. 14-16.

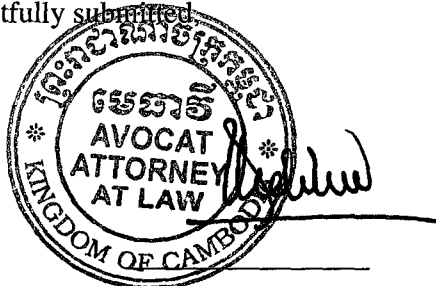
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argument put forward by the Defence that the Nuremberg Principles do not include common plan liability for war crimes and crimes against humanity.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to grant the relief sought, as stated already in its Request for Sanctions.

Respectfully submitted



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 25<sup>th</sup> day of September, 2009